ARMY TABLES

MISCELLANEOUS SERVICES

PART I

By Authority



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B. HOLLOWAY,

Major-General,

Secretary to the Government of India.

Simla, the 13th December 1915.

CONTENTS.

SECTION I

ESTABLISHMENT.

Table 1.—Establishment and distribution of Mounted Infantry in Burma.

	Details.	STATIONS. Bhamo.	Mandalay and Maymyo.	Meiktila.	REMARKS.
	COMBATANTS—				
	British (a)—				
3	Serjeants	..	2	..	[illegible]
	Corporals	..	2	..	
	Lance Corporals	..	4	..	
1	Privates	..	42	..	
	Indian (a)—				Indian.
	Indian Officers	2	2	2	(b) One per British officer supplied with [illegible]
	Havildars	2	2	2	
	Naiks	2	2	2	
	Sepoys	44	44	44	
	FOLLOWERS—				
	Bhistis	1	2	1	
0	Cooks	..	1	..	
1	Mochi	1	2	1	
	Salutri	1	2	1	
	Syces	(b)	(b)	(b)	
4	Sweepers	1	2	1	
5	Interpreters	(c)	(c)	(c)	
	ANIMALS AND SADDLERY—				
6	Ponies (d)	50	100	50	
7	Saddlery . . . sets	50	100	50	

NOTES 1.—In case of an officer providing himself with two suitable pony chargers he will be allowed to draw double horse allowance per mensem and will provide his own syce. Such double horse allowance will be inclusive of any horse allowance drawn as a separate item under regulations

2.—The proportion of N.-C. Os. may, when necessary, be kept up by appointing acting N.-C. Os with the pay of the acting ranks.

Table 2.—Establishment for the Cavalry School, Saugor.

Details.	No.	REMARKS.
OFFICERS		
...andant (Colonel on the	1	
. . . .	3	
...ant and Quartermaster ...n)	1	
... Instructor	1	
... officer	1	
TOTAL	7	
INDIAN OFFICERS.		
(Ressaldar)	1	
TOTAL	1	
BRITISH RANKS		
... Personal Assist-	1	On cadre of India Miscellaneous List.
Surgeon	1	
... or ...	1	Permanent Borne on Non-Departmental Section I U. List.
Serjeant	1	
Quartermaster Ser-	1	Acting rank only.
...on Serjeant Majors Riders)	2	
... Serjeant Majors (In- ...in fencing and gym-	2	
. . . .	1	Temporary establishment for one year's tour of duty
. . . .	2	
...oeing smith	1	
...nt Saddler	1	
...g smiths (including ve- ...y establishment)	3	
TOTAL	17	

Details.	No.	REMARKS.
INDIAN RANKS.		
Instructors (Duffadars)	4	
Rough Riders (Duffadars)	2	
Trumpeters (Indian Cavalry)	2	
TOTAL	8	
FOLLOWERS.		
Clerks	4	
Indian Cavalry Pensioners	13	Supervision of stable duties One with status of Kot Dafadar
Carpenter	1	Temporary on nerrick rates of pay. Services to be dispensed with when not actually required.
Moochi	1	
Tindal	1	
Storemen	4	
Firemen	2	
Hammermen	2	
Fileman	1	
Syces	169	
Daftri	1	
Chowkidar	1	
Chowdri	2	
Peons	2	
Naick	1	Veterinary Establishment.
Dresser	1	
Ward Servant	1	Medical Establishment.
Cook	1	
Bhisti	1	Veterinary Establishment.
Sweepers	10	Includes one for veterinary and one for medical establishment.
Pakhalis	4	
TOTAL	222	
Rubbish cart with driver and one pair of bullocks.	1	
Hand cart with sweeper	1	
Sullage cart with one driver and bullock.	1	

SECTION I.

ESTABLISHMENTS.

Table 3.—Establishment of Remount Depôts.

Item No.	Details.		Saharanpur.	Calcutta.	Hapur.	Mona and Sargodha.	Ahmednagar.	Hosur.
	Overseers.							
1	W O or N.-C. O, 1st grade.	No.	3	..	1	2	.	2
2	N-C O. 2nd grade .	"	..	..	2	1	1	..
3	" 3rd " .	"	.	1	..	1	2	.
4	Farm overseer (civilian)	"	1	..	1	1	1	1
5	Asst " " .	"		..	.	1	..	..
6	Farm overseers (Indian)	"	.	..	..	3	..	..
	Office Establishment							
7	Head clerk . . .	"	1	1	1	1	1	1
8	2nd " . . .	"	1	..	1	1	1	1
9	3rd " . .	"	1	..	1	1	1	1
10	Additional or Vety. clerk.	"	1	..	1	1	1	1
11	Treasurer and Munshi	"	1	..	1	1	1	1
12	Godown clerk .	"	..	1	..	..	..	..
	Servants							
13	Daftri .	"	1	..	1	1	..	1
14	Peons . . .	"	.	2	2	4	2	3
15	Chowkidars	"		2	4	13	8	.
16	Bhistis . .	"	.		.	..	..	3
17	Farrash . .	"	..	1		.	.	..
18	Dafadar of peons. .	"	..	.	..	..	.	1
19	Sweeper . . .	"	.	.	..	..	..	1
	Godown							
20	Overseer . . .	"	1	..	1	1	1	1
21	Munshi . .	"	1	..	1	2	1	1
22	Weighmen . . .	"	2	..	..	3	1	1
23	Parcher . . .	"	..	..	1	4	1	.
24	Peons .	"	4	..	..	.		.
	Workshop							
25	Blacksmiths . .	"	3	..	2	1	2	2
26	Bellowsmen .	"	1	..	..	.	..	2
27	Carpenters . . .	"	3	..	2	1	2	2
28	Mochis . . .	"	1	..	1	1	1	1
	Veterinary Hospital.							
29	Vety Assistant, 1st grade.	"	1	..	1	2	1	..
30	Vety. Assistant, 2nd grade	"	1	..	1	3	..	..
31	Vety. Assistant, 3rd grade.	"	1	..	1	4	1	2
32	Stable jemadar .	"	1	..	..	..	..	..
33	Salutri . .	"	..	..	..	..	..	1
34	Dressers . . .	"	2	..	2	6	2	4
35	Syces . . .	"	6	..	7	18	4	..
36	Bhisti . .	"	1	..	..	..	1	..

Item No.	Details.		Saharanpur.	Calcutta.	Hapur.	Mona and Sargodha.	Ahmednagar.	Hosur.
	Hospital.							
37	Asst Surgeon . .	No.	..	..	1	1	..	..
38	Hospital Assistant . .	"	1	..	..	..	..	..
39	Compounder . . .	"	1	..	1	2	..	..
40	Cook . . .	"	1	..	1	1	.	..
41	Ward servant . .	"	.	..	1	1	..	..
42	Ward coolies . . .	"	..	..	..	..	..	1
43	Sweeper . . .	"	1	..	1	1	..	1
44	Bhisti	"	1	..	..	..	..	..
	Bazaar							
45	Chowdri . . .	"	1	..	1	1	..	1
46	Chowkidar . . .	"	1	..	..	..	..	..
	Conservancy.							
47	Sweepers . . .	"	4	1	4	5	3	4
	Carts and Bullock Establishment							
48	Chowdri . .	No	1	.	..	..	..	1
49	Hackery or Cartmen .	"	14	..	..	..	8	25
50	Horse Cartmen .	"	12	..	12	23	8	8
51	Wellmen . . .	"	..	..	..	..	6	..
	Stables.							
52	Remount Darogas . .	"	3	..	1	4	1	2
53	Jemadars . .	"	5	1	5	4	4	2
54	Mates	"	5	..	7	4	4	10
55	Syces	"	198	..	210	546	142	159
56	Nalbands . .	"	5	1	7	4	5	5
57	Mate for cornmill . .	"	1	..	1	4	..	..
58	Muster writer . .	"	1	.	1	2	..	1
59	Grain boiler . . .	"	..	..	..	..	..	3
60	Trumpeter . .	"	.	..	..	..	..	1
	Riding Establishment							
61	Jemadar of sowars . .	"	2	..	1	..	..	1
62	Dafadars . . .	"	2	.	3	2	1	2
63	Sowars, 1st class . .	"	52	..	38	18	20	28
64	" 2nd class . .	"	20	..	17	18	..	18
	Farm Establishment.							
65	Cultivator . .	"	1	..	1	2	1	1
66	Asst. " . . .	"	1	..	1	2	..	1
67	Mate " . . .	"	6	..	2	4	..	..
68	Farm munshi . .	"	1	..	1	..	..	1
69	Head mali . . .	"	1	..	1	..	2	..
70	Asst. " . . .	"	11	..	1	..	..	..
71	Mate bildar . . .	"	1	..	..	.	..	..
72	Bildars	"	4	..	..	..	6	..
73	Chowkidars . . .	"	17	..	..	..	..	..
74	Farm labourers . .	"	..	.	2	..	2	..
75	Ploughmen .	"	..	..	..	..	..	30

SECTION 1

ESTABLISHMENTS.

Table 4.—Quartermasters', conservancy, marching and other establishments authorized for British troops serving in the 1st, 2nd, 3rd, 7th and 8th Divns., the Kohat, Bannu, Jhansi and Jubbulpore Bdes.

Item No.	Unit, etc.	A. Quartermaster's establishments allowed for the personal wants of British troops in all situations (a) — Pakhals.	A — Bhistis	A — Sweepers	B. Extra establishments allowed when marching in addition to A. — Bhistis.	B — Bildars	C. Conservancy establishments for troops in quarters only (a), (b) and (c). — Bhistis	C — Sweepers	C — Bildars.	C — Rubbish carts	C — Filth carts	Special scales, additional to unit scales.	Additional establishment allowed. — Bhistis	Additional — Sweepers.	Additional — Bildars.	Additional — Rubbish carts.	Additional — Filth carts	Additional — Receptacles, filth.	Scale of conservancy carts (for removal of sullage water) — Item No.	Details.	No. of carts authorized.	REMARKS.
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23
1	Hd. Qrs of a R. A. Brigade or group	..	..	..	..	..	1	1		..	..	When a cavy. or infy. unit furnishes one or more squadrons on detachment.	1	2	1	..	1	..	23	R. A. batts. or cos. (d) Detachments .	1 for one or more units in garrison and located together.	The service at Fort Govindgarh is performed by a cart allowed jointly for the detachments R. G. A. and British Infy . Only one cart will be allowed, where there is more than one detachment. 4 additional carts are allowed for seven months annually for Ranikhet. One extra allowed for each British infy battn. at Lucknow and Allahabad; also for British cavalry lines at Lucknow and the British infy. lines at Cawnpore and for the R. A. lines at Lucknow.
2	R. H. A battery on field army establishment	3	1	3	2	2	1	2	1	1	1	When a cavy. or infy unit furnishes detachments *of between 40 to 80* men from more than one coy or squadron	1	6	..		.	..	24	Regiment or battn. or detachment of, over 100 men, cavy. or infy. (e)	1 each .	
3	R. F. A howitzer battery	3	1	3	2	2	1	2	1	1	1	Battn of infy and convalescent Depôt at Koompur, Ranikhet, for 7 months annually if necessary	..	12	..	2	4	..				
												Hd Qrs wing at Chaubuttia, Ranikhet, for 7 months annually if necessary	.	4	..	1	1	..				

(a) Establishments for detachments must be found ordinarily from the authorized establishments of the unit, proportionate to the strength detached. The extra establishments admissible under the heads of "details attached to corps" and "special scales" should only be entertained when absolutely necessary

(b) Where local conditions render the authorized conservancy establishments insufficient, a Bde Comdr is empowered to sanction an increase not exceeding one sweeper in the case of a R. A. battery or coy, two sweepers and one bildar in the case of a battn and three sweepers and a filth cart in the case of a wing of infy.

(c) Units in Fort William are not allowed bildars or filth and rubbish carts

(d) One additional sullage water cart is authorized for the Brigade of R. F. A at Nowshera.

(e) One additional sullage water cart is authorized for the wing of B. I. at Dum Dum.

SECTION I

ESTABLISHMENTS.

Table 4.—Quartermasters', conservancy, marching and other establishments authorized for British troops serving in the 1st, 2nd, 3rd, 7th and 8th Divns., the Kohat, Bannu, Jhansi and Jubbulpore Bdes.

Item No.	Unit, etc.	A. Quartermaster's establishments allowed for the personal wants of British troops in all situations (a)			B. Extra establishments allowed when marching in addition to A.		C. Conservancy establishments for troops in quarters only (a), (b) and (c)					Special scales additional to unit scales.	Additional establishment allowed						Scale of conservancy carts (for removal of sullage water).			Remarks.
		Pakhalis	Bhistis	Sweepers	Bhistis	Bildars	Bhistis	Sweepers	Bildars	Rubbish carts	Filth carts.		Bhistis	Sweepers	Bildars	Rubbish carts	Filth carts	Receptacles, filth	Item No	Details	No of carts authorized.	
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23
1	Hd. Qrs. of a R. A. Brigade or group	..	..	..	.	..	1	1		..	..	When a cavy or infy unit furnishes one or more squadrons on detachment	1	2	1		1	.	23	R. A. batts or cos. (d) Detachments	1 for one or more units in garrison and located together.	The service at Fort Govindgarh is performed by a cart allowed jointly for the detachments R. G. A. and British infy Only one cart will be allowed, where there is more than one detachment. 4 additional carts are allowed for seven months annually for Ranikhet. One extra allowed for each British infy battn. at Lucknow and Allahabad, also for British cavalry lines at Lucknow and the British infy lines at Cawnpore and for the R. A. lines at Lucknow.
2	R H A battery on field army establishment.	3	1	3	2	2	1	2	1	1	1	When a cavy or infy unit furnishes detachments of between 40 to 80 men from more than one coy or squadron	1	6		.		.	24	Regiment or battn. or detachment of, over 100 men, cavy or infy. (e)	1 each .	
3	R. F. A howitzer battery	3	1	3	2	2	1	2	1	1	1	Battn of infy and convalescent Depôt at Roompur, Ranikhet, for 7 months annually if necessary	..	12	..	2	4	.				
												Hd Qrs. wing at Chaubattia, Ranikhet, for 7 months annually if necessary.	..	4	..	1	1	..				

(a) Establishments for detachments must be found ordinarily from the authorized establishments of the unit, proportionate to the strength detached. The extra establishments admissible under the heads of "details attached to corps" and "special scales" should only be entertained when absolutely necessary.

(b) Where local conditions render the authorized conservancy establishments insufficient, a Bde Comdr is empowered to sanction an increase not exceeding one sweeper in the case of a R. A. battery or coy, two sweepers and one bildar in the case of a battn, and three sweepers and a filth cart in the case of a wing of infy.

(c) Units in Fort William are not allowed bildars or filth and rubbish carts

(d) One additional sullage water cart is authorized for the Brigade of R. F. A. at Nowshera.
One additional sullage water cart is authorized for the wing of B. I. at Dum Dum.

SECTION 1.

ESTABLISHMENTS.

Table 4.—A. Quartermasters', conservancy, marching and other establishments authorized for British troops serving in the 1st, 2nd, 3rd, 7th and 8th Divns., the Kohat, Bannu, Jhansi and Jubbulpore Bdes.—*contd.*

Item No.	Unit, etc.	A. Quartermasters' establishments allowed for the personal wants of British troops in all situations (a).—Pakhals.	A.—Bhistis.	A.—Sweepers	B. Extra establishments allowed when marching in addition to A.—Bhistis.	B.—Bildars.	C. Conservancy establishments for troops in quarters only (a), (b) and (c).—Bhistis	C.—Sweepers	C.—Bildars.	C.—Rubbish carts.	C.—Filth carts.
1	2	3	4	5	6	7	8	9	10	11	12
4	R. H. A. battery on internal defence establishments, all R. F. A. (other than howitzer) heavy and mountain batteries.	(g) 3 (m)	(g) 1	3	2	2	(g) 1	2	1	1	1
5	Company of R. G. A. (j)	(h) 3	(h) ..	3	2	2	(h) 1	2	1	1	1
6	R. H. A. ammunition column.	2	1	1	..	..	..	..	..	..	..
7	R. F. A. howitzer ammunition column.	3	..	3	2	2	1	2	1	1	1
8	R. F. A. ammunition column.	4	1	3	2	2	1	2	1	..	1

Special scales, additional to unit scales. (13)	Additional establishment allowed.—Bhistis. (14)	Sweepers. (15)	Bildars. (16)	Rubbish carts. (17)	Filth carts. (18)	Receptacles, filth. (19)
Summer camp at Ranikhet for 7 months annually if necessary.	..	.	..	..	2	..
Cherat for 6 months	..	..	.	..	2	..
Subathu for 7 months	..	14	..	..	..	.
Simla saluting batty.	..	1	..	..	..	..
British infy. battn at Fyzabad.	..	..	..	..	1	..
British infy. battn at Lahore cantonment	..	6	..	..	2	..
Pubbi and Jaloza camps while in use.	..	1	..	..	..	..
R. F. A. ammunition column, Meerut	..	..	..	1	..	..
R. H. A. ammunition column, Meerut.	..	1	..	..	..	..
Wing of British Infantry at Dinapore	4	10	..	..	1	..
British Infantry battalion at Jubbulpore.	..	..	..	..	1	..

SCALE OF CONSERVANCY CARTS (FOR REMOVAL OF SULLAGE WATER).

Item No. (20)	Details. (21)	No of carts authorized. (22)
	Sanatoria and summer camps.	
25	Kasauli, Dagshai, Darjeeling, Landour, Kailana, Pachmarhi, Ranikhet, Lower Topa, Ghora Dakka and Khan Spur.	1 each camp or sanatorium.
	Murree, Cliffden and Willow Bank.	1
	Railway rest camps.	
26	Rawal Pindi, Kalka, Jhansi and Bareilly	1 each rest camp.
27	R. F. A. ammunition column, Meerut.	1

REMARKS. (23)

The camp at Kailana, Dalhousie and Cherat will be served by the cart or its equivalent allowed for the British infantry units at those stations.

At the following stations the infy. detachment will be served by the cart allowed for the R. A. unit:—

Forts Ferozepore, Attock, Allahabad, Multan defensible post, and at Campbellpore, Nowgong, Delhi, and Saugor.

NOTE 1.—The station hospitals at the following places will be served by—

(a) Bara Gali, Bareilly, Barian, Campbellpore, Delhi, Ferozepore, Kalabagh, Khyra Gali, Saugor and Sialkot; by the cart or its equivalent allowed for the R. A. unit.

(b) Amritsar, Ghora Dakka, Jutogh and Khan Spur by the cart or its equivalent allowed for the infy. detachment.

												Infantry Lattene at Lucknow.	..	..	1	..	..	..				(e) Lower for ... in lieu of ... allowed for the ... Note II. At stations where carts are not used, extra sweepers and ... are allowed in lieu of each cart.
												R. H. A., Ammunition column, Lucknow.	..	1	..	..	..	..				
												Detachment for British troops at ...	..	..	6	..	..	..				
												... the ... on the ... road for ... months of the year.	..	1	..	..	..	..				
												... at Meerut	..	2	..	..	1	..				
9	British Cavalry Regiment (l)	10	..	16	10	8	2(f)	7	4	1	3	R. F. A. battery, at Allahabad	3	..	..	..	..	..				
10	Full battalion of British Infantry. (n)	10 (l)	(i)	(a) 19	10	8	4 (l)	19	(k) 4	1(f)	4(f)	R. F. A. battery, at ...	..	1	..	..	..	..				
11	Half the wing	8	..	8	8	4	2	6	2	1	1	Each battery of Infy. at Lucknow.	..	..	..	1	2	..				
12	Half wing	8	..	8	8	4	2	5	2	1	1	For ... and ... at ..., and Arsenal	1	4(c)	..	..	1	..				
13	Single detached corps	2	..	2	2	1	1	2	1	..	1	For ... and clearing drain	2	2	..	..	..	..				
												... at the ...	..	2	..	..	..	..				
												For ... of the British Infantry detachment and ... Artillery ... and ... respectively.	..	2	..	1	..	..				
												... allowed in lieu of each filth cart at hill stations where such carts are not used	..	2	..	..	..	2				
												R. F. A. Battery, Agra		4	..	.	..	..				

(a) [illegible] for detachments must be found ordinarily from the authorised establishments of the unit, proportionate to the strength detached. The extra establishments admissible under the heads of "details attached to corps" and "special sales" should only be entertained when absolutely necessary.

(b) Where local conditions render the authorised conservancy establishments insufficient, a Sub. Comdr. is empowered to sanction an increase not exceeding one sweeper in the case of a R. A. battery or coy.; two [illegible] in the case of a batty., and three sweepers and a filth cart in the case of a wing of Infy.

(c) [illegible] are not allowed bhisties or filth and rubbish carts.

(d) Four bhistis only in the case of the regiment at Lucknow.

(e) [illegible] two sweepers and two coolies. Rs. 1 per mensem is also allowed for materials.

(f) [illegible] sweepers are allowed at [illegible] in lieu of filth and rubbish carts.

(g) R. F. A. batty. at [illegible] allowed 3 [illegible] 2 pakhalis.

(h) [illegible] R. G. A. " " 3 bhistis (no pakhalis).

(i) [illegible] British Infy. " " [illegible]

(j) The establishment authorised for the Company R. G. A. distributed between Fort Agra and Delhi is as follows:—

	Agra	Delhi
Bhisties	1	1
Sweepers	2	2
Bildars	1	1
Filth carts	3	2

(k) 4 in the case of battalions at Lucknow.

(l) The British Cavalry regiment at [illegible] is allowed the following dry earth conservancy establishment owing to the introduction of incineration:—

Bhisties 5, Sweepers 10, Bildars 1, Rubbish cart 1, Filth cart 1.

(m) Two additional temporary [illegible] are allowed for filling the [illegible] in the R. F. A. lines at [illegible].

(n) The British Infantry battalion located on the Ridge, Jubbulpore, is allowed the following special dry earth conservancy establishment owing to the introduction of incinerators:—

Latrine sweepers 10, Incinerator sweepers 6, Rubbish carts 3, Urine cart 1.

(o) 20 sweepers are allowed for the British Infantry regiment located on the Ridge, Jubbulpore, and 4 additional temporary men annually from 1st July to 31st October.

An additional sweeper is also allowed for the B. I. battalion furnishing the guard at the Harness and Saddlery Factory, Cawnpore.

												Detention barracks at Lucknow.	..	..	1	..	..	..			(c) Lower Topa; by the cart or its equivalent allowed for the detachment NOTE II.—At stations where carts are not used 3 extra sweepers and receptacles are allowed in lieu of each cart.
												R. H A., ammunition column, Lucknow	..	1	.	..	..	..			
												Establishment for British troops at Lucknow		..	6		.	..			
												Each of the four camps on the Kathgodam-Ranikhet Road for 7 months of the year.	..	1	..	.	.	..			
												Rest camp, barracks at Meerut	..	8	..	..	1	..			
9	British Cavalry regiment (l)	16	..	16	16	8	5(d)	7	4	1	3	R F A. batty. at Dinapore	3	..	.	..	..	..			
10	Full battalion of British Infantry. (n)	16 (i)	.. (i)	(c) 16	16	8	4 (i)	13	(k) 3	1(f)	3(f)	R. F. A batty at Barrackpore	..	1	.	..	..	..			
11	Hd. Qrs. wing	8	.	8	8	4	2	6	2	1	1	Each battn of infy. at Lucknow	..	..	.	1	2	..			
12	Left wing	8	..	8	8	4	2	5	2	1	1	For covered drains and catch pits in Ferozepore Fort, and Arsenal	1	5(e)	..	..	1	..			
13	Single detached Coy.	2	..	2	2	1	1	2	1	..	1	For flushing and clearing drain inside Fort, Rawal Pindi	2	2	..	..	..	..			
												B I guard room at the Rifle Factory, Ishapore	..	2	..	..	..	..			
												For joint use of the British Infantry detachment and Royal Garrison Artillery at Amritsar and Fort Govindgarh, respectively	.	2	..	1	..	..			
												Establishment allowed in lieu of each filth cart at hill stations where such carts are not used	..	3	..	..	..	3			
												R F A Battery, Agra.	..	4	..	..	..	..			

(a) Establishments for detachments must be found ordinarily from the authorized establishments of the unit, proportionate to the strength detached. The extra establishments admissible under the heads of "details attached to corps" and "special scales" should only be entertained when absolutely necessary.

(b) Where local conditions render the authorized conservancy establishments insufficient, a Bde Comdr is empowered to sanction an increase not exceeding one sweeper in the case of a R. A. battery or coy, two sweepers and one bildar in the case of a battn, and three sweepers and a filth cart in the case of a wing of infy.

(c) Units in Fort William are not allowed bildars or filth and rubbish carts.

(d) Four bhistis only in the case of the regiment at Lucknow

(e) The 5 men shown consist of one mate, two sweepers and two coolies. Re. 1 per mensem is also allowed for materials.

(f) Ten sweepers are allowed at Dagshai in lieu of filth and rubbish carts

(g) R. F. A batty, at Ferozepore allowed 3 bhistis, 3 pakhalis

(h) Coy., R. G A. " " 6 bhistis (no pakhalis).

(i) Battn British infy. " " 20

(j) The establishment authorized for the Company R G. A. distributed between Fort Agra and Delhi is as follows :—

	Agra	Delhi
Bhisties	1	1
Sweepers	2	2
Bildars	1	1
Filth carts	2	2

(k) 4 in the case of battalions at Lucknow

(l) The British Cavalry regiment at Rawal Pindi is allowed the following dry earth conservancy establishment owing to the introduction of incineration :—
Bhisties 3, Sweepers 10, Bildars 1, Rubbish cart 1, Filth cart 1

(m) Two additional temporary pakhali bhistis are allowed for filling the wash house tanks in the R. F. A lines at Nowshera

(n) The British Infantry battalion located on the Ridge, Jubbulpore, is allowed the following special dry earth conservancy establishment owing to the introduction of incinerators :—
Latrine sweepers 17. Incinerator sweepers 5. Rubbish carts 5 Urine cart 1.

) 20 sweepers are allowed for the British Infantry regiment located on the Ridge, Jubbulpore, and 4 additional temporary men annually from 1st July to 31st October.
An additional sweeper is also allowed for the B. I. battalion furnishing the guard at the Harness and Saddlery Factory, Cawnpore.

SECTION I.

ESTABLISHMENTS.

Table 4.—Quartermasters', conservancy, marching and other establishments authorized for British Troops serving in the 1st, 2nd, 3rd, 7th and 8th Divns., the Kohat, Bannu, Jhansi and Jubbulpore Bdes—*contd*

Item No.	Unit, etc.	A: Quartermasters' establishments allowed for the personal wants of British troops in all situations (e).			B: Extra establishments allowed when marching in addition to A		C: Conservancy establishments for troops in quarters only (a), (b) and (c).					Special scales, additional to unit scales	Additional establishment allowed.						SCALE OF CONSERVANCY CARTS (FOR REMOVAL OF SULLAGE WATER).			
		Pakhals.	Bhistis	Sweepers.	Bhistis.	Bildars.	Bhistis	Sweepers	Bildars	Rubbish carts	Filth carts.		Bhistis.	Sweepers	Bildars	Rubbish carts	Filth carts.	Receptacles, filth.	Item No	Details.	No of carts authorized	REMARKS
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23
	Depôts of units. Details attached to corps, and those marching, when necessary.																					
14	20 men or less	..	1	1	..	1	..	..	..	..	..	(d) (e) *Hill Sanatoria*.—Establishments will be allowed on the scale laid down for a British Infantry regiment proportionately in accordance with the strength of the depôt, 80 men, women and children (2 children calculated as one adult) being equivalent to a company for reckoning quartermasters' establishments and 90 for conservancy establishments. Fractions of a company receive establishments laid down for details shown against item 14, *et seq.* in column 2 opposite. When the strength of the sanatorium is equal to 4 companies, [illegible] men, or a full battalion of British Infantry the scale of quartermasters' and conservancy establishments should not exceed the scale laid down for the left wing or a full battalion. Two additional sweepers are allowed for the boiling of urine and excreta of enteric fever convalescents at the Hill Depôt, Naini Tal. One bildar is allowed throughout the year at Kasauli. At Darjeeling a reduced number of hill men may be employed as water carriers on higher rates of pay than those authorized, provided the cost of the sanctioned complement of bhistis is not thereby exceeded.										
15	21 to 40 men	1	..	1	..	1	..	..	..	..	..											
16	41 to 60 men	1	1	2	..	1	1	4	..	..	..											
17	61 to 80 men	2	..	2	..	1	1	4	..	..	..											
18	81 to 100 men	2	..	2	2	1	1	2	1	..	1											
19	101 to 150 men	3	..	3	2	2	1	3	1	..	1											
20	151 to 200 men	4	..	4	4	2	1	4	1	1	1											
21	201 to 250 men	5	..	5	4	3	2	5	2	1	1											
22	251 to 300 men	6	..	6	6	3	2	6	2	1	2											

Summer camps at Dalhousie, Ranikhet and Chakrata.—Quartermasters' establishments will be provided from establishments of units sending *details to these* camps, being temporarily replaced by such number of men proportionate to the strength detached added to the conservancy establishment, as may be required to complete to the authorized scale for the companies or squadrons remaining. Conservancy establishments for the camps will be engaged locally on the *hill sanatoria scale*

The following scale of conservancy carts is authorized for British troops when encamped on the Maidan at Calcutta

Strength	Rubbish carts	Filth carts	Cook-house carts
Regiment, British Cavalry.	4	3	3
Detachment of 2 squadrons	3	2	2
" " 1 "	1	1	1
Battery of Royal Horse or Royal Field Artillery	2	2	1
Company R G A	1	2	1
Section or ½ Battery or Company	1	1	1
Battalion of British Infantry	2	3	3
Head quarter Wing, British Infantry	2	2	2
Two Companies, British Infantry	1	·1	1

The above scale is in supersession of, and not supplementary to, the ordinary scale admissible for troops in barracks

(a) Establishments for detachments must be found ordinarily from the authorized establishments of the unit, proportionate to the strength detached The extra establishments admissible under the heads of "details attached to corps" and "special scales" should only be entertained when absolutely necessary

(b) Where local conditions render the authorized conservancy establishments insufficient, a Bde Comdr is empowered to sanction an increase not exceeding one sweeper in the case of a R A battery or coy., two sweepers and one bhistar in the case of a battn, and three sweepers and a filth cart in the case of a *wing of infy.*

(c) Units in Fort William are not allowed bhistars or filth and rubbish carts

(d) Quartermasters' and conservancy establishments required for the Naini Tal Hill Depôt, between the 15th April and 15th October annually, will be entertained on the 'Company' in lieu of the 'Wing' scale.

(e) Quartermasters' and conservancy establishments shall be regulated by the actual daily strength of the depôt.

SECTION

ESTABLISH

Table 5.—Quartermasters' and conservancy establishments authorized

Item No.	Followers, etc.	Quartermasters' Establishments, both divisions. (g)							
		Hd Qrs R A Bde. of group	R H A batty on field army establishment.	...rnal defence establish- ... heavy and mountain		...n column	...n column	...giment.	...lion.
1	2	3	4	5	6	7	8	9	10
1	Pakhalis (f)	..	3	3	3	2	4	16	16
2	Bhistis (f) (i)	1	1	1	..	1	1	..	..
3	Sweepers	1	3	3	3	1	3	16 (b)	16
4	Toties	..	..	..	..	..	..	..	..
5	Coolies	..	..	..	..	..	..	..	..
6	Bildars	..	..	..	..	..	..	..	..
7	Trench bildars	..	..	..	..	..	..	..	..
8	Rubbish carts	..	..	..	..	..	..	..	..
9	Urine "	..	..	..	..	..	..	..	..
10	Cesspool " (d)	..	..	..	..	..	..	..	..
11	Filth, crowley or conservancy carts.	..	..	..	..	..	..	..	..

Item No.	Followers, etc.	Conservancy Establishments,																									
		Secunderabad.										Bangalore.						Bellary.				Fort St. George.		St. Thomas' Mount.			
		...quarters		...n infantry.	...h infantry.								...Infantry.					...ry.		...ater from cook-houses		...h infantry.		...le or group		...ter from cook-houses.	
1	2	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36
1	Pakhalis (f)	..	..	..	..	..	..	..	..	2	..	..	..	..	..	..	2	..	..	..	1	..	..	..	..	..	..
2	Bhistis (f) (i)	..	..	..	..	..	..	..	..	1	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	1
3	Sweepers	2	..	4	3	..	..	..	..	2	2	..	9	1	1	1	2	4	1	..	1	2	..	1	..	..	1
4	Toties	2	16	27	18	4	4	4	4	2	3	18	20	6	5	5	4	10	3	..	1	10	1	1	5	..	..
5	Coolies	..	..	..	..	..	..	..	..	..	..	..	3	..	..	..	..	..	1	..	..	..	..	..	..	..	..
6	Bildars	2	3	2	2	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
7	Trench bildars	2	2	2	2	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
8	Rubbish carts	2	2	2	2	..	..	..	..	..	1	6	3	..	1	1	..	2	1	..	..	..	..	(h) 1	..	..	..
9	Urine "	..	..	..	..	..	..	..	..	..	..	3	5	1	1	1	..	1	1	..	..	..	..	..	..	..	..
10	Cesspool " (d)	2	4	2	4	..	..	..	..	..	..	3	3	1	1	1	..	1	..	2	..	..	..	..	..	(h) 1	..
11	Filth, crowley or conservancy carts.	3	3	5	4	..	..	..	..	3	2	3	4	1	1	1	..	1	1	..	..	..	..	(h) 1	..	..	..

NOTES—(a) Establishments at these stations are for joint use in barracks and hospitals.
(b) The cavalry regiment at Secunderabad has 14 sweepers only.
(c) Two additional bildars allowed for eight months annually.
(d) Where filth or cesspool carts are not used three sweepers and three receptacles are allowed in lieu.
(e) For not more than four months annually.
(f) Batteries of Royal Horse and Field Artillery at Secunderabad and Bangalore (stations with pipe water supply) are allowed 3 bhisties in lieu of pakhalis and bhisties.

L

HENTS.

for British troops serving in the Secunderabad and Burma Divns.

SECUNDERABAD DIVISION.														CONSERVANCY ESTABLISHMENTS, BURMA DIVISION.															
POONAMALLEE		WELLINGTON.			CANNANORE (a)			MALAPPURAM. (a)		CALICUT (a)		TRICHINOPOLY.	RAMANDROOG (e)	MANDALAY.		MAYMYO.	BHAMO. (a)	SHWEBO. (a)	RANGOON								PORT BLAIR.	MEIKTILA (a)	THAYETMYO.
Sanatorium.	Garrison Guard.	Hd Qrs wing, British Infantry.	Sanatorium.	Removing sullage water from cook-houses	Dett., British Infantry.	Removing sullage water from cook-houses.	Garrison Guard.	Dett., British Infantry.	Removing sullage water from cook-houses	Dett., British Infantry	Removing sullage water from cook-houses	Garrison Guard	Depôt.	Dett., British Infantry	Garrison Guard	Hd Qrs and six Companies, British Infy	Dett., British Infantry	Hd Qrs wing, British Infantry.	Hd Qrs and seven Cos., British Infantry	Hd Qrs, R. G. A. group	1st Company, R. G. A.	2nd Company, R. G. A.	Defences	Garrison Guard	Attached Section		Dett., British Infantry.	Wing, British Infantry	British Infantry detachment.
37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62 (j)	63 (k)	64	65	66
..	..	..	..	..	..	..	1	.	.	..	.	.	5			.	.	..		.	..	..	.	..	..	..	..	..	..
..	..	..	..	..	..	..	..	.	.	..	..	.	..	2	1	.	.	..	..	..	..		4	3	2	1	3	2	1
3	..	..	18	.	1		..	1					3	3	1	7‡	3	6	4	1	.		7	3	1	..	2	1	2
6	1	8	18	..	3	..	1	4	.		.	1	2	.		..	..	..	16		2	2		2	3	1	6	..	..
..	..	..	..	..	..	..	..	..	..			.	..	.	.	..	.	.	..	..	..	..	..	..	..	..	..	..	..
..	..		2 (c)	..	.			.	..	Conserved by Municipality	.	.	.	1		2	..	3	..	..	1	..	..	..	..	..	..	1	..
..	..	..	..	..	..	..	..	..	..		..	.	..	..	..	..	..	.	..	..	..	.	..	..	..	..	..	..	..
2	..	2	3	.	1	.	-	1	..		..	..	..	1	..	2	..	2	1	..	1	..	..	..	..	..	..	1	..
..	..	..	..	..	1	..	..	..	..		..	.	..	..	..	..	..	..	3	..	..	1	..	..	.	..	..	..	..
..	..	..	..	2	..	..	..	..	1		1	..	.	1	..	2	..	2	1	..	1	..	.	..	..	..	..	1	..
1	..	4	4	..	1	..	..	1	.		..	..	3	1	..	3	2	2	2	..	1	1	..	1	1	..	..	1	1

(g) The following Quartermasters' establishment is allowed at Meiktila —Pakhalis 6, bhisties 8, sweepers 8. Mandalay :—Pakhalis

SECTION I.

ESTABLISHMENTS.

Table 6.—Quartermasters', conservancy and other establishments allowed for British troops serving in the 4th, 5th (excluding the Jhansi and Jubbulpore Bdes.) and 6th Divns. and Aden Brigade.

Item No.	General scale applicable to units located at Ahmednagar (g), Hyderabad, Indore, Kamptee, Kirkee, Karachi, Mhow, Neemuch, Nasirabad and Poona.	In cantonments. Conservancy. Halalkhor Pakhals or Bhistis	Sweepers.	Toties	Bildars	Rubbish carts	Filth carts (b), (k)	Carts for removing sullage water from cook-houses (c), (h)	In cantonments. Water. Pakhals	Bhistis	Coolies for pumps	Marching. Conservancy. Sweepers	Bildars	Marching. Water. Pakhals	Bhistis
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
1	Hd. Qrs., R. A. Bde. or group	.	1	.					.	1		1			1
2	Battery R. H. A. on field army establishment	.	5	..	1	1	1	1	3	1	..	3	2	3	3
3	Other batteries R. H. A. and all field, heavy and mountain batteries (e)	..	5	.	1	1	1	1	3	1	..	3	2	3	3
4	Company, R. G. A. (l)	..	5	.	1	1	1		3		.	3	2	3	2
5	R. H. A. ammunition column (l)	.	1		.	.			2	1	..	1		..	1
6	R. F. A. ammunition column	1	5		1		1	.	4	1	.	3	2	3	3
7	British cavalry regiment	.	23	.	3	1	3	2	16			16	8	16	16
8	British infantry battalion (a), (d), (f), (m), (o)	.	29	.	3	1	3(k)	1	16		.	16	8	16	16
	Special at other stations.														
9	Aden: Hd. Qrs. R. G. A., group, 3 cos. R. G. A. and coast defence lascars.	8	19		3	2									
10	Aden: Each Company R. G. A.	..	.	..	..		..			11	.	.	.	..	..
11	Aden: British Infantry battalion	1	29	..	3	1	2	3		28	.	3	2	3	2
12	Colaba: Hd. Qrs., R. G. A. group, 3 cos. R. G. A. and coast defence lascars.	4	12	..		2	4			4	..	16	8	16	16
13	Colaba: Hd. Qr. wing British infantry	1	13	..	6	2	3	1		3	.	9	6	9	6
14	Belgaum: Battery, R. F. A.	..	3	2	.	1	1	1	3	1	.	8	4	8	8
15	Belgaum: British infantry battalion	..	16	12	2	3	2 large 2 small	3	16	.	.	3	2	3	3
16	Garrison Guard, Belgaum											16	8	16	16
17	Quetta: Hd. Qrs., R. G. A. group	..	1	1	..	.	.	.	..	.	.				
18	Quetta: Mountain battery	..	1	..	.	.	2	.	..	.	.	.	..	..	.
19	Quetta: R. G. A. company	..	5	..	1		3	..	..	1	.	1	..	..	1
20	Quetta: British infantry battalion	..	5	..	1	.	3	..	..	3	..	3	2	3	3
21	Bombay Arsenal Depôt Guard	12	29	..		..	8	..	..	3	..	3	2	3	2
22	Detachment B. I. at Kirkee (n) employed at Kirkee Arsenal.	3	2 12	..	3	..	..	.	.	16	..	16	8	16	16
23	Butcher's Island, Bombay	..	3	..	1	1	1	1	.	1	..	..	..	..	..

REMARKS. (17)

(a) When an infy battn. has one or more cos on detached duty, 2 sweepers, 1 filth cart and 1 bildar extra are allowed. If a battn is divided into wings, each wing is allowed one filth, one rubbish and one cook-house cart, and the Bde Comdr may sanction an additional filth or rubbish cart if found absolutely necessary. For detachments of less than a wing a cook-house cart may be authorized if the detachment cannot be served by the cart of another unit. At Ahmedabad the cart allowed for the R. F. A. battery will serve the British infy detachment. All other establishments required by the detachments must be found from the unit scale.

(b) An extra filth cart is authorized for the British infy battn at Kamptee and the detachment at Hyderabad.

(c) The following special scales of cook-house carts apply to British infantry units at the under-mentioned stations.—Ahmednagar 4, Mhow 2 and Poona 5, each battalion.

(d) The following sweeper and filth and rubbish cart establishment is allowed for the British Infantry regiments at Wanowrie and Ghorpuri (Poona):—

	Sweepers.	Filth and rubbish carts.
Wanowrie ..	28	5
Ghorpuri ..	29	6 (including one filth cart for the attached section).

One additional bhisti is allowed for the attached section and married quarters of the British Infantry at Ghorpuri.

Sanatoria, etc (r)

24	Deolali Wh.	ntry (f)	7	19		1	1	1	1	14		4				
25	Khandalla	months)	1	7		1		1			2					
26	Khandwa {			2						1						
27		y	4	14		1				7						
28	Taragarh De-	s)														
29		adults		1							1					
30			1	2							1					
31			1	2						1						
32			1	4						1	1					
33	Purandhar	adults	1	4						1						
34			1	4						1						
35			1	5						1	1					
36			1	5						2						
37			2	6						2	1					
38			2	6						3						
39			2	7						3	1					
40			2	7						4						
41			3	8						4	1					
42			3	9						4	1					
43			3	9						5	1					
44	Mount Abu	adults	1	4							1					
45		ts	1	4							1					
46			1	5						1	1					
47			1	5						2						
48			2	6						2	1					
49			2	7						3						
50			3	8						3	1					
51			3	9						4						
52			3	10						4	1					
53	Depôts	adults		1							1		1			1
54	of units,	ts	1	2							1		1	1		2
55	and		1	2						1			1	1	1	1
56	details		1	4						1	1		2	1	1	2
57	marching		1	4						2			2	1	2	2

(e) The R. F. A. battery at Karachi is allowed an extra sweeper for the latrines of the magazine and arsenal guard rooms. One additional conservancy sweeper is allowed for the married quarters in the R. A. lines at Neemuch.

(f) The R G. A Company at Karachi is allowed to draw the berrick rate of pay for a halalkhor pakhali and make its own arrangements to remove the sullage water from the cook houses.

(g) Units at Ahmednagar are allowed water carts as follows, hand bhistis being substituted for pakhalis :—

R. F. A battery 2 carts, British Infantry battalion 4 carts, these with bullocks and drivers being hired under regimental arrangements.

(h) Where filth or cook house carts are not used, 3 sweepers and 3 receptacles are allowed in lieu of each cart.

(i) Also 1 chowdri

(j) Sanction to any variation of conservancy establishment considered advisable may be granted by the G O C Division provided that aggregate cost of the conservancy establishment employed does not exceed the amount authorized by regulations

(k) The British Infantry battalion at Ahmednagar is allowed 1 additional filth cart and one additional rubbish cart

(l) The R H A ammunition column at Ahmednagar is allowed 2 bullocks for supplying water at such times when government animals cannot be made available

(m) The left British Infantry battalion at Quetta is allowed an extra sweeper to attend to the conservancy arrangements of the garrison military police barrack at that station.

(n) This establishment is the special authorised establishment for the detachment of B. I. at Kirkee, irrespective of the stations from which it is drawn

(o) Three additional cook-house carts are allowed for the British Infantry battalion at Karachi and one rubbish cart for the British Infantry detachment at Hyderabad.

General instructions applicable to all Divisions and Brigades.

(i) Two hand bhistis are allowed in lieu of each pakhali if the latter class is not procurable. At stations where there is a pipe water supply (except Khyra Galli), bhistis will replace pakhalis, but the total number of bhistis in a unit is not to be reduced below the field service scale. If a corps is equipped with Government transport hand bhistis will replace pakhalis and mules pakhali bullocks

(ii) Rubbish, filth and cook house carts will be supplied by the M. W. S or P. W. D. Where a cart is sanctioned in the foregoing tables the sanction covers the driver and cattle required.

(iii) The establishments required for a rest or other temporary camp will be decided and sanctioned by the O C the station concerned.

(iv) Transport sergeant majors are allowed the *services of one bhisti and one sweeper*. *Master gunners* and park sergeants the part services of these servants, arrangements being made with the nearest unit.

(r) In calculating the total strength at Hill Sanatoria 2 children should be reckoned as 1 adult. Quartermasters' and conservancy establishments shall be regulated by the actual daily strength of the Depôt, except in cases where fixed scales are authorized.

SECTION I.

ESTABLISHMENTS.

Table 7.—Regimental and hospital followers for Indian troops.

Item No.	Detail	Scale for: Artillery. A	B	Cavalry. C	D	E	E(1)	F	G	H	I	J	Infantry. K	L	M	N	O	P	Q	Sappers and Miners (2): No. 15 (Burma) Co	Railway Company.	No 23 Fortress Co	Other Service Companies	Signal Companies.	1st Corps Hd. Qrs	1st Corps B Company	2nd Corps Hd Qrs	2nd Corps D Company	3rd Corps Hd. Qrs.	3rd Corps E. Company.	Jamrud Indian hospital.	Sibi Indian hospital.	Units to which the scales are applicable.
1	2	3	4	5	6	7	7A	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33
	Regimental.																																A.—Frontier Garrison Artillery. B.—Indian Mountain Battery. C.—Guides Cavalry. D.—Viceroy's Bodyguard. E.—Governor's Bodyguard, Madras. E(1).—Governor's Bodyguard, Bombay. F.—1st, 2nd, 7th, 10th, 11th, 13th, 14th, 15th, 18th and 19th Lancers, 3rd, and 9th Horse; 4th, 5th, 6th, 8th, 12th, 16th, 17th, 21st, 22nd, 23rd and 25th Cavalry. G.—38th and 39th C. I. Horse. H.—26th, 27th and 28th Light Cavalry. I.—29th, 30th, 31st, 32nd and 37th Lancers; 33rd Light Cavalry; 20th, 34th, 35th and 36th Horse. J.—Aden Troop. K.—1st and 3rd Brahmans; 2nd, 5th and 6th Light Infantry; 4th, 7th, 8th, 11th, 13th and 16th Rajputs; 9th Bhopal Infantry; 10th Jats; 12th, 23rd, 32nd, 34th, 48th and 106th Pioneers; 14th, 15th, 35th, 36th, 45th, 47th, 51st, 52nd, 53rd and 54th Sikhs; 17th, 18th, 56th, 94th, 95th, 96th, 97th, 98th and 99th Infantry; 19th, 20th, 21st, 22nd, 24th, 25th, 26th, 27th,
1	*Gnatthis*	..		..	..	..	..		..	..	..	..					..	..	..	..	..	..	..	..	1	..	..	..	..	..	..	..	
2	Moulvis	..	(10)	..	..	..	..	(11)	..	..	..	..	(11)	..	(12)	(12)	..	..	..	..	..	..	..	..	1	..	..	..	..	..	..	..	
3	Pandits	..		..	..	..	..		..	..	..	..					1	1	..	..	..	..	..	..	1	..	..	..	..	..	..	..	
4	Schoolmasters (10)	..	..	..	..	1	..	1	1	1	..	..	1	.	1	1	1	1	.	..	..	..	..	..	1	..	3	..	3	..	..	..	
5	Munshis or vernacular schoolmasters. (10)	..	..	..	1	..	..	1	1	1	..	..	1	..	..	1	1	1	..	..	..	..	..	..	1	..	1	..	1	..	..	..	
6	Writers	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	1	..	..	..	..	..	..	..	..	..	..	..	..	..	
7	Chowdris	..	..	..	..	..	..	1	1	1	1	..	1	1	1	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	
8	Tindals	..	.	..	..	..	..	..	..	1	..	..	..	..	..	..	..	..	..	..	..	..	..	..	1	..	1	..	..	..	..	..	
9	Lascars	..	(7)	1	2	2	..	1	1	3	1	2	.	..	..	..	..	..	..	..	..	..	..	..	1	.	.	..	1	..	..	..	
10	Armourers	..	..	..	..	..	..	..	..	..	..	1	..	..	..	..	..	..	1	1	..	..	1	..	2	1	2	1	..	1	..	..	
11	Mistri carpenters	..	1	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	.	..	..	..	..	..	..	..	..	..	
12	Carpenters	..	2	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	
13	*Mistri smiths*	..	2	..	..	..	..	..	..	1	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	
14	Smiths	..	3	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	
15	Head mochi	..	1	..	..	..	..	..	..	1	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	
16	Mochis, 1st class (11).	..	2	..	..	..	..	..	..	2	..	..	..	..	..	..	..	..	1	..	..	..	1 (24)	..	..	2	..	..	..	..	..	..	

SECTION I.

ESTABLISHMENTS.

Table 7.—Regimental and hospital followers for Indian troops.

Item No.	Detail	Artillery. A	Artillery. B	Cavalry. C	Cavalry. D	Cavalry. E	Cavalry. E(1)	Cavalry. F	Cavalry. G	Cavalry. H	Cavalry. I	Cavalry. J	Infantry. K	Infantry. L	Infantry. M	Infantry. N	Infantry. O	Infantry. P	Infantry. Q	Sappers and Miners (2) No 15 (Burma) Co.	Railway Company	No 23 Fortress Co	Other Service Companies	Signal Companies	1st Corps Hd Qrs	1st Corps B Company	2nd Corps Hd Qrs	2nd Corps D Company	3rd Corps Hd. Qrs	3rd Corps E. Company	Jamrud Indian hospital	Sibi Indian hospital
1	2	3	4	5	6	7	7A	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32
	Regimental.																															
1	Grunthis	..		..	..	..	..		..	..	..	..					..	..	..	..	..	..	..	..	1	.	..	..	..	..	..	..
2	Moulvis	..	(10)	..	..	..	..	(11)	..	..	..	..	(11)		(13)	(12)	.	..	..	..	..	..	..	..	1	..	..	..	..	..	..	.
3	Pundits	..		..	..	..	..		..	..	..	..		..			1	1	..	..	..	..	..	..	1	..	.	..	..	..	..	..
4	Schoolmasters (15)	..	..	..	..	1	..	1	1	1	..	..	1	..	1	1	1	1	..	..	..	..	..	..	1	..	3	..	3	..	..	.
5	Munshis or vernacular schoolmasters. (15)	..	..	..	1	..	..	1	1	1	..	..	1	..	..	1	1	1	..	..	..	..	..	..	1	..	1	..	1	..	..	..
6	Writers	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	1	..	..	1	..	.	..	..	..	..	..	..	..	..
7	Chowdries	..	..	..	..	..	..	1	1	1	1	..	1	1	1	..	..	..	..	..	..	..	..	..	1	..	1	..	..	..	..	..
8	Tindals	..	.	..	..	..	..	..	..	1	..	..	..	..	..	..	..	..	..	..	..	..	..	..	1	.	..	..	1	..	..	..
9	Lascars	..	(1)	1	2	2	..	1	1	3	1	2	..	..	..	..	..	..	1	1	..	..	1	..	2	1	2	1	..	1	..	..
10	Armourers	..	..	..	..	..	..	..	..	..	..	1	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
11	Mistri carpenters	..	1	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
12	Carpenters	..	2	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
13	Mistri smiths	..	1	..	..	..	..	..	..	1	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
14	Smiths	..	3	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
15	Head mochi	..	1	..	..	..	..	..	..	1	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
16	Mochis, 1st class (11)	..	2	..	..	..	..	..	..	2	..	..	..	..	..	..	..	..	1	..	..	1	..	1 (20)	..	..	2	..	..	..	..	..

Units to which the scales are applicable (33):

A.—Frontier Garrison Artillery.
B—Indian Mountain Battery.
C—Guides Cavalry.
D—Viceroy's Bodyguard.
E—Governor's Bodyguard, Madras.
E(1)—Governor's Bodyguard, Bombay
F—1st, 2nd, 7th, 10th, 11th, 13th, 14th, 15th, 18th and 19th Lancers; 3rd, and 9th Horse; 4th 5th, 6th, 8th, 12th, 16th, 17th, 21st, 22nd, 23rd and 25th Cavalry.
G.—38th and 39th C. I. Horse.
H.—26th, 27th and 28th Light Cavalry.
I—29th, 30th, 31st, 32nd and 37th Lancers; 33rd Light Cavalry; *20th, 34th, 35th and 36th* Horse.
J—Aden Troop.
K—1st and 3rd Brahmans; 2nd, 5th and 6th Light Infantry; 4th, 7th, 8th, 11th, 13th and 16th Rajputs; 9th Bhopal Infantry; 10th Jats; 12th, 23rd, 32nd, 34th, 48th and 106th Pioneers; 14th, 15th, 35th, 36th, 45th, 47th, 51st, 52nd, 53rd and 54th Sikhs; 17th, 18th, 66th, 94th, 95th, 96th, 97th, 98th and 99th Infantry; 19th, 20th, 21st, 22nd, 24th, 25th, 26th, 27th,

17	Mochis, 2nd class	..	2	..	..	1	..	..	..	2	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
18	Forgemen, 1st class.	..	..	..	..	..	..	..	..	1	.	1	..	.	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
19	Forgemen, 2nd class.	.	..		..	1	..	..	..	..	.				..	.	..	.	..	..	..	..	..	..	..	..	..	..	..	..	..	..
20	Forge boy .	.	..		.	..		..	..	1	.	1	..	..		..	..	..	..	..	..	..	..	..	..	.	..	..	..	..	..	..
21	Bhistis (11) (22) .	8	1	6	..	.	1	8	8	8	8	4	8	(11) 8	8	8	8	4	1	4(7)	(9)	1	2	3	..	3	..	2	1	2	..	..
22	Pakhalls	..	3(3)	..	1	1	1	..	..		.	..			.	..			..	..	.	.	..	.	..	..	2	..	..	..	..	..
23	Cooks .	..	6	..	..	.	..	..			..	..			.			..	.	4(7)	(9)	.	..	2	.	.	.	..	..	..	..	..
24	Sweepers (16) (20)	8	3	..	1	.	.	.		8			8	8	8	8	8	8	2	3	(9)	1	2(8)	2(16)	.	3	4	2	.	2	.	..
25	Naiks of Syces	..	..	..	1	1	..		.	.		.		.	.			..	.	.		.	.	.	..	.	.		..	.	..	.
26	Syces .	..	3(2)	..	48	23			.	159		.						.	.	.	..	.	..	4	.	..	..		..	.	..	.
27	Grass-cutters (4)	..	40	..	100		.		.	512													..	..	..	.	..	..	..	..	..	..
28	Camel attendants	..	.	..	..				.	4							.		..		..	..	.		..	..	.	..		..		..
29	Flagman .	..	..	..	.		1		.			..				..	.		..	.	.		.	..	..	.	..	.	.	.	..	..
	Conservancy.																															
30	Bhistis . .	..	..	..	1	..		..	..	.		.	.	.		.	(19)	..		..	..	..		..	1			.			..	..
31	Bildars . .	..	..	..	1	..		.	(6)				.		.			5	1	.			.		2	..		.			.	
32	Sweepers or totlies (14).	..	..	..	1(5)	..	1	..	(6)		.			.		.		2	..	.	.	.	.	..	3		2	.	3	-	.	..
33	Carts, filth, with drivers and bullocks (10)	..	..	..	..	.	1		(6)	..		..			.	.	1	2		.	..	.		..	2	.	.	..	1	.	..	..

28th, 29th, 30th, 31st, 33rd, 46th, 62nd, 66th, 67th, 69th, 74th, 76th, 82nd, 84th and 87th Punjabis; 37th, 38th and 41st Dogras; 39th, 55th, 57th, 58th and 59th Rifles; 40th Pathans; Guides Infantry; 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 2-10th Gurkha Rifles

L.—61st, 64th and 81st Pioneers; 63rd and 83rd Light Infantry; 73rd, 75th, 79th, 80th, 86th and 88th Infantry.

M.—72nd, 89th, 90th, 91st and 92nd Punjabis, 93rd Burma Infantry, 1-10th Gurkha Rifles.

N.—101st and 102nd Grenadiers; 103rd, 105th, 110th and 127th Light Infantry; 104th, 123rd and 125th Rifles, 107th, 121st and 128th Pioneers; 108th, 109th, 112th, 113th, 119th, 120th, 122nd, 124th and 126th Infantry; 114th, 116th and 117th Mahrattas; 129th and 130th Baluchis.

O.—42nd and 43rd Regiments.

P.—44th Merwara Infantry.

Q.—Resident's Escort, Nepal.

Special messing establishments.

The following messing establishment is allowed for each half squadron of cavalry, half company or unit under 100 strong of sappers and miners (other than No 15 Burma Company), and company of infantry, in which the general messing system is adopted:—

40 to 69 men messing together	1 cook.
70 men and over messing together	2 cooks and 1 bhisti.

(1) Class regiments one religious teacher only. Mixed regiments one teacher for every 3 companies or 1½ squadrons of Mussalmans or Hindus, or 2 companies or 1 squadron of Sikhs, up to a limit of two teachers of different denominations for any one unit. (2) Indian mountain batteries are allowed, while serving in Burma, 6 lascars and 3 additional syces (3) These pakhalls should be supplied with cast battery mules if possible. (4) Grass cutters will only be maintained when grass is not supplied by the Farms Department, or other Government agency (5) Three additional sweepers are allowed in lieu of a filth cart while the bodyguard is at Dehra Dun (6) Three bildars, 14 sweepers and 3 filth carts are authorized for the unit located at Goona (7) In the Burma Company the 4 cooks and two of the bhistis are given for messing purposes and should only be engaged if required. (8) Companies detailed for the field army are allowed an extra sweeper, in peace time (9) 2 bhisties, 2 cooks and 2 sweepers are authorised when these companies are employed on railway construction work in addition; the following are also authorised during musketry and other military training —for the company located at Quetta—1 bhisti, 1 cook and 1 sweeper for a period not exceeding three months annually; for the company located at Sialkot—1 bhisti and 1 cook for a period not exceeding 3 months annually and 1 sweeper permanently (10) One filth cart with driver and cattle is authorised for the hospital of a unit or detachment of not less than a battery, half squadron or company in the *1st, 2nd, 3rd, 7th, and 8th Divisions, Jhansi, Jubbulpore, Kohat, Derajat and Bannu Brigades* At hill stations when carts are not used three sweepers are allowed in lieu (11) In the 61st, 64th and 81st Pioneers In the 63rd Light Infantry 73rd, 75th, 79th, 80th Infantry, 83rd Light Infantry, 86th and 88th Infantry, 6 regimental bhisties only are allowed. (12) Religious teachers are allowed under the conditions given in footnote (1), for the 3rd Horse 1st, 11th and 18th Lancers 5th, 6th, 12th, 16th, 17th and 23rd Cavalry; the regiments included in columns K. and M. 102nd Grenadiers; 106th, 107th, 121st and 128th Pioneers, 123rd and 125th Rifles; 127th Light Infantry; 122nd, 124th and 126th Infantry and 129th and 130th Baluchis. Two religious teachers per station are allowed for the Indian Artillery at Abbottabad, Kohat and Dehra Dun. (13) Schoolmasters shown against this item may be either enlisted men or civilians If the former are employed, they are included in the authorized establishment of combatants, civilians cannot be employed in addition thereto (14) Latrine sweepers are authorised at the various outposts in the Quetta Division as follows—1 for 12 months and 1 for 6 months at Sibi, 2 each for 6 months at Mastung and Kalat, 2 each for 12 months at Shelabagh and Mir Ali Khel, 1 for 6 months at Hirok and 1 each for 12 months at Peshin, Harnai, Marratangi, Hindubagh, Killa Saifulla, and Musa Khel One sweeper is authorized for 12 months at each of the stations of Charbar and Jask. (15) Vernacular schoolmasters of Indian Cavalry and Infantry appointed prior to the issue of India Army Order No. 125 of 1910, may be either civilians or enlisted men, if the latter, they are included in the authorised establishment of combatants and not in this table (16) An additional sweeper is allowed at Quetta. (17) A mochi is allowed for the repair of the saddlery of the Mounted Infantry detachment at Gyantse and Yatung (18) A whole time temporary regimental sweeper on nerrick rate of pay is allowed for the Indian Infantry regiment occupying the "Kitchener Lines" at Poona on account of Indian details attached to that unit while attending classes of instruction. (19) 1 driver with two bullocks is authorized at Deoli for drawing water from the Nekchal wells (20) One sweeper in addition to Corps establishment is allowed for the section of the company of Sappers and Miners detached for duty at Chitral (21) When the Indian Cavalry detachments at Jaipur and Deoli are furnished by Non-Silladar cavalry, a temporary bhistie on the nerrick rate of pay and a part time sweeper at Rs. 2 per mensem are allowed for the former station; and a part time sweeper at Rs 2 per mensem for the latter station (22) One water cart for the conveyance of water to the Larrymore boiler and two additional bhisties are authorized for the Indian Infantry Detachment at Port Blair. (23) 1st Sappers and Miners only. (24) 2 male and 2 female sweepers are authorized to attend to the latrine in the Carnegy (L. I.) lines at Bombay.

SECTION I.

ESTABLISHMENTS.

Table 7.—Regimental and hospital followers for Indian troops—*concld.*

Item No.	Detail	Artillery. A	Artillery. B	Cavalry. C	Cavalry. D	Cavalry. E	Cavalry. E[1]	Cavalry. F	Cavalry. G	Cavalry. H	Cavalry. I	Cavalry. J	Infantry. K	Infantry. L	Infantry. M	Infantry. N	Infantry. O	Infantry. P	Infantry. Q	Sappers and Miners.[1] No 16 (Burma) Co.	Railway Company.	No 23 Fortress Co.	Other Service Companies	Signal Companies.	1st Corps. Hd Qrs.	1st Corps. B. Company.	2nd Corps. Hd. Qrs	2nd Corps. D. Company.	3rd Corps. Hd. Qrs.	3rd Corps. F Company.	Jamrud Indian hospital.	Sibi Indian hospital.	Units to which the scales are applicable.
1	2	3	4	5	6	7	7A	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33
	Hospital. [2]																																*Special messing establishments*—concld
34	Ward servants	..	..	..	1	..	..	..	..	..	..	1	..	.	..	..	..	..	..	..	..	..	.	..	.	..	.	..	..	..	..	..	
35	Bhistis [3]	1	1	1	1	.	..	1	1	1	1	..	2	2	2	2	2[5]	2	.	1	..	.	.	.	2	..	..	..	..	1	1	1[6]	In the event of the messing strength being temporarily reduced, these followers need not be discharged, but casualties should not be replaced unless the messing strength at the time warrants this.
36	Cooks	1	1	..	2	..	..	..	..	..	..	..	2	..	2	..	2	2	..	1	.	..	..	.	2	..	..	..	..	..	..	1	
37	Sweepers or totties [4]	1	1	1	1	1	..	1	1	1	1	1	2	2	2	2	2	2	.	1	..	..	..	..	2	..	..	2	..	1	.	1	*Depôts of units on service, etc.* Depôts of Indian infantry units on service and reserve battalions of infantry or companies of sappers and miners formed on mobilisation are allowed one bhisti and one sweeper per 100 men or fraction thereof exceeding 20. For scale of followers allowed for Indian Infantry reservists during training period see Army Tables, Indian Infantry.

(1) One sweeper in addition to Corps establishment is allowed for the section of the company of Sappers and Miners detached for duty at Chitral. (2) Establishments for detachment hospitals are provided as follows: *1st, 2nd, 3rd, 7th and 8th Divisions, Kohat, Derajat and Bannu Brigades*—A detached wing of cavalry is allowed one bhisti and one sweeper, a detached wing of infantry takes one bhisti, one cook, and one sweeper from the regimental establishment. Detachments of not less than a half squadron or company but less than a wing are allowed one bhisti and one sweeper. *4th, 5th and 6th Divisions and Aden Brigade*—Detachments of between 100 and 500 men are allowed 1 sweeper, and above 500 men, 2 bhistis and 2 sweepers. *Secunderabad and Burma Divisions*—Establishments must be found from those of the unit. (3) Bhistis are authorised for such hospitals of Indian troops as are not provided with a piped water supply. One bhisti is allowed for the Indian troops hospital at Charbar and for station requirements. (4) The Indian infantry detachment at Perim is allowed a hospital sweeper. A sweeper is allowed for Indian troops' hospital at Steamer Point, Aden. (5) One bhisti only in hospital of 43rd regiment. (6) Pakhali bhisti.

SECTION I.

ESTABLISHMENTS.

Table 8.—Conservancy establishments authorized for Indian troops and followers at stations in the Secunderabad Division, in which cantonment funds do not exist.

Item No.	Station and unit.		Toties.			Sweepers.	Peotahmen.	Coolies.	Cart drivers.	Carts.				Remarks.
			Male.	Female.	Girl.					Filth	Urine.	Rubbish.	Hand.	
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
1	Madras	Governor's Body-guard.	1	2	1	1	..	..	..	1	..	..	..	Hired cart Rs. 5 and Rs 2-8-0 per mensem allowed for plant and disinfectants respectively. (a) 8 days per mensem
2	Madras	Indian infantry battalion.	11	..	..	9	3	..	3	2	..	..	..	
3	Madras	S and T. corps	2		..		..		1	1	..	..	1	
4	Madras	Ordnance Department.		.	..	..	.	2	..	..	..	..	2	
5	Perambore lines.	Indian infantry det	2	.	..	2	2 (a)	.	..	1	..	1	..	
6	Ootacamund	Indian infantry det	..	.	.	2	..	..	..	..	..	..	..	
7	Cannanore	Indian infantry in garrison.	6	1	..	8		..	..	2	2	1	..	
8	Cannanore	Station hospital followers	1	..	..	..	.	..	..	..	..	..	..	
9	Cannanore	S and T. followers	1	.	..	..	..	..	..	1	..	..	..	
10	Trichinopoly.	Indian Infantry in garrison.	3	3	..	8	..	..	..	1	2	2	..	

Table 9.—Quartermasters' establishments for the Indian military survey class at Roorkee.

Item No.	Followers.	Scale.	Remarks.
1	2	3	4
1	Bhisti	1	
2	Sweepers	1	

Table 10.—Conservancy establishments for personnel of Defence Light Sections.

Item No.	Details.	Scale for					Remarks.
		Aden.	Colaba.	Calcutta.	Karachi.	Rangoon.	
1	2	3	4	5	6	7	8
1	Bhistis	..	1	3	2	3	Two trolleymen are allowed for Karachi Defence Light
2	Sweepers	1	3	3	2	6	

SECTION I.

ESTABLISHMENTS.

Table 11.—Quartermasters' establishment authorized for sanatoria, etc.

Item No.	Establishment.	Scale for												Remarks.
		Darjeeling	Naini Tal	Landour.	Pachmarhi.	Standing Camp, Kailana.	Standing Camp, Ranikhet.	Kasauli.	Murree.	Dalhousie.	Wellington.	Poonamallee.	Khandala (a).	
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
1	Chowdri . .	1	..	1	1	..	..	..	..	..	1	..	..	(a) For 8 months only.
2	Weighman . .	1	..	2	..	..	..	..	..	..	..	..	..	
3	Mutsuddy . .	1	..	1	..	..	..	..	..	..	..	..	..	
4	Peon . . .	..	..	..	1	..	..	..	..	..	2	..	1	
5	Range Chowkidar .	..	1	2	1	1	2	1	..	..	..	..	..	
6	Shristadar . .	..	..	..	..	..	..	..	..	..	..	..	1	
7	Lamplighter . .	..	..	..	..	..	..	..	..	..	1	1	..	
8	Tindal . . .	.	1	..	1	..	..	1	1	1	1	..	..	
9	Tent lascars . .	2	3	2	3	..	..	2	..	3	4	2	..	

Table 12.—Menial servants, and conservancy establishments specially authorized in the 6th (Poona) Division.

Item No.	Details.		Scale for					Remarks.
			BOMBAY.			(a) SATARA COMBINED SCHOOL OF MUSKETRY.		
			For preparing tea rations in Bombay Docks.			For the period when classes are held.	During interval between the classes.	
			1 to 100.	101 to 300	301 to 500.			
1	2		3	4	5	6	7	8
1	Cooks	No.	1	..	1	..	..	
2	Begaries	"	1	..	3	..	..	
3	Sweepers	"	..	..	..	8	4(b)	
4	Filth cart and driver .	"	..	..	..	1	1	
5	Rubbish cart and driver .	"	..	..	..	1	..	
6	Refuse cart and driver .	"	..	..	..	1	..	
7	Muccadam	"	..	..	..	1	1	
8	Bildars . . .	"	..	..	..	1	..	

(a) A latrine sweeper is authorised for the detachment of Indian Infantry at Satara.
(b) In addition 5 sweepers are authorized for 5 days before the commencement and for two days after the conclusion of this class.

SECTION I.

ESTABLISHMENTS.

Table 11.—Quartermasters' establishment authorized for sanatoria, etc.

Item No.	Establishment.	Scale for												Remarks.
		Darjeeling.	Naini Tal.	Landour.	Pachmarhi.	Standing Camp, Kailana.	Standing Camp, Rankhet.	Kasauli.	Murree.	Dalhousie.	Wellington.	Poonamallee.	Khandala (a).	
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
1	Chowdri . .	1	..	1	1	..	..	..	..	..	1	..	..	(a) For 8 months only.
2	Weighman . .	1	..	2	..	..	..	..	..	..	..	..	..	
3	Mutsuddy : .	1	..	1	..	..	..	..	..	..	..	..	..	
4	Peon . . .	..	..	..	1	..	..	..	..	..	2	..	1	
5	Range Chowkidar .	..	1	2	1	1	2	1	..	..	..	..	..	
6	Shristadar . .	..	..	..	..	..	..	..	..	..	..	..	1	
7	Lamplighter . .	..	..	..	..	..	..	..	..	..	1	1	..	
8	Tindal . . .	..	1	..	1	..	..	1	1	1	1	..	..	
9	Tent lascars . .	2	3	2	3	..	..	2	..	3	4	2	..	

Table 12.—Menial servants, and conservancy establishments specially authorized in the 6th (Poona) Division.

Item No.	Details.	Scale for					Remarks.
		BOMBAY.			(a) SATARA COMBINED SCHOOL OF MUSKETRY.		
		For preparing tea rations in Bombay Docks.			For the period when classes are held.	During interval between the classes.	
		1 to 100.	101 to 300	301 to 500.			
1	2	3	4	5	6	7	8
1	Cooks . . . . . No.	1	..	1	..	..	
2	Begaries . . . . ,,	1	..	3	..	..	
3	Sweepers . . . . ,,	..	..	..	8	4(b)	
4	Filth cart and driver . ,,	..	..	..	1	1	
5	Rubbish cart and driver . ,,	..	..	..	1	..	
6	Refuse cart and driver . ,,	..	..	..	1	..	
7	Muccadam . . . . ,,	..	..	..	1	1	
8	Bildars : . . ,,	..	..	..	1	..	

(a) A latrine sweeper is authorised for the detachment of Indian Infantry at Satara.
(b) In addition 6 sweepers are authorized for 5 days before the commencement and for two days after the conclusion of this class.

SECTION I.

ESTABLISHMENT.

Table 13.—Menial Establishment, Military Prisons and Detention Barracks.

Item No.	Details	SCALE FOR Poona	Trimulgherry	Dagshai	Lucknow.	Sialkot.	Thayetmyo.	Peshawar.	Quetta.	Aden.	Hyderabad (Sind).	Karachi.	REMARKS.
1	Cooks (a)	1	1	1	1	1	(b) 1	1	1	1	1	1	
2	Bhistis (a)	1	1	1	1	1	1	1		..	.	1	
3	Sweepers (c)		.			.	..		..	..	..	..	

(a) This establishment will be entertained only where arrangements cannot be made for the work to be carried out by men under sentence

(b) A soldier cook is allowed in place of a native cook

(c) Sweepers are allowed on the following scale —

for 20 men and under . . 1.
for 21 to 40 men . . 2.
for 41 men and over . . 3.

When two or more sweepers are not ordinarily entertained the Brigade Commander may, if found absolutely necessary, sanction the employment of an additional sweeper at Military Prisons and Detention Barracks where incineration is carried out.

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 14.—Daily scale of rations (other than those for sea voyages) for British troops.

Notes.—I. *See A. R., I., Vol. II* for those entitled to free rations. II. General Officers Commanding may, on the recommendation of the medical authorities, sanction changes in the scale of rations by reducing one article and proportionately increasing another (except tea or coffee), *provided no extra expense is incurred*. Sanction to such changes must be renewed monthly. III. Rations articles must not be subsequently exchanged for other articles or sold through the agency of any S. and T. subordinate or contractor, or in communication with such person. IV. Mobilisation and fort reserves of food supplies will be issued for turnover purposes, in lieu of fresh provisions, at the scale of equivalents given below. V. The scale of diet for soldiers under sentence in military prisons, detention barracks and barrack detention rooms is shown in I. A. F. P-1471.

Item No.	Articles		Daily scale per man. In barracks.(p)	When travelling by road.(a)	When travelling by rail. Breakfast.	When travelling by rail. Dinner.	When travelling by river steamer.(b)	Remarks
1	2		3	4	5	6	7	8
1	Bread, best quality or biscuit	lbs.	1	1	[illegible]	[illegible]	1	
2	Meat, best grass fed (c)	"	1	1	[illegible]	[illegible]	1	
3	Firewood, dry (e)	"	(t) 3	3	1[illegible]	1[illegible]	3	
4	Rice (f) or flour	ozs.	4	4	(g)	(g)	4	
5	Tea, black (r) or	"	[illegible]	[illegible]	[illegible]	..	[illegible]	
6	Coffee (q)	"	1[illegible]	..	..	..	..	
7	Sugar, brown	"	2[illegible]	2[illegible]	2[illegible]	..	2[illegible]	
8	Salt (h)	"	[illegible]	[illegible]	[illegible]	[illegible]	[illegible] (k)	
9	Potatoes (i) or dhal (j)	lbs.	1	1	(o)	(o)	1	
10	Water	gals.	..	..	..	..	1	
11	Vinegar	ozs.	..	..	..	..	(l)	
12	Limejuice	ozs.	(m)	(m)	(m)		(m)	
13	Milk	pints	(n)	..	(s)		..	
14	Mustard, English (with tinned meat only)	ozs.	..	..	..	..	[illegible]	

Remarks (column 8):

(a) When troops are undergoing unusual *exercise, e.g., a march exceeding 3 days, or at camps-of-exercise*, but not at artillery or musketry camps, or ordinary manœuvres at or near a military cantonment, an extra ¼ lb of bread may be issued under the orders of the Brigade Commander. When bread is condemned and a fresh supply is not immediately procurable 1 lb of flour and 1 lb firewood per man may be issued in lieu. (b) Full rations for wives and half rations for children of soldiers are allowed. Biscuit and tinned meat will be issued for river journeys when bread and fresh meat are not obtainable. (c) Mutton will be issued on such days as the Divisional Commander may fix. Mutton may be tendered when only a few pounds of beef are wanting to complete the ration on any particular day. Fresh meat is issued in joints. (e) In billets 18" × 2". When the rations are cooked on Warren's ranges, fuel will be supplied for these ranges under Table LXXIX, and firewood will not form part of the ration scale. (f) Best ordinary but not white table rice. (i) Potatoes and onions equal in value to 2 ozs rice. (h) Best ordinary but not refined or table salt. (i) With the concurrence of the local medical and supply and transport authorities, the Officer Commanding station may sanction the issue of green vegetables in lieu of potatoes, to the extent of the quantity procurable at the cost of the quantity of potatoes not issued provided the total cost of the entire ration shall not exceed 1 anna 6 pies. (j) Mutter or mussoor dhal may be issued at the scale of 1 oz. to 4 ozs. potatoes when the latter are not procurable or a change is considered desirable. (k) Issued with fresh meat only. (l) ¼ pint per man per week. (m) Issued as a prophylactic on recommendation of A. D. M. S. at not more than 1 oz. per man with ½ oz. of sugar. May also be issued to families of British troops at Aden. (n) When considered necessary by the senior medical officer, a pint of fresh milk may be issued daily to children of British soldiers at Aden whether entitled to free rations (or allowance in lieu thereof) or not. (o) Cheese 2 ozs. and jam 4 ozs. per man per diem. (p) Troops and families under orders to land before the dinner hour will be provided on boardship with breakfast only, the dinner ration shown in column 6 being issued on land to troops with half and quarter that ration to women and children respectively.

Whenever it becomes *obvious that the ship cannot be alongside until noon at the earliest*, dinners on the usual scale (which if so arranged may consist of preserved meat, vegetable and biscuit) will be issued on board ship at the most convenient hour.

Dinners will be issued on boardship to troops and families embarking between the breakfast and dinner hour.

The following free rations will also be issued on land to troops embarking or disembarking when they are required to march or proceed before breakfast otherwise than by troop train:—

Each man. { Bread or biscuit . . . . [illegible] lb; Tea . . . [illegible] oz.; Sugar . . . [illegible] oz; Firewood . . . 1[illegible] lb. }

Half and quarter the above ration to each woman and child respectively.

Officers and their families may obtain these refreshments on payment.

(q) Such amount only as is actually required for *bona fide* consumption by the men, the balance of the ration being made up of tea. (r) Sweetened, cold tea, at the rate of two pints per ration per diem may be issued to troops travelling long distances by rail in troop trains to and from ports. (s) One pint of fresh milk or the equivalent in condensed milk, is allowed to each child under five years of age travelling by rail, to or from a port in a troop train on a journey of over 12 hours' duration. (t) For English cooking stoves in use in the family quarters of British troops, 20lbs. of firewood per stove are allowed in lieu of this ration."

Scale of equivalents

(1) Emergency ration = half the ordinary cantonment ration of meat and the full rations of tea and sugar.
(2) 2 oz. chocolate, soluble = [illegible] oz. tea.
(3) [illegible] lb. tinned meat = 1 lb fresh meat.
(4) 4 oz. potato meal = 1 lb. potatoes.
(5) 4 oz. pickles = 1 lb. potatoes.
(6) Milk condensed, unsweetened by Bernese Alps Milk Company—1 part milk *plus* 2[illegible] parts water equals pure cows' milk. Milk sterilized by the Nestle and the Anglo Swiss Milk Company—1 part milk equals 1 part pure cows' milk.

Note.—Pickles and potato meal will usually be issued in the proportion of 1 oz. pickles to 3 oz. potato meal.

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 15.—Daily scale of rations (other than those for sea voyages) for Indian troops.

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Item No.	Articles		Daily scale per man. On ordinary duty at stations beyond sea (b)	Aden and outposts. (a)	Persian Gulf	Baluchistan (c)	Port Blair and Hill stations in Upper Burma.	Tindals and lascars, coast defences at Cross Island, Middle Ground and Oyster Rock batteries in Bombay Harbour	REMARKS
1	2		3	4	5	6	7	8	9
1	Atta or rice (e)	lbs.	2	1¾	2	2	2	1½	(a) Indian recruit boys at Aden draw ½ rations on the scale shown in this table (b) Indian soldiers joining the reserve and sowars and privates of all branches of the Indian Army (including the Aden Troop) when discharged at a station beyond sea with or without pension are entitled to free rations on the scale in this table while awaiting a passage back to their command. (c) Issue, or compensation in lieu thereof, admissible from date of arrival at Sibi (d) one oz issued as a prophylactic with ½ oz sugar (or in lieu ¼ oz amchur) on recommendation of A. D M S (e) The supply of table rice to Indian troops is prohibited
2	Chillies	ozs					⅓		
3	Curry stuff and Kokum	,,		1				⅙	
4	Dhal	,,	3	3	3	3	3	4	
5	Fish, salt	,,						3	
6	Ghee	,,	2	2	2	2	2	2	
7	Limejuice	,,	(d)	(d)	(d)	(d)	(d)	..	
8	Meat, fresh	,,					..	4	
9	Salt	,,	¼	¼	¼	¼	¼	⅓	
10	Sugar	,,							
11	Tamarind	,,					½	..	
12	Turmeric	,,	⅙	⅙	⅙	⅙	⅙	..	
13	Vegetables	,,		7			..	8	

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 16.—Daily scale of rations (other than those for sea voyages) for public followers.

Item No	Articles.		Daily scale per follower. On ordinary duty at stations beyond sea.	Aden and outposts. (b)	Persian Gulf.	Port Blair and hill stations in Upper Burma.	Baluchistan. (c)	Remarks
1	Atta, or rice (e)	lbs	1½	1½	1½	1½	1½	(a) At Perim only. (b) At Aden followers whose pay exceeds Rs 15 per month do not receive free rations. [illegible]
2	Chillies	ozs	..	..	..	¼	..	
3	Curry stuff and kokum	„	.	1	..	..	..	
4	Dhal	„	3	3	3	3	3	
5	Firewood	lbs.	.	(a) 3	..	..	..	
6	Ghee	ozs	1	1	1	1	1	
7	Limejuice	„	..	(d)	..	..	..	
8	Salt	„	½	½	½	½	½	
9	Sugar	„	.	(d)	.	..	..	
10	Tamarind	„	..	..	..	¼	..	
11	Vegetables	„	..	7	..	..	..	

NOTES—1. Men specially entertained for service in Burma on special rates of pay do not receive free rations.

2. When a free issue is unauthorised, and rations have to be issued on payment, 1½ lbs. atta or rice, 4 ozs dhal, 1 oz ghee, and ½ oz. salt will be issued daily at the rate of Rs 2-8-0 per man per month or Re. 0-1-3½ per day.

These issues may be made on the authority of the G O C Division or Independent Brigade

3 Public followers serving in Assam (excepting Dacca) are supplied with rations on payment of Rs. 2-8 0 per mensem per ration. The families of S. and T followers serving at Aden may also draw rations on payment at this rate

4. Pension boys and bellowsboys, also recruit boys other than those serving at Aden, if under 16 years of age, receive half rations only.

5 When local supplies are unobtainable and the ration consequently issued is incomplete, no money compensation is paid but compensation in lieu of rations is admissible to followers serving at stations in the Persian Gulf at rates fixed annually; also at contract or price current rates to those serving in Burma, when rations cannot be issued in kind S. and T followers marching with troops in Burma are allowed to purchase rations from contractors at cantonment rates and in addition are allowed marching batta

6 The following classes of Indian followers are entitled to free rations in Burma and the Andamans unless in receipt of special rates of pay for service in those localities which specifically debar them from receiving free rations :—

Branch of Service or Department	As Indian troops Table 15, A T. M S	As followers. Table 16, A T. M. S.
British Infantry	...	Bhistis and sweepers of quartermasters' [illegible]
Artillery	Lascars, store-men and tindals	[illegible]
Indian Infantry	...	[illegible] rates of pay), cooks, mutsuddy, moulvi, pundit and grunthi
Ordnance Department	....	Bhistis, lascars, artificers, sirdars, tindals and totis.
Supply and Transport Corps	Quarter-master dafadars, kot-dafadars, naicks of mule and bullock transport and veterinary assistants in Upper Burma and the Shan States	Clerks, lance naicks, drivers, syces and artificers of mule transport and lance naicks and drivers of bullock transport
Army Hospital Corps hospitals of Indian infantry regiments and station hospitals.	....	Bhistis, cooks, dhobies of the A. H Corps, sweepers ward servants and totis.
Army Bearer Corps	All men.	....
All branches of the service and departments	...	All followers serving in Upper Burma and in the Shan States and not otherwise entitled to rations.

7. The sale of any portion of the ration issued by the State is strictly prohibited.

8 Whenever rations are issued by the S. and T. Corps free or on payment, a monthly ration certificate on (I A F. S -1523) will be furnished to the S and T. Officer by the Corps or department concerned. A week or a month's supply of rations may be drawn at one time if preferred.

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 17.—Scales of Rations and Water.—European troops, their families, seamen and other third class passengers conveyed in Indian Marine Troop ships, hired transport and freight ships.

SCALES OF RATIONS FOR MEN, WOMEN AND CHILDREN

Days per week to be issued	Article.		Men	Women.	Children: Over 5 and under 10	Children: One and under 5 years of age *		Notes
6	Meat, fresh	oz	12	8	4	*Daily scale* †		The scale is to be strictly adhered to whenever practicable, but to meet cases in which fresh provisions may not be procurable, or it may be necessary to vary the tea ration, the following list of equivalents is appended —
2	" " for soup	"			4			
1	Compressed corned beef and mutton	"	12	8	6	Milk, fresh	2 pts	
Daily	Bread, fresh	"	16	12	8	Bread	4 oz	
"	Vegetables, fresh	"	2	2	1			
"	Potatoes	"	10	10	5	Rusks or tinned farinaceous food	½ oz.	Meat, fresh=equal weight compressed corned meat
"	Butter	"	1¼	1¼	½			Bread fresh=equal weight biscuit, rice flour
2	Rice	"	2	2				
3	Rice	"			2	Sugar	2 "	1 lb fresh vegetables or potatoes=2 oz.
4	Oatmeal	"	2	2	1			
2	Flour	"	6	6	3	Rice	[illegible]	
2	Suet	"	1	1	½			
2	Raisins	"	2	2	1			
Daily	Tea	"	¼	¼	⅛			
"	Sugar	"	2	2	2			
2	" (extra for puddings)	"	2	2	1			
2	" (extra for rice)	"	1¼	1¼				
4	Jam	"	2	2	1			
Weekly	Salt	"	2	2	1			
"	Pepper	"	¼	¼	$\frac{1}{16}$			
"	Mustard		¼	¼	⅛			
"	Vinegar	pt	¼	¼	$\frac{1}{16}$			
"	Pickles	oz	6	6	3			
"	Milk, condensed, unsweetened ½ lb	tins	2	2	1			
Daily	Milk, fresh	pt						

Boys of 10 and under 14 and girls of 10 and upwards are to receive a woman's ration.
Boys of 14 and upwards are to receive a man's ration
† Fresh milk will be issued when procurable and the price is not prohibitive Only full cream unsweetened condensed milk in the smallest sized tins will be issued in lieu of fresh milk.

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 18.—Sea Ration Scales.—Indian troops and followers.

Item No.	Articles.	Long voyages (over 10 days). Indian troops and followers of all castes, daily. Cooking.	Long voyages (over 10 days). Non-Cooking.	Short voyages (under 10 days). Cooking.	Short voyages (under 10 days). Non-Cooking.	REMARKS.
1	2	3	4	5	6	7
		lb oz	lb oz.	lb oz.	lb. oz	
1	Atta or rice	1 8	..	1 8	..	
2	Chillies	0 ¼	.	0 ¼	..	
3	Dhal	0 4	..	0 4	..	
4	Garlic	0 ⅛	0 1/16	0 ⅛	0 1/16	
5	Ghee	0 2	0 3	0 2	0 2	
6	Ginger	0 ¼	..	0 ¼	.	
7	Gur	0 2	..	0 2	.	
8	Onions or other vegetables	0 4	0 2	0 4	0 2	Half this scale if potatoes, kobanis or other dried fruits, are issued in lieu.
9	Parched gram	..	0 12	.	0 10	
10	Potatoes	0 6	..	0 6	..	
11	Powa (Choora) or avel	..	1 0	..	1 0	
12	Salt	0 ½	0 ½	0 ½	0 ½	
13	Sugar	0 1	0 6	0 1	0 6	
14	Tamarind	..	0 2	..	0 2	Kokum may be issued in lieu
15	Tea	0 ¼	..	0 ¼	..	
16	Turmeric	0 ⅛	..	0 ⅛	..	
17	Firewood	1 8	..	1 8	..	Or ½ lb. coal.
18	Water, imperial gallons	1 0	1 0	1 0	1 0	

GENERAL REMARKS

1 All Indian ranks and recognised public followers are entitled to sea rations when provided with entitled passages, or when doing duty on boardship (except men of localized units at Aden proceeding on furlough or leave) Their families may draw rations on payment when provided with entitled passages.

2 The families of East Indian trumpeters, drummers, buglers, fifers and private musicians of late Madras corps, and of Europeans and East Indians serving in late Bombay corps, enrolled before 25th September 1902, will, when allowed to accompany their husbands on foreign or other service, continue to draw free rations under the regulations then in force.

3. In addition to the ordinary rations shipped for cooking men, rations on the non-cooking scale for one-fourth the voyage should also be put on board for them, as in cases of sickness or bad weather non-cooking rations may be necessary for all.

4 When powa is not procurable, 4 ozs raw gram and 12 ozs dry fruit (dates, raisins, etc) may be substituted

5. The following articles will be shipped by the S and T. Corps for issue on payment to Indian troops and followers on "long-voyages," but on "short voyages" opium for Sikhs and Punjabis and rum for Gurkhas and others entitled thereto need only be shipped :—

Item No.	Articles.	Scale to be shipped by S. and T. Corps.	REMARKS
1	Sugar.	2 ozs. per diem for cooking men. 3½ ozs per diem for non-cooking men	To be issued as required, not exceeding scale.
2	Rum, 25° U. P.	1 dram per diem for half the number of men embarked.	Rum may only be issued on the written advice of the medical officer in charge, repeated from day to day. The maximum issue is to be one dram per man per diem.
3	Tobacco { smoking / eating	½oz. per man per diem	[illegible]
4	Opium (of good Government quality) for Sikhs and Punjabis only.	20 grains per man per diem	[illegible] to registered consumers in such quantities as may be required The O. C. must give the S. and T. Corps timely notice of the number of men for whom opium is required.

6. Rum will be issued at the rate of one anna per dram, exclusive of excise duty · all other articles at cost price, and the shipping S. and T. officer will determine the price of all payment issues.

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 19.—Daily standard rations for Government animals

Table 19.—Daily standard

Item No.	Detail of rations.	Horses and sowari (q) camels. (p) — Secunderabad Division and Belgaum. — Country breds of British corps and all colonials	Horses and sowari (q) camels. (p) — Secunderabad Division and Belgaum. — Other horses and sowari camels.	Horses and sowari (q) camels. (p) — Other Divisions — Country breds of British corps and all colonials.	Horses and sowari (q) camels. (p) — Other Divisions — Other horses and sowari camels	Ponies. — Mounted infantry — Burma Division	Ponies. — Riding and draught — Burma Division	Ponies. — Riding and draught — Secunderabad Division and Belgaum	Ponies. — Riding and draught — Other Divisions	Ponies. — Pack. — 1st class 13 2 and over. — Burma Division.	Ponies. — Pack. — 1st class 13 2 and over. — Secunderabad Division and Belgaum.	Ponies. — Pack. — 1st class 13 2 and over. — Other Divisions	Ponies. — Pack. — 2nd class under 13 2 — Burma Division	Ponies. — Pack. — 2nd class under 13 2 — Secunderabad Division and Belgaum.	Ponies. — Pack. — 2nd class under 13 2 — Other Divisions	Mules. — Ordnance mules — Burma Division	Mules. — Ordnance mules — Secunderabad Division and Belgaum	Mules. — Ordnance mules — Other Divisions.	Mules. — Sapper equipment mules. — Burma Division	Mules. — Sapper equipment mules. — Secunderabad Division and Belgaum.	Mules. — Sapper equipment mules. — Other Divisions.	Mules. — Pioneer equipment Maxim gun and pack transport — 1st class 13 2 and over. — Burma Division	Mules. — Pioneer equipment Maxim gun and pack transport — 1st class 13 2 and over. — Secunderabad Division and Belgaum	Mules. — Pioneer equipment Maxim gun and pack transport — 1st class 13 2 and over. — Other Divisions.	Mules. — Pioneer equipment Maxim gun and pack transport — 2nd class under 13 2. — Burma Division.	Mules. — Pioneer equipment Maxim gun and pack transport — 2nd class under 13 2. — Secunderabad Division and Belgaum.	Mules. — Pioneer equipment Maxim gun and pack transport — 2nd class under 13 2. — Other Divisions.
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28
	GRAIN—																										
1	Bran . lbs	2	1½	2½	2	..		.			.	.	.	.	.		..	..	.	..	..	..	..	..	..	.	..
2	Barley . „	..	..	5	4	.	..	.	(f) 6	.	.	(f) 6	.	.	(f) 5	..	.	3	..	..	(f) 6	..	..	(f) 6	..	..	(f) 5
3	Dhan . „	..	..	.	.	6	6	.	..	6	.	.	5	..	..	3	..	..	6	.	..	6	..	..	5	..	.
4	Gram . „	4	3½	2½	2	..	..	.	(f) 6	..	.	(f) 6	..	.	(f) 6	3	.	3	..	..	(f) 6	..	..	(f) 6	..	..	(f) 5
5	Kulthi (o) (s) „	4	3½	..	..	.	.	6	.	.	6	..	..	5	.	..	6	..	..	(o) 6	..	..	(o) 6	..	..	5	..
	FODDER—																										
6	Green (n) . lbs.	30 (g)				30	30			30			..			30			30			30			25		
	or																										
7	Dry . . „	20				20	20			15			13			20 (r)			20			15			13		
	or																										
8	Bhusa . „	..	..	..	..	20	20			15			13			20 (r)			..	..	..	15			13		
9	SALT . . ozs.	1				[illegible]	[illegible]			[illegible]			[illegible]			[illegible]			[illegible]			[illegible] (f)			[illegible] (f)		

GENERAL

O C units are at liberty to feed their animals on any recognised description of forage, and to fix the actual scale of issue but are circumstances A running account will be maintained with the obj
given when the animals are in hard work The account must be bal
lapsing, and any debit balance being referred for the sanction of the
exceptional hard work connected with manœuvres, the debit balance
financial authority after careful investigation of the circumstances and on
will also take over their forage account, but no unit will be required

…D T. CORPS.

…ions for Government animals.

…raught.			Elephants. (a),(b),(c)				Bullocks.									Donkeys.					
							S. T or Artillery			A. T. draught.			A. T. pack.			1st class			2nd class		
…	Secunderabad Division and Belgaum	Other Divisions	Large over 8' 6".	Medium	Small under 7' 6"	Camels (d) (e)	Burma Division	Secunderabad Division and Belgaum	Other Divisions	Burma Division.	Secunderabad Division and Belgaum	Other Divisions	Burma Division	Secunderabad Division and Belgaum	Other Divisions	Burma Division	Secunderabad Division and Belgaum	Other Divisions	Burma Division	Secunderabad Division and Belgaum	Other Divisions
29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50
		(f) 6				(f) 5												(f) 3¼			(f) 3
5						1	6½			5			5			3½			3		
		(f) 6				(f) 5			6½			5			5			(f) 3¼			(f) 3
..	6							6½			(f) 5			5			3½			3	
	30		650	575	500	(h) 40		35			30			30			25			20	
	15		330	290	250	(h) 25		25			20			14			13			10	
	15		..	..	..	(h) (i) 16		20			(f) 14			14			13			10	
	½			2		1		½ (k)			½ (k)			½ (k)			¼			¼	

REMARKS.

(a) Alternative scale which may be given when necessitated by hard work—

	Grain-atta or rice—double the quantity of rice if unhusked—also 10 lbs grass if rice is issued, for tying it into bundles	FODDER		Salt	Oil
		Green	Dry.		
	lbs	lbs	lbs	ozs.	ozs
Large .	15	450	200	2	1
Medium	15	400	175	2	1
Small .	15	320	150	2	1

(b) Elephants at Dibru… [illegible]

(d) When no grazing is available for employed camels of silladar camel corps, compensation in lieu will be allowed; this compensation will be the daily cost of 10½ lbs white bhusa and 5½ lbs. missa bhusa at the price current rates prevailing at the headquarter station of the civil district in which the camels are.

(e) Zira (cummin seed) may be issued to camels on field service at the scale of 1 lb each camel a month at the discretion of the commandants of camel corps.

… aggregate value of the standard ration during the financial year is not exceeded, except in unavoidable … cheaper grains when the animals are in light work, which will admit of a more liberal and varied ration being … succeeding month, the account being finally closed on the 31st March, any credit balance on that date … the debit balance of a corps be attributable to the ration scale being necessarily increased to meet … … in question. Debit balances due to other causes may only be written off by the competent … do not accompany a unit on its transfer to another station, the unit which takes over the animals … ponsible for the same and must before leaving the station apply for its write-off.

SUPPLIES BY S.

Table 19.—Daily standard

Item No.	Detail of rations.	Horses and sowari (q) camels. (p)				Ponies.										Mules.											
		Secunderabad Division and Belgaum.		Other Divisions.		Mounted infantry.	Riding and draught.			Pack. 1st class 13.2 and over			Pack. 2nd class under 13.2			Ordnance Mules			Sapper equipment mules			Pioneer equipment Maxim gun and pack transport. 1st class 13.2 and over.			Pioneer equipment Maxim gun and pack transport. 2nd class under 13.2.		
		Country breds of British corps and all colonials.	Other horses and sowari camels.	Country breds of British corps and all colonials.	Other horses and sowari camels.	Burma Division.	Burma Division.	Secunderabad Division and Belgaum	Other Divisions	Burma Division.	Secunderabad Division and Belgaum.	Other Divisions.	Burma Division.	Secunderabad Division and Belgaum.	Other Divisions.	Burma Division.	Secunderabad Division and Belgaum	Other Divisions.	Burma Division	Secunderabad Division and Belgaum.	Other Divisions	Burma Division.	Secunderabad Division and Belgaum.	Other Divisions.	Burma Division.	Secunderabad Division and Belgaum.	Other Divisions.
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28
10	OIL . oz.	..	..	..	..	..	..	..	..	..	.	..	..	..	..	..			..	.	..	..	..	..	..	..	..
11	WATER (l) (at Aden only), . gals.	12(m)				.	10			10			8			10			10			10			8		
12	BEDDING . lbs.	8				..	..	..	..	..	..	..	..	..	..	..			..	..	..	..	..	..	..	..	..

III.

AND T. CORPS.

rations for Government animals—*concld.*

Draught.			Elephants. (a),(b),(c)			Camels (d) (e).	Bullocks.									Donkeys.						Remarks
							S T or Artillery.			A. T. draught			A T pack			1st class			2nd class.			
Burma Division.	Secunderabad Division and Belgaum	Other Divisions.	Large over 8' 0".	Medium.	Small under 7' 0".		Burma Division	Secunderabad Division and Belgaum.	Other Divisions	Burma Division.	Secunderabad Division and Belgaum	Other Divisions	Burma Division	Secunderabad Division and Belgaum	Other Divisions.	Burma Division.	Secunderabad Division and Belgaum.	Other Divisions	Burma Division.	Secunderabad Division and Belgaum.	Other Divisions.	
29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	
..	..	..	1			..	.			.			.	.			..		.	.	.	(f) Barley or gram, whichever is cheape For camels ground barley or gram if barley is n obtainable, but departmental camels in Aden Bd [illegible]
10			.	..	.	10	.	.	..	.	.	.	..	.	.	-	..	..	..	..		(e) In the Sec[illegible]
			..	..	..	..	..	..	..	..	..	..	..									(e) Hay or bhusa whichever is cheaper.

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 20.—Ration scales for animals on sea voyages.

Item No.	Animals.	Grain.	Bran.	Linseed crushed or linseed cake.	Hay or dry fodder.	Bhoosa.	Salt	Atta or rice.	Water.	Only to be issued if necessary. (a) Vinegar.	Only to be issued if necessary. (a) Nitre.	Description of grain to be issued.
1	2	3	4	5	6	7	8	9	10	11	12	13
		lb	lb.	lb.	lb	lb.	oz.	lb.	gals	gill.	oz.	
1	Horses .	Oats or barley 3	5	Nil.	10	..	1	..	12	1	½	Oats should always be issued if possible and crushed in the crushers on board. Gram should not be issued if it can be avoided. Carrots, when available, should be placed on board and issued in the proportion and in lieu of 1 lb. bran, for sick or delicate feeders.
		or Gram . 2	5	1								
2	Mules and ponies.	Oats or barley 2	4	Nil	8	..	½	..	10	½	¼	
		or Gram . . 1	4	½								
3	Camels .	. 3	..	..	20	..	¼	..	15	.	½	Gram. oats, barley or jowari.
4	Draught and siege train bullocks.	.. 2	1	1		15(b)	1	..	10	..	¼	Gram. Rock salt 1 lb monthly in addition
5	Pack bullocks	.. 1½	½	½	..	12(b)	¼	..	10	.	¼	
6	Donkeys .	.. 1	½	..	10	.	¼	..	5	.	¼	Gram, oats or barley.
7	Elephants, large	..	..	..	170(c)	..	2	20(d)	50	..	1	Atta (coarse wheat flour) made into chapatis and baked. Rice 3rd quality Dhan (unhusked rice) double quantity.
8	Elephants, medium.	..		..	150(c)	.	2	18(d)	40	..	1	
9	Elephants, small	..	..	.	130(c)	..	2	16(d)	30	..	1	
10	Slaughter cattle	.. 1	½	..	..	12(b)	½	..	10	..	¼	Gram
11	Slaughter sheep and goats.	.. ½	..	..	2	..	1/16(e)	..	1	..	..	Gram, jowari or linseed (crushed).

(a) When considered necessary [illegible] be given [illegible]

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 21.—Daily scale of rations, water.

Item No.	Details.	Scale per diem each.
	At Hill Sanitaria. (*a*)	Gals.
	1st, 2nd, 3rd, 7th and 8th Divisions, Kohat and Bannu Brigades—	
1	British Soldiers	7
2	Wives and adult members of soldiers' families	7
3	Children ditto ditto	3½
4	Lady nurses attached to military hospitals	7
5	Two sepoy orderlies at central signalling school, Kasauli (*d*)	3½
6	Hospital servants (excluding store-keepers and conservancy establishments)	1
	Special for Indian troops serving at Cherat—	
7	Indian soldiers	3½
8	Followers	1
	Special for Indian troops serving at Fort Thal—(*e*)	
9	British officers	10
10	Indian soldiers	4
11	Followers	3
12	**For estabts. at Forts Fulta and Chingri Khal—**	(*b*)
	For Forts at Cross Island, Middle Ground and Oyster Rock, Bombay harbour—	
13	Europeans	6 (*c*)
14	Indians	
	For Defence Light Section Estabts. at Manora—	
	British—	
15	Commissioned officers	50
16	Wives of ditto	30
17	Children of ditto	15
18	Warrant and N. C. Os. and men	20
19	Wives of ditto	10
20	Children of ditto	5
	Indian—	
21	Rank and file	8
22	Wives of ditto	3
23	Children of ditto	1½
24	Public and private followers	5
25	Hospital Assistant	5
26	Wife of ditto	3
	Harbour Defence Establishments at Manora—	
	British—	
27	Warrant officers (master gunner and civilian mechanic)	15
28	Wives of ditto ditto	10
29	Children of ditto ditto	5
	Indian—	
30	Gunners and boatmen	5
31	Wives of ditto	3
32	Children of ditto	1¾
33	Public followers	5
34	Wives of ditto	3
35	Children of ditto	1½
	Harbour Defence Establishments at Manora—	
36	Coolies for moving stores	1

(*a*) Supply should be calculated on the total number of persons (British troops and their families) at a station and is sufficient for [illegible]

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 21.—Daily scale of rations, water—*contd.*

Item No.	Details.	Scale per diem each.
	At Hill Sanitaria—*continued.*	Gals.
	Military Works Services at Manora—	
37	Sub-Divisional Officer	15
38	Wife of ditto	10
39	Children of ditto	5
40	Servants of ditto (up to a maximum of 3)	5
	Troops and followers at Kings Bank, Choki Point and Syriam—	
41	British troops	7
42	Indian ditto	5
43	Followers	5
	Military, Marine and Military Works Service personnel (including public and private followers) at Monkey Point—	
44	British officers	40
45	European and Eurasian adults	20
46	European and Eurasian Children	12
47	Indian adults	12
48	Indian children	8
49	Workshops and launch boilers	100 daily.
50	For washing barracks	300 weekly
51	For filling cable and fire tanks	1,000 "
52	For fire engine practice	1,000 "

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 21.—Daily scale of rations, water—*continued.*

Item No.	Details.	Daily scale of water.							Remarks.
		Steamer point.		Crater.		Perim	Aden Troop, Khormaksar.		
		Condensed, galls.	Aqueduct, galls.	Condensed, galls.	Aqueduct, galls.	Condensed, galls.	Condensed galls	Aqueduct, galls.	
	At Aden—condensed water. (*a*)								Officers when at Shaikh Othman are allowed 15 gallons of condensed water each per diem.
53	Officers not attached to messes	15	..	10	5	15	15	..	To pay cost of delivery at quarters. (See item 62.)
54	Executive and Assistant Engineers	15	..	10	5	15	15	..	Ditto.
55	Superior Mechanics	15	..	10	5	15	15	..	Ditto.
56	Horses of Aden Troop	..	..	..	..	..	..	14	Reduced to 12 gallons from October to April.
57	Wives and adult members of families of officers, Executive and Assistant Engineers and superior Mechanics.	10	..	5	5	10	10	..	Officers and other officials concerned to pay cost of delivery at quarters.
58	Officer Commanding at Perim and adult members of his family.	..	..	..	..	..	..	..	Same as items 53 for Officer Commanding and 49 for family.
59	Post Master, Aden	..	..	..	..	..	..	..	Ditto.
60	*Married Clerks* in Military and Postal offices, Supply and Transport Corps Agents and Hospital Store keepers (*husband and wife*)	4	6	4	6	10	..	..	Dairy clerk comes under this item.
61	Horses of mounted officers (or motor cars or motor cycles maintained in lieu of horses) and of subordinates of the Military Works Services. Restricted to the number of horses for which horse allowance is admissible and *included in pay or drawn as a* separate item.	10	..	..	10	10	..	..	Officers and other officials concerned to pay cost of delivery at quarters.
62	Officers attached to messes	10	..	5	5	..	..	..	To pay cost of delivery at quarters.
62	Officers' mess per head	5	..	5	..	..	..	..	To pay cost of delivery at mess.
63	Children of officers, Executive and Assistant Engineers and superior Mechanics.	5	..	3	2	5	5	..	Officers and other officials concerned to pay cost of delivery at quarters.
64	British Warrant Officers and Non-Commissioned Officers and privates.	3	2	3	2	5	..	..	Dairy Sergeants, etc., come under this item.
65	Unmarried school mistresses and wives of British Warrant Officers and Non-Commissioned Officers and privates.	3	2	3	2	5	..	..	Wives of Dairy Sergeants, etc.

(*a*) The regimental establishment of the detachment at Isthmus conveys 16,000 gals. monthly for its own use; all above these quantity is not delivered free by the S. and T. Corps.

NOTE.—Indian troops and followers, also any Sub-Assistant Surgeons, when on duty at Shaikh Othman, are allowed one of condensed water per man per diem, women and childern accompanying the detachment also receive one gallon each daily.

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 21.—Daily scale of rations, water—*continued.*

Item No.	Details.	Daily scale of water.							Remarks.
		Steamer Point.		Crater.		Perim.	Aden Troop, Khormaksar.		
		Condensed, galls.	Aqueduct, galls.	Condensed, galls.	Aqueduct, galls.	Condensed, galls.	Condensed, galls.	Aqueduct, galls.	
	At Aden—*continued.*								
88	Office of A. D. M. F., Aden Brigade	2	..	..	..	..	..	..	For drinking purposes and making ink
89	Office of Brigade Staff, Aden Brigade.	5	..	..	..	..	..	..	For drinking purposes and making ink.
90	Station Supply Office, Aden Brigade.	12	..	..	..	..	..	..	Ditto ditto.
91	Establishments of the Aden and Aden Camp Post Offices during office hours.	15	.	10	..	..	..	..	Cost of delivery borne by the Postal Department.
92	Station Supply Depôt . .	..	..	8	..	..	..	..	For warrant officer and 4 non-commissioned officers.
93	For washing mail vans . .	..	3	..	3	..	..	..	Cost of delivery borne by the Postal Department.
94	For browning arms	..	..	..	..	..	..	..	As sanctioned by Brigade Commander
95	Cleaning rifles	15	..	15	..	..	..	..	Per Infantry Regiment per diem during annual course of musketry.
96	Cleaning and washing buckets, casks and other vessels for the storage of drinking water of Aden garrison.	500 gallons condensed water weekly.							200 gallons of condensed water are allowed quarterly for washing tanks at Perim. Monthly; used exclusively for sweet water carts and tanks
97	For washing carts and tanks .	..	..	..	..	65†	..		† For cleaning water barrels.
98	For cleaning water carts and tanks at Steamer Point and Crater.	3,000 gallons condensed water monthly.							
99	For washing bedding of British troops.	..	..	..	..	..	..		90 gallons condensed per 100 sets
100	For cleaning out quarters occupied by men of Army Bearer Corps.	..	..	..	..	..	..		100 gallons, aqueduct, monthly.
101	Station Hospital at Steamer point*	50	100	..	..	..	..		From 15th April to 15th October. * The Matron of the Station Family Hospital, Aden (if not the wife of a soldier), is allowed 3 gallons condensed and 2 gallons aqueduct water daily for herself and for each of her children.
	Ditto ditto ditto .	40	60	..	..	..	..	..	From 16th October to 14th April
102	Section Hospital, Crater . .	..	..	20	60	..	..	..	From 15th April to 15th October.

SUPPLIES BY S. AND T. CORPS.

Table 21.—Daily scale of rations, water—*continued.*

Item No.	Details.	Daily scale of water.							Remarks.
		Steamer Point		Crater.		Perim	Aden Troop, Khormaksar.		
		Condensed, galls.	Aqueduct, galls.	Condensed, galls.	Aqueduct, galls.	Condensed, galls.	Condensed, galls.	Aqueduct, galls.	
	At Aden—*continued.*								
102A	Section Hospital, Crater	..	..	20	30	..	..	..	From 16th October to 14th April.
103	Station Hospital, Steamer Point, and Section Hospital, Crater.	60	..	60	..	..	..	..	Per 100 pieces of clothing to be washed.
104	Soldiers and Sailors' Institute	30	..	10	10	..	..	..	
105	Forts Ras Morbat and Tarshyne for tanks connected with defence works	..	..	..	..	..	..	..	As required.
106	Forts Ras Morbat and Tarshyne for drinking purposes during hot season	200	..	..	..	..	..	..	
107	Forts Ras Morbat and Tarshyne for recharging the 6" and 10" H. P. cylinders for working guns.	..	..	..	..	..	..	..	100 gallons condensed when required
108	Officer Commanding R. A. for cleaning guns of defences at Steamer Point, Ras Morbat and Ras Tarshyne	484	..	..	..	..	..	..	Per month.
109	Royal Indian Marine vessels H M water boat "Sakka" and H. M. steam launch "Despatch."	..	..	..	..	..	..	..	Condensed water as required.
110	Light House at Perim	..	..	..	.	20	..	..	Monthly.
111	Signalling guns, Light House at Perim.	..		..	.	24	..	..	Ditto.
112	Position finding station at Amen-khel for use of specialists.	40	..	..	..	..	..	..	Ditto.
113	Ordnance Department for general purposes	..	..	93	186	..	..	..	Ditto.
114	Ordnance Department for the preservation of the telegraphic wire.	..	..	50	..	..	..	..	Ditto
115	Families of all attested followers (except those of Aden Troop)—								
	Women	2	1	..	..	..	..	..	
	Children	1	½	..	..	..	..	..	
116	Families of the Aden Troop—								
	Women	..	..	..	..	..	1	2	
	Children	..	..	..	..	..	1	1	
117	4 European constables each	10	..	..	..	..	..	..	Water is issued on payment as required to the Harbour Police.
118	3 Havildars each	2	..	..	..	..	..	..	
119	4 Naicks each	1½	..	..	..	..	..	..	
120	46 Constables each	1¼	..	..	..	..	..	..	
121	2 Police stations each	7	..	..	..	..	..	..	
122	Aden Municipality . each	..	..	..	..	..	..	..	Condensed water on payment as required.
123	Jail and Civil Hospital ,,								
124	The Royal Navy ,,								
125	Fishermen and Petty Traders at Perim.								
126	For cleaning butter and milk pots, etc.	3	..	2	..	..	..	..	Daily.
	For washing floor of issue room	..	5	..	..	..	..	..	Every Saturday [cost being debited to Dairy accounts].

SECTION III.

SUPPLIES BY THE S. AND T. CORPS.

Table 22.—Scale of bedding (other than the personal bedding of the British soldier for which see A. R. I., Vol. II).

Item No.	Detail.	Mattress cases. (a) (b) (l).	Pillow cases. (a) (b) (l).	Leather straps with buckles. (a) (b).	Coir. (b) (l).	Straw. (c).	Blankets.	Remarks.
		No.	No.	No	lbs.	lbs	No.	
1	In main guard rooms for officers on guard or with men and women in barracks, military pupils, and military prisons	2	2	1	..	..	..	Per cot in use.
2	For British soldiers temporarily employed in Government Military Farms.	2	2	..	..	..	..	
3	To N. C. Os. and men on the U. L. together with their wives, who are living in Government quarters and are entitled to barrack furniture	2	2	..	.	..	..	
4	To the children of the N. C. Os. and men mentioned at items 1, 2 and 3 (see Table 43, item 7)	1	1	.	..	..	..	
5	To British Infantry, Fort St. George (d)	70	70	70	1,505	..	..	
6	For rest barracks and camps	2	2	2	..	..	..	Per officer and man (e)
7	For stuffing, per set of one mattress and pillow case in use, first issue	.	..		21½	..	..	19½ lbs. per mattress and 2 lbs. per pillow case.
8	To replace loss in re-teasing per set of one mattress and pillow case in use	..	..	..	1	.	.	Quarterly (f)
	For British troops—							
9	For tents on line of march when marching	..	..	..	..	6 3	.. ..	Per man or woman. (g) Per child not in arms. (h) } per diem.
10	For tents when encamped in cantonments, and for tents in rest camps, when barrack furniture is not available	..	..	..	..	6 3	.. ..	Per man or woman. Per child not in arms. } (h)
11	When in camp for artillery practice, musketry instruction, etc., or sanitary reasons (other than epidemic outbreaks) and cots are not used	..	..	..	..	6	..	Per man (i)
12	In camps for cholera or other epidemic outbreak when cots or charpoys are not supplied	..	..	..	..	6 3	.. ..	Per man or woman Per child not in arms. } (j)
	For Indian troops and followers—							
13	On line of march when marching } In damp and inclement weather when deemed absolutely necessary by Officer Commanding on the spot and on the recommendation of a medical officer, if present.	..	..	..	..	5	..	Per man per day (k).
14	In camps } In damp and inclement weather when deemed absolutely necessary by Officer Commanding on the spot and on the recommendation of a medical officer, if present.	..	..	..	..	5	..	Per man per week (k)
15	For use of men, whose regiments belong to outstations, confined in main guard, Fort William.	..	..	..	..	..	10	

SECTION III.

SUPPLIES BY THE S. AND T. CORPS.

Table 22.—Scale of bedding (other than the personal bedding of the British soldier for which see A. R. I., Vol. II).

Item No.	Detail	Mattress cases (a) (b) (f)	Pillow cases. (a) (b) (f)	Leather straps with buckles. (a) (b)	Coir. (b) (f)	Straw. (c).	Blankets.	REMARKS.
16	Drum, fife and bugler majors, drummers, fifers and buglers of European extraction serving in Indian regiments of the 1st, 2nd, 3rd, 7th and 8th Divisions and who were enrolled before the 15th September 1902	..		..	..	..	1	Annually.
17	Trumpet, drum, fife and bugler majors, farrier majors, trumpeters, drummers, fifers, buglers, farriers and veterinary pupils, whether of European or Indian extraction, serving with Indian corps of the old Madras Army, and who were enrolled before the 15th September 1902.	..	..	.	..	.	1	Biennially
18	Carnatic ordnance artificers							
19	To replace loss in re-teasing per set of one mattress and pillow case in use in Hospitals of Indian troops.	.	..	..	1	..	..	Quarterly.

(a) Period of duration 3 years. (b) Repaired and remarked regimentally in the case of units, and cost recovered on contingent bills;

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 23.—Scale of cooking utensils for British Troops.

Item No.	Articles	Per mess of eight men (a).	Per eighteen men in mess.	Per cook-house (b)	Remarks
1	Bags, flannel, for coffee, to last six months.	1	..	..	(a) The number of messes is calculated on the strength of each squadron, battery, company, depôt and sanitarium; bandsmen, trumpeters and drummers of cavalry and infantry messing separately may also be calculated for separately; an additional set is allowed for each group of men in excess of an exact multiple of eight.
2	Baskets, ration	1 (e)	..	..	
3	Bowls, hand, gal iron, 9½″ dia by 3¼″ deep, with short wooden handles	..	..	2	
4	Choppers, to last two years	1 (g)	..	.	
5	Buckets, gal iron, 3 gns with lids	.	..	2	
6	Colanders, 14″ diameter	..		1	(b) These items are allowed for cook-houses fitted with ranges and also for cook-houses in which cooking is done by British soldier cooks; two sets are allowed when a cook-house is used for more than one squadron, battery, company or band.
7	Bowls, pudding, mixing	..	..	2	
8	Dredgers, flour	..	..	1	
9	Forks, flesh	..	..	2	(c) Supplied on payment to regimental institutes and serjeants' messes.
10	Irons, grid—to last two years	1 (g)	..	..	(d) Not taken on the line of march but returned to the Supply and Transport Corps.
11	Kettles, camp, oval, with covers—to last two years.	1 (c)	..	.	
12	Kettles, tea, wrought-iron—to last five years.	1 (d)	..	..	(e) Cost debitable to fixed allotments of units having an allotment.
13	Knives, butcher's	1 (g)	..	..	(f) For carriage of cooking utensils; 17 per British infantry battalion, 10 per British cavalry regiment, 4 per Royal Horse Artillery and Royal Field Artillery battery, 3 per British Mountain battery, 2 per Heavy Battery and Royal Field Artillery Ammunition Column and 1 per Royal Horse Artillery Ammunition Column.
14	Ladles—to last two years	1	..	..	
15	Machines, weighing (with oblong tin pan) with weights 14 lbs. to ¼ oz	..	..	1	
16	Pins, rolling	..	..	2	
17	Steel	..	..	2	(g) Per 2 camp kettles.
18	Strainers, tea	..	..	2	
19	Sulleelahs (f)	..	..	..	
20	Trays, iron	..	1	..	

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 24.—Scale of lamps, lanterns (a), oil (b) and wick.

NOTES I.—The scales of oil and wick will be as follows :—*Daily scale of oil per lamp or lantern*—"A" scale=7 ozs kerosine or 5 ozs. common oil, "B" scale=10 ozs kerosine or 6 ozs common oil; "C" scale=2½ ozs kerosine or 2 ozs. common oil, "D" scale=5 ozs kerosine or 3 ozs common oil, "E" scale=6 ozs kerosine or 4 ozs common oil, "F" scale=11 ozs all night and 4 ozs. till tattoo, in summer; and "G" scale =15 ozs. all night and 8 ozs till tattoo, in winter. When two scales are quoted in the table below the first is for summer *viz.*, from 1st April to 30th September, and the second is for winter, *viz.*, from 1st October to 31st March *Scale of wick*—For kerosine lamps, 6 inches per gallon of oil issued, and for lamps burning common oil, 1 oz per gallon of oil issued II.—In the case of units, etc, having a fixed allotment the scale of wick will be "as required," cost being met from such allotment, for all other lamps provided by the State the scale will be as above except for "sunlight" lamps in use with covered gymnasia, and lanterns, tent, I P., Marks II and III, the scale for which is 12 ring wicks and 9 feeder wicks per lamp per annum and 7 inches per lantern per mensem respectively. III.—" Oil for lamp of wards, surgeries, inner passages, and hospital offices of hospitals of British and Indian troops, also for rooms occupied by lady nurses, should be of 150° F fire test. IV—Lamps, oil and wick are not allowed for those buildings in which electric lighting plant has been installed and is in use

Item No.	Place or service.	Number and description of lamps.	Scale of oil.
1	Dormitories and dining rooms occupied by single British rank and file. Rooms occupied by signallers in the Telegraph Department at stations not occupied by British troops(e)	(t) Lamps, kerosine, hanging or wall.	A and B or C and D
2	Staircases . } of hospitals and barracks of regimental soldiers, except latrines and urinals of staff sergeants.	(z)	As fixed by the standing Barrack Committee A and B.
3	Passages .		
4	Latrines .	(t)	
5	Urinals .		
6	Special washing compartment . .	(t)	
7	Matron's quarters } of hospitals, British troops, . . each		
8	H. S K.'s store-room . .		
9	Kitchens . .	1	
10	Each hospital ward and surgery, Indian troops and followers . . . . ,,	(a a) *1	All night F. and G.
1	Tents of British troops when not marching (c) . . . . . . ,,	1	
	Garrison guards and officers' rooms of the same . . . . . ,,	1	*Duplex lamp for ward. A and B.

Item No.	Place or service.	Number and description of lamps.	Scale of oil.
13	Quarter and other regimental guards (except liquor bar guards) and barrack detention rooms, British troops (d)	(t) Lamps, kerosine, hanging or wall.	A and B.
14	Station, Main and fort gate guards when mounted by Indian troops . each	1	A and B.
15	Quarter guards and places of arms detached from quarter guards of non silladar cavalry . . . . . ,,	1	A and B.
16	Quarter guards of Indian Infantry regiments and detachments, and of corps and detached companies of sappers and miners . . . . . . ,,	1	..
17	Rear guards of Indian Infantry detachments at Jamrud, Shabkadar and Abazai . . . . . . ,,	1	A and B.
18	Guards of Indian mountain batteries . ,,	1	A and B.
19	Warrant and non-commissioned officers on gate duty at arsenals . . . ,,	1	
20	Quarters in rest barracks while occupied ,,	1	

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 24.—Scale of lamps, lanterns (a), oil (b), and wick—*contd.*

Item No.	Place or service.	Number and description of lamps.	Scale of oil.
21	Military prisons and detention barracks .	(t) Lamps, kerosine, hanging or wall	C and D
22	Tunnels at Aden	(t)	Double B
23	Approach to Arsenal Guard, Poona. . each	2	C and A when rooms are used
24	Prayer rooms (t) . . . . . . „	(t)	C and A when rooms are used
25	Main guard, Fort St. George . . . extra	1	A and B.
26	Main entrance, British infantry lines, Bangalore . . . . . . No	1	A and B.
27	Garrison guard, Secunderabad . . . „	3	A and B.
28	Military treasure room, Mhow . . . „	1	A and B.
29	Harness and Saddlery Factory Guard, Cawnpore (including living rooms, latrine and urinal)	5	A and B
30	Neemuch Treasury Chest Guard . .	2	A and B.
31	Deesa Treasury Chest Guard . . .	1	A and B
32	Mori gate Guard, Attock . . extra	2	C and D.
33	Entrances (archways) to Fort St. George	(t)	A and B
34	Environs of barracks, Kasauli . . .	18 (v)	A and B.
35	War game building, Poona	12	D when used D and A when used.
36	Military medical pupils when accommodated in hired buildings owing to accommodation in colleges not being sufficient . . .	As required.	C and D.

Item No.	Place or service.	Number and description of lamps.	Scale of oil.
37	Corridors of building occupied by military students of the Grant Medical College, Bombay	5 Lamps, kerosine, hanging or wall	A and B.
38	Lines of Indian troops and Indian transport personnel, Burma Division. — Every 25 rank and file or less . . .	1	A and B. (c c)
39	Every Indian officer .	1	A and B. (c c)
40	Every 3 havildars or less in a separate room .	1	C and D.(c c)
41	For first class forts and defences—		A and B.
42	*Attock Fort*—Inner Lahori gate, Inner Mori „, Outer Mori „ (g) (h) .	30	A and B.
43	*Chingri Khal*—Entrance gate . . .	1	A and B.
44	*Fulta* —Entrance gate	1	A and B.
45	*Madras* (g) (i)	18	A and B.
46	*Rangoon.*—Main gate, Syriam main battery. Main gate, Syriam mine fields battery. Main gate, Chowki Point. Main gate, King's bank main battery. Main gate, King's bank mine fields battery. Main gate, Monkey Point battery. Two enclosure gates and 3 street corners and 1 near the S. A. A. store Monkey Point battery. (g) (u)	12	A and B.

47	*Aden.*—Main gate, Fort Tarshyne	1		
48	" " " Morbut . extra	1		
49	*Sukkur* (*g*) (*i*)	9		
50	*Bombay.*—Colaba, North, Command gate	1		
51	" " outer gate (near main road)	1		
52	Colaba South, entrance gate	1	Lamps, kerosine, hanging or wall	A and B
53	Oyster Rock, entrance gate	1		
54	Middle Ground, entrance gate	1		
55	Mahaluxmi, entrance gate	1		
56	Malabar North, entrance gate	1		
57	" South, two entrance gates	2		
58	*Karachi*—Manora, 2 entrance gates; Beach Fort, south east gate; Marsh Fort, entrance gate (*g*) (*j*)	5		
59	*Quetta*—Miri Fort, entrance gate (*f*) (*g*)	12		
60	Sitabuldi Fort, for men working in the tunnel	1		C and D
61	For lighting Fort Chitral	6		
62	For latrines of Indian troops. Cavalry regiment and infantry battalions	One per group of latrines	Lanterns, hurricane	D and A.
63	For latrines of Indian troops. Heavy and mountain batteries, ammunition columns, frontier garrison artillery, sapper and miner companies or detachments of these units	2		
	Latrines of hospitals of Indian troops and departmental followers' hospitals—per hospital	1		A.

65	British guard, Manora	1		A and B.
66	Carts using Coonoor Ghat, per 3 or less	1		D and A.
67	Sassoon Dock, Colaba, when required	7		
68	Veterinary hospitals: Bodyguard, mountain or heavy artillery and each regiment, non silladar cavalry	1		A and B.
	Veterinary hospitals: At stations where there is not more than one regiment, or two batteries	1		
	Veterinary hospitals: At Bangalore	2		
	Veterinary hospitals: At other stations where there is more than one regiment, or two batteries	3		
69	Elephant shed and sepoys hut, Santrabari	2	Lanterns, hurricane	A and B.
70	Lascar, civil police, and transport guards, over military stores . each	1		
71	Hospitals, British and Indian troops and followers, per 100 beds or less	1		C and D.
72	For non-commissioned officer in charge, Arsenal guard, Rangoon	1		A and B.
73	For each guard, tent of reservists camps	1		C and D.
74	British guard, Mhow Fort	1		C and D.
75	For section of Indian Mountain Battery at Drosh	1 (*bb*)		..
76	British guard, Arsenal, Kirkee	2		A and B.
77	British guard, Ammunition Factory, Dum Dum	2		A and B.

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 24.—Scale of lamps, lanterns (a), oil (b), and wick—contd

Item No.	Place or service.	Number and description of lamps.		Scale of oil.
78	Wards and reading rooms of hospitals, British troops	(l)	Lamps, duplex, hanging	All night F and G for one lamp Till tattoo, F and G for other lamps.
79	Surgeries, hospitals of British troops . each	1		
80	Recreation room, hospital, British troops.	1	Lamp, duplex, table, with globe, chimney and punkah protector	Till tattoo F and G
81	For covered gymnasia	(k)	(k)	(k)
82	For night classes, British Army schools, per 12 scholars or less	(l)	(l)	(m)
83	Guards at powder factory and magazine at Kirkee . each	1	Lamps, hand, railway pattern.	A and B, D
84	For the use of the sentry over certain outlying magazines at Fort St. George	1		A and B.
85	Each rest camp during trooping season only	1		A and B, D
86	Quetta Fort	2	Lamps, street.	D and A.
87	Fort Shabkadr	4		A and B.
88	for lighting the landing places at— Elephanta causeway, Bombay Butcher Island Pier, Bombay. Pilot Bunder, Colaba, Bombay	 2 2 1		A and B.
89	British troops, when tent lanterns are used, each tent	1	(n)	E and A.
90	For use in Khojak tunnel in case of emergency.	10	(g) (n)	E and B.
91	Each lady nurse	1 1	Lamps, duplex, wall.	All night F and G for one lamp. Till tattoo, F and G for the other.
92	Duty room of lady nurses	1	Lamp, duplex, table, with punkha protector.	All night F and G.
93	General sitting and dining rooms of lady nurses, each	1	Lamp, duplex, wall.	Till tattoo, F and G.
94	Quarters occupied by a family, widow, warder not on Unattached List, and non-commissioned officers of or above the rank of sergeant (except those in class I for pension), British troops except departmental (o) (p)	..	..	C and D. (w)
95	Quarters occupied by a warrant officer, school mistress, non-commissioned officers in class I for pension, British troops, except departmental (p)	..	..	A and B.
96	Warrant or non-commissioned officers in charge of a rest-camp (p)	..	..	
97	Sergeants' messes, British troops. For half the number of lamps considered necessary by the Standing Barrack Committee	..	..	C and D.
98	Upper Pagoda guard, Rangoon, British troops	1	(q)	A and B.

99	British guard in Bombay arsenal "Castle Guard")	1	(r)	A and B.
100		2	(s)	
101	For each of the operating rooms provided in station hospitals at Peshawar, Nowshera, Rawal Pindi, Sialkot, Murree, Lahore Cantonment, Ambala, Jullundur, Ferozepore, Kasauli, Dalhousie, Rurki, Agra, Bareilly, Ranikhet, Chaubuttia, Chakrata, Landour, Allahabad, Fyzabad, Cawnpore, Lucknow, Lebong, Darjeeling, Naini-Tal, Karachi, Quetta, Jubbulpore, Nasirabad, Mhow, Pachmari, Mount Abu, Ahmednagar, Belgaum, Poona, Aden, Secunderabad, Bangalore, St. Thomas' Mount, Wellington, Maymyo, and Rangoon	1	(y)	(y)
	For each of the operating rooms provided for combined hospitals of Indian troops at Jhelum, Abbottabad, Dehra Ismail Khan, Kohat, Dehra Dun, Lansdowne, and Quetta . .	1	(y)	(y)
102	Farrier-majors } of non-silladar cavalry enrolled before 1st April 1909 . . .	..	..	C and D
103	Farriers and veterinary pupils (x) } of non-silladar cavalry enrolled before 1st April 1909 . . .	..	..	D.

104	For each quarter or tent of British soldiers temporarily employed in Government Military Farms	1	Hanging.	A and B.
105	West Gate, Fort Durgai . . .	1	Lamp, hurricane.	A and B.
106	For lighting the vicinity of guard rooms, outside storerooms and workshops in the lines of transport units and of the Army Bearer Corps stationed in 1st (Peshawar) Division, Kohat, Derajat and Bannu Brigades . . .	To be fixed annually by G. O. C.		
107	Fort Armament, Delhi	3	Lamps, kerosine, hanging or wall.	A and B
108	No. 2 Guard Room Arsenal Main Guard, Kirkee	4	Lamps, kerosine, hanging or wall.	A and B
109	No. 75 Guard Room Arsenal Main Guard, Kirkee	6	Lamps, kerosine, hanging or wall.	A and B
110	Divisional Medical mobilisation stores .	2	Lamps, kerosine, hanging or wall.	D
		1	Lantern, hurricane	D

of units will be kept in a serviceable condition by means of the authorized issues of component parts, *see* Table 42. Burners and reservoirs of lamps in barracks of British certificate of the Officer Commanding the unit that the renewal is necessitated by fair wear and tear (*b*) Both kerosine and vegetable oil are issued by the fluid ounce of which (1 lb of kerosine oil=20 fluid ozs and 8 lbs. =1 gallon); issues in bulk will be made in gallons and not by weight. (*c*) For recreation tent but not for tents used as library or . (*d*) In Secunderabad Division, when a non-commissioned officer commanding a main guard has a room separate from the men, an extra lamp will be allowed with oil on scales A ormitory, with oil and wick on scales A and B, will be supplied where electric lighting has been installed. (*i*) As permanently fixed by standing barrack committee (*z*) With glass pitals. (*aa*) Duplex with glass reservoir.

n charge of units will be kept in a serviceable condition by means of the authorized issues of component parts, *see* Table 42 Burners and reservoirs of lamps in barracks of British w d on the ertificate of the Officer Commanding the unit that the renewal is necessitated by fair wear and tear. (*b*) Both kerosine and vegetable oil are issued by the fluid ounce of which 160 an mperia gal on (1 lb. kerosine oil=20 fluid ozs. and 8 lbs.=1 gallon); issues in bulk will be made in gallons and not by weight. (*f*) Only one lighted nightly. (*g*) Those not lighted nightly will be in store for use whe t or work is occupied, in such cases the scale of oil will be according to requirements. (*h*) Only 3 are lighted nightly. (*i*) None lighted nightly. (*j*) Only 4 lighted nightly. s permanently fix d by in barrack committee. (*u*) Only ten lighted nightly. (*v*) Two lamps allowed all the year, the remaining 16 from 15th March to 15th October only. (*bb*) Veterinary ital it ra es, with one wick per mensem (*cc*) Oil on these scales is also allowed when accommodated in tents.

will be kept in a serviceable condition by means of the authorized issues of component parts, *see* Table 42. Burners and reservoirs of lamps in barracks of British troops he Officer Commanding the unit that the renewal is necessitated by fair wear and tear. (*b*) Both kerosine and vegetable oil are issued by the fluid ounce of which 160 make oil=20 fluid ozs. and 8 lbs =1 gallon); issues in bulk will be made in gallons and not by weight. (*g*) , (*k*) Special pattern "Sunlight" lamps of either 200 or 100 candle rements Scale of oil per diem for those days on which gymnasia are used: summer 6 fluid ozs. per 100 c p. lamp and 7½ fluid ozs. per 200 c p. lamp; winter, 10 fluid ozs. ozs per 200 c. p. lamp (*l*) Lamps Ditmar's Astral 30" (*m*) B scale per lamp for each night on which classes are held, subject to a maximum of 170 ozs. per mensem p n use at higher education classes 24 ozs. are allowed. (*n*) Tent lanterns, which are supplied by Ordnance Department, Mark II and III lanterns receive oil on E and B and A scales. (*o*) In Secunderabad and Burma Divisions non-commissioned officers on unattached list who are in receipt of less than Rs 20 per mensem will be allowed oil on each. . (*q*) Hand lantern. (*r*) Diets buck-eye pattern lamp. (*s*) . (*t*) As permanently fixed by standing barrack committee.
Nightly for every 8 men. (*y*) Ross's patent "Sunlight" lamps. Oil and wick will be supplied as required

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 25.—Scale (d) of well gear and bullocks for use in lines of British troops, Non-Silladar Cavalry Regiments, etc.

Item No.	Detail.	Chains, iron, or ropes (a) (c).	Motes, leather with iron frame. (a)	Pulleys. (a)	Bullocks with drivers.	Yokes per pair of bullocks. (a)	Chursah Coolies.	Remarks.
1	For drawing water from wells for watering horses, for filling plunge baths, for filling reservoirs for tatties and for lavatories attached to barracks and hospitals; and for watering regimental and company gardens per well	1	1	1	(b)	..	(e)	*Note*.—Where Persian wheels are used, earthen chatties and *mal* ropes will be supplied under the conditions in note (a) below.
2	For drawing water from the well inside the Bareilly Fort	1	1	1	..	1	..	
3	For drawing water for the mules of Mountain Batteries per well	1	1	1	.	..	..	
4	For use in the following forts —							
	Jamrud	2	2	2	.	..	..	
	Durgai	2	2	2	.	.	..	
	Chitral	1	.	1	.		.	
5	For carrying water to the Musketry Camp at Hebbal (Banglore)	.	.	..	(b)	..	..	

[illegible]

Table 26.—Equipment for sanitaria

Item No.	Articles.	Where required and for what purpose.	Authorised proportion.	
1	Basins, washing, steel (a)	For barracks, British troops, at all stations	1	Per man.
2	" washing, steel, fixed	For quarter guards and cells	..	As required, to be fixed by M. W. S
3	Brooms	For cleaning barracks, etc.	..	As required. Cost to be met from fixed allotment.
4	Brushes			
5	" scrubbing, coir	For scrubbing barrack furniture	..	Ditto
6	" washing.	For cleaning mattress and pillow cases		
7	Buckets, G. I, with lids and lips, 3 gals.	For distributing water from filter tanks to barracks, cook-houses, etc	1	Per 20 men of strength of sanitarium.
8	Buckets, G. I., 3 gals	For storage of water for fires and for filling metal tanks used for carriage of water.	..	*Vide* Table 34.
9	Clocks	For schools	..	
10	Jars, water, or chatties	For drinking water	..	As required Cost to be met from fixed allotment.
11	Measures, Imperial (b)	For liquor bars . . . . sets	1	Per sanitarium.
12	Pans, privy, earthen	For privies	..	As required. Cost to be met from fixed allotment.
13	" privy, iron (c)	For privies where earthen pans are not used.		
14	Scales, copper, with weights	For weighing groceries, etc.	1	Per sanitarium.
15	" wooden, with weights.		1	
16	Scissors, country	For trimming lamps	..	As required. Cost to be met from fixed allotment.
17	Trays, earthen	For urinals		
18	" iron	For iron urinals where used		
19	Tanks, metal	For carriage of water	..	*Vide* Table 34.
20	Tubs, G. I, with and without lids	*Vide* Table 34		
21	Urinals, earthen	For urinaries	..	As required. Cost to be met from fixed allotment
22	" iron	Where earthen urinals are not used		

(a) Period of duration = 4 years, and to be tinned twice a year (b) Each set consisting of following measures 1 gal., ½ gal., 1 quart., 1 pint, 1 half pint, 1 dram and 1 half dram (c) At stations where issued a reserve of 20% will be maintained.

SECTION III.

SUPPLIES BY S. AND T. CORPS.

27.—Stores authorised for Remount Depôts.

Item No.	Articles.		Saharanpur.	Hapur.	Mona and Sargodha.	Calcutta.	Hosur.	Ahmednagar.	Item No.	Articles.		Saharanpur.	Hapur.	Mona and Sargodha.	Calcutta.	Hosur.	Ahmednagar.
1	2		3	4	5	6	7	8	9	10		11	12	13	14	15	16
1	Basins, washing, steel	No	4	4	6	3	3	3	14	Pans, copper, deg h...	No	20	20	30	2	10	..
2	Boilers, copper, grain	„	2	2	3	2	2	2	15	„ iron	„	20	20	40	.	10	..
3	„ „ water	.	2	2	4	1	1	1	16	„ privy, iron	„	70	60	100	40	24	24
4	„ iron, grain		5	5	4	2	3	3	17	Pillows, cocoanut fibre .	„	28	20	40	12	12	..
5	Carts, dead horse	„	1	1	1		1	1	18	Pruners, tree .	prs	4	4	4	.	4	2
6	Clocks .	.	6	6	6	2	3	3	19	Pumps, Chinese . .	No	..	..	..	..	1	..
7	Charpoys		10	10	20				20	„ for lifting water	„	..	.	.	..	1	..
8	Fittings, E. W. for wash hand stands	sets	2	2	4	1	1	2									
9	Lamps, office	No	6	6	6	4	2	2	21	Rollers, iron or stone, small	„	3	3	4	..	2	1
10	Lanterns, hurricane	.	30	30	40	30	10	15	22	„ „ large	„	1	1	2	..	1	1
11	Mats, coir	„	As required						23	„ wooden .	„	6	6	6	1	2	..
12	„ rubber	.	3	3	3	3	3	3	24	Scales hand, 1 oz to 12 lbs	„	1	1	1	1	1	1
13	Mattresses, cocoanut fibre	„	25	20	40	6	12	.	25	Scissors, country . .	prs	16	18	16	2	10	12
									26	Traps, rat . . .	No	50	60	60	5	20	20
									27	Urinals, earthen . .	„	30	30	60	12	32	12

Table 28—Signalling Equipment allowed for Units, etc.

Item No.	Articles.	Signal Company.	Instructional Class.	British Troops.					Indian Troops				Sanitaria (except Murree and Naini Tal) and standing camps at Chakrata, Dalhousie and Ranikhet.	Fort Armaments.						
				Mountain Battery.	Company R. G. A.	Cavalry Regiment.	Infantry battalion.	Siege Train Unit, Rurkee.	Cavalry Regiment.	Aden Troop.	Infantry battalion.	Detached half battalion, British or Indian (a).		Bombay and Fort William.	Buxa Fort.	Chitral Fort.	Other Forts.	Deralat Brigade.	Abazai (b).	Fort Blair (c).
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21
1	Chaguls, Canvas, Field hospital pattern.	15	12	2		2	2		2	.	2	..		..	..	.	.	..	..	..
2	Funnels, oil . . .	20	12	..	2	4	4	4	4	2	4	2	2	4	..	..	2	..	1	2
3	Pakhals, metal, . sets	3	2	..	.	..	..	..	.	.	.	.	..	.	.	..	..	.	..	.
4	Scissors, . . . pairs	20	12	..	2	4	4	4	4	2	4	2	2	4	.	.	2	6	1	1
5	Sigrees	.	2	.	..	.	..	..	..	..	..	..	..	..	..	.	.	..	..	..

(a) Also allowed for British infantry detachment, Kirkee, as station stores
(b) Station stores, on charge of the Guides Cavalry, for communication between patrols, and for use in the case of troops moving out
(c) Allowed as Station Stores.

SUPPLIES BY S. AND T. CORPS.

Table 29.—Equipment for 1st class Gymnasia.

Item No.	Articles.		Scale per Gymnasium at Ambala.	Lucknow.	Secunderabad.	Poona.	Remarks.
1	Basins, washing steel	No.	2	2	2	2	
2	Brooms, with long bamboo handles	"	2	2	2	2	
3	"	"	5	5	..	..	
4	Brushes, with long handles	"	6	6	6	6	(a) For unboarded floors of gymnasia, excluding schools of arms, at 52 lbs. per 10 superficial feet of area as a first issue. For regimental gymnasia coir, straw or grass is allowed for stuffing mattresses at the scale of 71½ lbs. of coir or one maund of straw or grass.
5	Buckets, G. I., 3 gals	"	6	6	6	6	
6	Coir, loose fibre (a)	"	..	..	..	..	
7	Cocoanut fibre mats	"	2	2	2	2	
8	Jars, water, or chatties	"	6	6	..	6	
9	Lamps	"	*Vide* Table 24.				
10	Mops	"	6	6	6	6	
11	Pans, privy, glazed earthenware	"	12(*b*)	6	..	6	
12	Scrubbers	"	6	6	6	6	
13	Sqeegees	"	2	2	2	2	
14	Trays, glazed, earthenware	"	2	2	..	..	(b) Six for the Indian troops latrine attached to the gymnasium.
15	Urinals, glazed	"	5	5	..	3	

Table 30.—Equipment for School of Cookery, Poona.

Item No.	Articles.	Scale.	Item No.	Articles.	Scale.
1	Aldershot oven (for field instruction) . No.	1	11	Meat choppers . No.	2
2	Benches (for cutting up) "	2	12	Mess tins (infantry) "	20
3	Brooms, bass "	2	13	Bowls, pudding, mixing "	2
4	Brushes, hand, scrubbing "	2	14	Pails, I. G "	2
5	Camp kettles "	15	15	Rolling, pins "	2
6	Colanders, 14" diameter "	1	16	Soup ladles "	2
7	Forks, flesh "	2	17	Steel. "	1
8	Flour dredger "	1	18	Tea strainers "	2
9	Bowls, hand, gal iron, 9½" dia by 3½" deep, with short wooden handles "	2	19	Pails, gal iron, 3 gns. "	2
10	Meat blocks "	2	20	Machines, weighing (with oblong tin pan) with weights 14 lbs. to ¼ oz. "	1

NOTE—Cost of renewals or repairs should be met from the accessories grant.

Table 31.—Equipment for Cavalry School, Saugor.

Item No.	Articles.	For what purpose.	Authorised proportion.	
1	Chopping blocks, small	Cook-rooms	1	per cook-room.
2	Durries	Quarters of British officers other than students.	4	per quarter.
		Quarters of British officer students	2	per quarter.
		Commandant's office	3	
3	Pans, commode	Quarters of British officers other than students.	2	per quarter.
		Quarters of British officer students	1	per quarter.
		Commandant's office	1	
4	Toilet sets	Quarters of British officers other than students.	2	per quarter.
		Quarters of British officer students	1	per quarter.
5	Tubs, bath	Quarters of British officers other than students.	2	per quarter.
		Quarters of British officer students	1	per quarter.

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 32.—Equipment (a) for rest barracks and camps.

Item No.	Articles.	Where required and for what purpose.		Authorized proportion.	
1	Basins, washing, steel		No.	1	Per officer. For men as required.
2	Brooms	For cleaning barracks, etc.		..	As required.
3	" with long bamboo handles				
4	Brushes, with long handles	For scrubbing barrack furniture		..	Ditto.
5	" scrubbing, coir	For cleaning mattress and pillow cases			
6	" washing	For rest barracks at Khandwa	No.	1	Per 20 men.
7	Buckets, G. I., with lids and lips, 3 gals.	For others		..	*Vide* general scale in table 34.
8	Buckets, G. I., 3 gals.	*For storing water for fires, and for filling* metal tanks used for carriage of water.		..	*Vide* table 34.
9	Chopping blocks, small	...		..	As required.
10	Cooking utensils	*Vide* table 23			
11	Durries (carpets)	For officers' rooms and tents	No.	1	Per room or tent.
12	Fittings, E. W., for wash hand stands . . sets	...		1	Per washhand stand authorised by Table 68.
13	Jars, water, or chatties	For drinking water		..	As required.
14	Lamps	*Vide* tables 24 and 42			
15	Pans, privy, earthen	For privies		..	As required.
16	" " iron	For privies where earthen pans are not used			
17	Scissors, country	For trimming lamps	prs.	1	Per building.
18	Surahis	For drinking water			As required.
19	Trays, earthen	For urinals			
20	" iron	For iron urinals where used	No.	1	Per urinal.
21	Tanks, metal	For carriage of water		..	*Vide* table 34.
22	Tubs, G. I., with lids	For lavatories and cookhouses when not provided with iron tanks or reservoirs.		2 1	Per lavatory. Per cook-house.
23	" G. I., without lids	For bathing purposes	No	1	Per officers' bath room.
24	Urinals, earthen	For urinaries		..	For men as required.
25	" iron	Where earthen urinals are not used			As required.

(a) Equipment of rest barracks and camps will be returned into store when camps are closed.

TABLE 33.—Equipment for ladies' waiting rooms and officers' mess at the Sassoon Dock, Bombay.

Item No.	Articles.		Scale.	REMARKS.
1	Chicks, door	No.	2	
2	Fittings, E. W., for washhand stands	sets	1	*Vide* Table CXV.
3	Glasses, dressing, large	No	1	
4	Matting, coir	"	(a)	
5	" coloured, China	pieces	4 (b)	
6	Tubs, bath, zinc	No.	2	
7	Vases, flower, blue	"	4	

(a) For one room
(b) For floor of one small room.

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 34.—Equipment for special and miscellaneous services.

Item No.	Articles.	Where required and for what purpose.	Authorized proportion.	
1	*Basins, washing, steel (a)*	For British troops in barracks, etc., at all stations . . . . No	1	Per man.
		For military signallers of the Telegraph Department not accommodated in barracks, *1st, 2nd, 3rd 7th and 8th* Divns . . . . . . No.	1	Per 4 men.
		For officers' mess and families, Sassoon Dock, Colaba, during trooping season . . . . . No	28	
2	Basins, washing, steel, fixed	For quarter guards and detention barrack rooms	..	As required. To be fixed by M. W. S.
3	Basins, iron, enamelled	For offices of Commandant and Engineer, Indian Central Flying School, Sitapur .	1	Per office.
4	Bath, galvanised iron	For the Orderly Officer's quarters in Fort Ferozepore	1	
5	Boilers	For boiling kulthi for transport animals at Belgaum and in the Secunderabad Division . . . . No.	1	Per 50 animals.
6	Boxes, tin	For Divisional, Brigade, Station Staff and Supply and Transport Offices, for holding confidential papers and stationery for courts martial	.	As required. Number to be fixed by Divl. or Bde. Comdr.
7	Brooms	For barracks with boarded, stone or brick floors—British troops	.	As required. Cost to be met from fixed allotment.
8	„ Goa	For use in Sassoon Dock, Bombay, during trooping season . . . . No	12	
9	*Brushes, with long handles*	*For barracks with boarded, stone or brick floors*	..	As required. Cost to be met from fixed allotment.
10	„ scrubbing coir	For scrubbing barrack furniture . .		
11	„ washing	For cleaning mattress and pillow cases .		
12	„ tar	For applying tar to urinals and necessary utensils, Secunderabad Division . No.	1	Per two utensils, etc.
13	Buckets, G. I., with lids and lips, 3 gallons	For distributing water from filter tanks to barracks, cook-houses, etc. No.	40	Per regt. or battn. of Brit. cavy. and infy.
		„	10	Per batt. of horse or field artillery.
		„	7	Per heavy or mounted batt. or coy., R.G.A.
		„	4	Per R. F. A. Ammunition Column.
		„	2	Per R. H. A. Ammunition Column.
		For filling metal tanks authorized for British corps for carriage of drinking water	3	Per R. H. A., R. F. A. and mountain batt. and coy., R. G. A.
			2	Per heavy battery.
			16	Per regt. of Brit. cavy. or battn. of infy.
		For filling metal tanks used for carriage of water at— Bara Gali, Chakrata, Changla Gali, Chaubuttia, Cherat, Ghora Dakka, Jutogh, Kalabagh, Kasauli, Khyra Gali, Ranikhet and Taragarh	1	Per 20 animals or less.
		Arkonam, Deolali, Guntakal, Mount Abu, Pachmarhi, Poonamallee, Purandhar, Ramandroog, and Wadi	1	Per pakhali.
		For storage and carriage of drinking water in Indian infantry lines at Crater, Aden .	32	

(a) Period of duration 4 years, to be tinned twice a year.

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 34.—Equipment for special and miscellaneous services—*contd*

Item No.	Articles.	Where required and for what purpose.	Authorized proportion.	
		For latrines of the "Horbury" pattern where in use	.	As required.[1]
		For cess pools, Secunderabad and Burma Divisions.	.	
		For use in Sassoon Dock, Colaba, during trooping season . . . . No.	2	
		For station hospital laundry at Deolali „	6	
		Fo[illegible]	20	Each.
		Fo[illegible] [illegible] thatched or wooden roofs . No.	4	Per room of 16 men.
		[illegible]	4	Per room of 16 men. (*a*).
		[illegible] tanks for holding water have been constructed and buckets have superseded ghurrahs and kerosine oil tins . .	..	As required. Scale to be fixed by Asst. C. R. E.
14	Buckets, G. I., 3 gals.	For storage of water for fires at S. and T. Store Depôts at—		
		Kamptee . . . . No.	224	
		Deolali . . . . . . „	12	
		Maymyo . . . . . . „	12	
		For storage of water for fires at the 7 Defence Forts, Bombay	24	Per fort.
		For storage of water for fires at Subathu and Dagshai	50	
		For lines of Khyber Rifles and the Khyber defences . . . . . No.	166	
		For use with fire-engines at—		
		Dalhousie	16	Ranikhet barracks.
			48	S. & T. buildings.
			70	M. W. buildings.
			10	Farm buildings.
		Ferozepore	100	For buildings in Fort.
		Jullunder . . . . . No.	25	R. F. A.,
			12	British Infantry.
		Multan . . . . „	6	Heavy battery.
		Bannu (station engine) . . . „	50	Indian Infantry.
		Jhansi . . . . „	8	Brit. Infantry.
		Bombay (Butcher Island) . . „	42	Defence Light Section.
		Manora . . . . . . „	6	Defence Light Section.
		Jacobabad (station engine) . . „	12	Indian Cavy.
		Roorkee Fort	120	
		For regimental institutes and family quarters of British units at stations where fire-engines have been withdrawn . .	50	Per regt. of cavalry or Battn. of infantry.
			25	Per Royal Artillery unit.
		For storage of water for fires at Banan .	60	
		For all barracks and buildings which have *neither thatched nor wooden roofs but* have wooden walls, at stations in the hills or plains where there are no fire engines, stand pipes or hose . . .	..	As required.
15	Carts, water, with draught animals.	For conveyance of drinking water from the "Dilwara" well at Nasirabad to the lines of British troops quartered at that station . . . . . No.	..	See Table 6.
16	Casks, half	For cook-houses of Indian troops in Burma and the Andamans for reception of refuse . . . . No.	4	Per cook house.

(*a*) For family quarters, W. O.'s and S. S. quarters and other regimental buildings to which this scale cannot be applied, the number of buckets required will be fixed by the A. C. R. E.

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 34.—Equipment for special and miscellaneous services—*contd.*

Item No.	Articles.	Where required and for what purpose.	Authorized proportion.	
17	Casks, with covers . . .	Issued to the troops at Aden—(i) for the storage of aqueduct water for British troops, (ii) for the storage of both condensed and aqueduct water for Indian troops . . . . . . No.	6	Per company, R. G. A.
			8	For coast defence lascars.
			6	For R. G. A. staff.
			34	Per battalion, Brit. Infy.
			74	Per battalion, Indian Infy.
			54	For Aden troop.
			27	Per coy. of S. and M.
			15	For Aden defences.
18	„ with lids . .	For barracks of Indian troops at Port Blair [illegible]	2	Per barrack.
		[illegible]	3	„ „
19	Chamber utensils, E. W.. .	For barrack detention rooms . . .	1	„ room.
20	Chamber pots . . .	For married quarters of warrant officers (non-departmental), schoolmasters, schoolmistresses, n. c. o.'s and privates . .	1	„ quarter.
21	Charpoys	For use in sanitary camps when straw is not used . . . . . . No.	1	„ man.
		For cleaning bhoosa in mounted units „	1	„ squadron or battery. (*a*)
22	Chicks	At Quetta for married quarters and end rooms of single men's barracks, British Infantry lines, and R. A. barracks. .	..	As required.
		For British Infantry hut barracks at Subathu	1	Per door and window.
		For regimental school of British Infantry battalion at Secunderabad . . No.	27	
23	Chicks, coarse, for verandahs .	For Military buildings in Fort St George; Supply Reserve Depôt Office, Madras; and Military Staff Offices, St. Thomas' Mount and Poonamallee . . .	..	As required
24	Chopping blocks, small . .	For barracks, married and detached quarters, sergeants' messes, and quarters of warrant officers (non-departmental) and [illegible] Ferozepore	1	Per cook-house.
25	Chursals, leather . . .	For pakhali water mules and bullocks. .	1	Per animal.
26	Clocks	For schools for adults and grown up children, and infant schools, British troops No.	1	Per school where absolutely necessary.
		For guard rooms (other than regimental guard rooms)— (i) where the guard is furnished by more than one unit; . . . (ii) where the guard is furnished by a unit in addition to the regimental guard	1	Per guard room.
27	Coir, fibre, loose . . .	For 1st class and regimental gymnasia at Fort William, Barrackpore, Dum-Dum,	52	Per ten superficial feet of area (excluding schools of arms) so as to allow of an uniform depth of 6 inches.

(*a*) Renewals at 10 per cent per annum.

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 34.—Equipment for special and miscellaneous services—*contd.*

Item No.	*Articles.*	*Where required and for what purpose.*	*Authorized proportion.*	
28	Cooking places	For boats carrying troops in Burma	..	As required.
29	Cots, string (*a*)	For British troops in standing camps at Ambala, Meerut, Bareilly and Sitapur	1	Per man, woman and two children.
30	Dish, soap, iron, enamelled	For offices of Commandant and Engineer, Indian Central Flying School, Sitapur	1	Per office.
		For married quarters of warrant officers (non-departmental), schoolmasters, school-	1	Per quarter.
31	Durries, 16′×13′		1	Per quarter.
32	Durries	Ferozepore	3	
33	Extinguishers, Minimax, fire	For S and T. Store Depôt, Aden . No	10	
34	*Fittings, E. W., for washhand stands.*	For washhand stands authorized by Tables 34, 47, 58, 56, 68, 69, 71, 75, 78 and 57 . sets	1	Per washhand stand
		For the orderly officer's quarters in Fort Ferozepore	1	
35	Flare lights, Wells (*b*)	For Fort Lockhart when occupied by regular troops . No.	3	
36	Funnels, tin	For store rooms of British troops, 4th, 5th and 6th Divns. and Aden Bde. . No.	1	For each separate corps, detachment or sanitarium.
		For use with condensed water at Aden	..	As required
37	Gear, well, *viz.*, chain, iron	For veterinary hospital at Ahmedabad No.	1	Renewed when required.
38	Gear, well, *viz.*, bucket, leather; chain, iron; and pulley	For Artillery lascar lines at Aden . set	1	Renewed when required.
39	Gear, well, *viz.*, rope and leather bucket	....	1	Per Indian unit Hospital at Nowshera.
40	Ghurrahs, or kerosine oil tins with handles. (*c*)	For all public buildings having thatched or wooden roofs at stations in the plains where there are no fire engines, tanks and buckets	..	As required Scale to be fixed by Asst. C. R. E.
		For fire protection in the 16th Mule Cadre Lines, Peshawar	100	In Burma the ghurrahs or tins will be kept filled with sand or earth under regimental arrangements
		For Indian corps (except Indian Infy. battn. at Allahabad) . No.	100	Per half squadron of Cavy. and company of Infy.
			250	For Mountain Battery lines at Nowshera.
			180	Per detached company of Sappers and Miners.
		For storage of water for fires at S. and T. Store Depôts at—		
		Ferozepore . No.	200	
		Kalka "	31	
		Jutogh "	80	
		Dinapore "	100	
		Jhansi, Nowgong, Jubbulpore } 28th Mule Corps "	290	
		For fire protection in the Army Bearer Corps lines, Mhow	12	
41	Ghurrahs, with covers	For use in Sassoon Dock, Colaba, during trooping season . No.	60	
		For Poona signalling school "	3	
42	Glass, toilet, with stand	For the orderly officer's quarters in Fort Ferozepore	1	

(*a*) To be renewed annually, if necessary. (*b*) Scale of oil, *vide* Table 42, item 55, cleaning materials and wicks and renewals of component parts as required

(*c*) Kerosine oil tins, with handles, will be substituted for ghurrahs as the latter become unserviceable, and they will in turn be replaced by tanks and buckets, G. I. 3 gals., as funds are available. See Item 14 of this table. At Quetta half tubs can be issued in lieu of ghurrahs at the rate of five half tubs to 26 ghurrahs.

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 34.—Equipment for special and miscellaneous services—*contd.*

Item No.	Articles.	Where required and for what purpose.		Authorised proportion.	
55	Mosquito curtains (*a*)—*concld*	For R. G. A. detachments in Malabar and Mahaluxmi Forts .	No	1	Per man.
		For British or Indian guards at the Mint and at the Jafferpore and Luckinsore Ranges	,,	1	Per man.
		For British Infantry detachment at Bhamo	,,	1	Per man.
		For Coast Defence Gunners stationed at the River Forts, Rangoon . .	,,	1	Per man.
		For men on garrison guard at Butcher Island, Bombay	,,	1	Per man.
		For men on the Bombay Arsenal guard	,,	1	Per man
		For Indian N. C. O.'s and men of Rangoon Section, Q. V. O. Sappers and Miners, Rangoon . . .	,,	1	Per man.
		For public followers employed at the river forts, Rangoon	,,	1	Per man.
		For the warrant or non-commissioned officer performing night duty in the Rangoon arsenal . . .	,,	1	
		For the non commissioned officer on detached duty at Duckinsore magazine . . .	,,	1	
..		For British garrison at Agra Fort . .	,,	1	Per man.
56	Muzzles for mules . . .	Issued as station stores for the use of the Indian Mountain battery sending a section to Drosh . . .	,,	1	
57	Pans, commode . . .	For commodes authorized in Section IV	,,	1	Per commode.
58	,, privy, iron . . .	For use in Sassoon Dock, Colaba, during trooping season . . .	,,	..	As required.
		For privies of corps, detachments and batteries and companies of artillery in barracks	,,	..	As required Cost to be met from fixed allotment.
		For privies of British soldiers serving with R. A. Staff, S. and M. and Defence Light Section . . .	,,	1	Per opening in seat.
		For privies in compounds of churches attended by troops	,,	1	Per opening in seat.
		For British garrison and other guards .	,,	..	As required.
		For Indian units not provided for by cantonment authorities . . .	,,	..	As required. Cost to be met from fixed allotment if in receipt of the same.
		For signalling and veterinary schools .		..	As required. (*b*)
59	,, ,, earthen . .	For latrines of Indian Infy. detachment at Anandale, Simla		20	
		[illegible]		2	
		[illegible]		9	
		[illegible]		[illegible]	
		[illegible]		1	Per opening in each privy seat.
		For latrines of servants of departmental warrant and N. C. O's. . . .		..	As required.
		For servants' privies attached to officers' quarters and mess-houses, the property of Government (c)		..	As required.
		For British troops undergoing musketry course at Pallavaram		..	As required. Cost to be met from fixed allotment.
		Indian Military General Hospital at Aden .		8	
		Indian Infantry Hospital at Poona .		1	

(*a*) Renewed as required through fair wear and tear
(*b*) Scale to be fixed by Standing Barrack Committee.
(*c*) Not applicable to units in receipt of fixed allotment.

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 34.—Equipment for special and miscellaneous services—*contd.*

Item No.	Articles.	Where required and for what purpose.	Authorised proportion.	
60	Pans, privy, Horbury's	For latrines in lines at Secunderabad, of the escort of Resident, Hyderabad	1	Per opening in each privy seat.
		For Horbury pattern latrine seats in the 9th (Secunderabad) Division	1	Per opening in each seat.
61	Pokers	For fireplaces at Rawalpindi, Sialkot, Campbellpore, Attock and Jhelum No	1	Per fireplace.
62	Receptacles, filth	For latrines of Indian Infy. at Port Blair	20	Per latrine.
63	" iron	For urinaries of Indian Infy. at Port Blair	1	Per urinary.
64	Ropes, with hook	For barracks with thatched roofs, for use with fire engines	2	Per 20 buckets.
65	Scales, copper, with weights	For British troops for weighing groceries, rations, forage, etc	1	Per regt. of cavy., battn. of infy, battery or company of artillery, or detached portion of same.
66	Scales, wooden, with weights		1	
67	Scales, with weights from ¼ oz. to 4 lbs.	For Indian troops in Burma and Andamans for weighing out rations	1	Per battn. or detached portion of same.
68	Scissors, country	For trimming wicks of kerosine oil lamps	1	Per building lighted with kerosine oil lamps. (*a*) (*b*)
69	Scrapers	For stations in Burma Divn. for British and Indian troops	..	As required. Cost to be met from fixed allotment
70	Scrubbers, cocoanut fibre			
71	Scrubbers	For barracks with boarded floors, British troops, Belgaum and Secunderabad and Burma Divns.	..	As required. Cost to be met from fixed allotment.
72	Stands, tin	For burners of lamp in use with Indian troops in Burma and Andamans	1	Per burner.
73	Stoves, Rippingilles, No. 67-A. B. C. dinner	For family quarters, Queen's Barracks, Fort William	1	Per family.
		For family quarters, Fort St. George	1	Per family (2 to be maintained as a reserve).
		For families of British t[illegible] accommodated [illegible]	1	Per family.
			1	Per family.
74	Surahis	For drinking water. At plain stations	..	As required. Cost to be debited to fixed allotment.
75	Tanks, metal	For carriage of water . . . prs. (*c*)	3	Per R. H. A., R. F. A., British mountain battery and company, R. G. A.
			2	Per heavy battery.
			1	Per R. H. A. Ammunition Column.
			3	Per R. F. A. Ammunition Column.
			16	Per regt. of British cavy. or battn. of British Infy.

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 34.—Equipment for special and miscellaneous services—*contd.*

Item No.	Articles.	Where required and for what purpose.	Authorised porportion	
75	**Tanks**, metal—*concld.* . .		3	Per Divisional signal company.
			1	Per pakhali authorised at Mount Abu, Pachmarhi, Poonamallee, Purandhar and Ramandroog sanitaria.
			50	For use on the Samana posts.
		For carriage of water for British troops at—		The S and T. Corps maintains a reserve of 500 pairs of tanks, and 1,000 sets of components, for use in peace and war.
		1st, 2nd and 3rd Divns. — Bara Gali prs.	18	
		Changla Gali ,,	12	
		Cherat . ,,	770	
		Ghora Dakka ,,	60	
		Kalabagh ,,	18	
		Kasauli ,,	222	
		Khyra Gali ,,	18	
		Jutogh . ,,	99	
		7th and 8th Divns. . — Chakrata ,,	444	
		Landour ,,	103	
		Chaubuttia, Ranikhet ,,	303	
		5th Divn . . . Taragarh ,,	12	
		9th Divn . . . — Arkonam ,,	6	
		Guntakel ,,	1	
		Wadi . ,,	1	
		For carriage of water for the Indian battalion stationed at Malakand . ,,	12	To be maintained as station stores
76	**Trays**, earthen or iron . .	For urinals—		
		(i) For units, etc., having a fixed allotment .	..	As required. Cost to be met from fixed allotment.
		(ii) Others . . . . . . No	1	Per urinal in use
77	,, tooth brush, enamelled .	For married quarters of warrant officers (non-departmental), schoolmasters,	1	Per quarter
78	**Tubs**, bath	No	1	Per quarter
79	,, G. I., with lids .	,,	6	
		,,	2	Per lavatory not provided with tanks or reservoirs for the purpose
80	,, ,, with hinged lids .	For cook-houses of British troops not provided with iron tanks . . . No.	1	Per cook-house.
81	,, ,, without lids (*a*)	For stables of British Mounted Corps, and gun sheds etc , of Artillery units. ,,	12	Per squadron British Cavalry and per Heavy battery having bullock draught.
			13	Per Horse, Field Mountain, and partly Horsed Heavy Battery.
			8	Per Horse Artillery Ammunition Column.
			25	Per Field Artillery Ammunition Column.
		For British soldiers temporarily employed in Government Military Farms . No	1	Per single or married man.
		For Military signallers of the Telegraph Department not accommodated in barracks . . . . . . No.	1	Per man.
		For Telegraph training school at Trimulgherry . . . . . No.	1	

(*a*) Tubs issued to stables and gun sheds of British troops will have two tin pots attached to each with chains A reserve of per cent. tin pots will also be supplied.

Table 34.—Equipment for special and miscellaneous services—*concld.*

Item No.	Articles.	Where required and for what purpose.	Authorised proportion.	
81	Tubs, G. I., without lids—*concld.*	For private ablution rooms of lavatories	1	Per ablution or bath room.
			4	Per lavatory.
		Divn. . . . . . . No.	4	Per 25 men.
		For storage of water for fires at S. and T. Store Depôt at Purandhar . . No.	8	
82	Tubs, half cask . .	For use in Sassoon Dock, Colaba, during the trooping season	9	
83	Urinals, iron	For use in Sassoon Dock, Colaba, during trooping season . . . . No.	18	
		For urinaries of upper storeys of barracks in 4th, 5th and 6th Divns., and Aden Bde. for night use only. . . No.	2	Per urinary.
		For use at night in barracks of British Infy. regts., Quetta, from 1st December to 31st March	40	Per regiment
		For urinaries in compounds of churches	.	As required
			1	Per guard.
			..	As required (*a*)
			1	
			..	As required. (*a*)
84	,, with trays, zinc, or iron. (*b*) (*c*)	...abad . . . . No	1	
		Detachment of Royal Garrison Artillery at Manora	..	As required. Cost to be met from special allotment
		For Indian Infy. battn. at Aden and Perim . . . . . No.	13	
		For workshops, staff sergeants and single men's quarters and sergeants' mess of	..	As required (*a*)
			..	As required (*a*)
			2	Per privy.
		For barracks of British troops . . .	..	As required. Cost to be met from fixed allotment.

(*a*) Scale to be fixed by Standing Barrack Committee. (*b*) Where earthen urinals are not procurable iron ones will be supplied.
(*c*) Iron urinals are supplied to British troops at all stations in Burma.

Table 35.—Equipment for the Staff College, Quetta.

Item No.	Articles.		Scale.	Remarks.
1	Chicks	No.	24 (*a*)	
2	Clocks, hanging	,,	6	
3	Clocks	,,	1 (*b*)	
4	Curtains	Pairs.	4 (*b*)	
5	Durries	Sq. Yds.	410 (*a*)	
6	,, ...	,,	34 (*b*)	
7	Fittings, E. W., for washhand stands	set	1	
8	Lamps, table, with fittings	No.	4 (*a*)	
9	,, wall, with brackets and fittings	,,	12 (*a*)	
10	Mats, door	,,	8 (*a*)	
11	Pans, commode	,,	4	
12	Stoves, slow combustion	,,	2	
13	,, oil	,,	1 (*a*)	

(*a*) For general library. (*b*) For library for directing staff.
NOTE.—Such articles as are not included in the above table will be bought under the authority of the Commandant and paid for from the contingent grant of the College.

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 36.—Scale of fuel for warming and drying.

NOTES I.—The following is the scale of fuel, etc., allowed, but issues should be restricted to actual requirements as dictated by weather; the scales and period authorised being notified in station orders. Financial powers may be exercised by competent financial authorities in cases where definite scales have not been fixed, and in cases where issues in excess of fixed scales are temporarily necessary, or, where the service itself is not provided for. Fuel surplus from previous supplies will be credited in making demands for fresh supplies. When not obtainable from the Supply and Transport Corps fuel should be purchased locally at the market rate and the cost recovered on a contingent bill. II.—Units, etc., having a fixed allotment will meet the cost of fire pans, drying baskets or frames, and grates required for drying purposes from that allotment. III.—Fuel for Regimental married families, hospital matrons, unmarried school mistresses, married school mistresses when not provided for with husbands, assistant surgeons, regimental warrant officers, non-departmental U. L. N.C. Os employed in divisional and brigade, including the medical division, staff offices, staff and other sergeants, soldier students in Thomason College, guard rooms, battery offices, institutes, libraries, orderly rooms, prison rooms, sergeants' messes, prayer rooms, workshops and all auxiliary buildings with fireplaces except offices of which the officer in charge draws an office allowance, is allowed on the scale for small fireplaces, and only for one fireplace in each set of quarters occupied by one family or office, library, etc., institute room. IV.—Where the use of fuel in station hospitals is authorised, its issue to each lady nurse is allowed on the scale locally in force for small fireplaces, for each general dining and general sitting room in lady nurses' quarters, fuel is allowed on the scale locally in force for small fireplaces, except at *Quetta, where the large fireplace scale is allowed.* V.—*Fuel for offices of A. D. M. S. is allowed at the scales obtaining in stations in which they are situated.* VI.—Unless otherwise stated, the issue of fuel in the table below is in pounds. VII.—In buildings where stoves have been provided instead of open fireplaces, charcoal will be issued to extent considered necessary by the O. C. the station, but the cost of the charcoal must not exceed that of the quantity of wood allowed. VIII.—When separate day rooms with fireplaces exist in barracks, fuel will not be issued for dormitories if exclusively used as such. IX.—Fuel in barracks will be under the charge of a N. C. O. X.—Fuel is not authorised for liquor bars or regimental refreshment rooms. XI.—When coal is issued, a kindling allowance of firewood is allowed at the rate of 5 lbs. of wood for every 100 lbs. of coal issuable. XII.—The military prisons and detention barracks referred to in Army Regulations, India, Volume II, are allowed to draw fuel "as required" for miscellaneous purposes such as making supper cocoa, hot baths, washing cooks and men's clothing, etc.

Item No.	Stations.	Service for which required.	British or Indian.	For warming per diem.				For drying							Remarks.
				Fire wood		Period		Charcoal.					Period		
				Large fireplace.	Small fireplace	From	To	Per diem.	Per mensem.	Fire pans.	Drying baskets or frames.	Grates with tripods and ash pans.	From	To	
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
1	Abbottabad	Hospital (troops and followers).	Indian	160	80	1st Nov.	31st Mar.	..	..	..	..	..	..	..	(†) Per guard.
		Quarter and Station *Magazine Guards.*	"	80 (†)		20th Dec.	1st Mar.	..	..	..	..	..	..	..	(a) Per fireplace.
2	Abu	Barracks and guard rooms.	British	40 (a)		1st Dec.	End of Feb.	10(b)	..	1 (b) (c)	..	..	Monsoon	months	(b) Per five men or patients.
		Hospitals (troops)	"	40 (a)		15th June	15th Sep.	10(b)	..	..	..	1 (b) (c)	Do.	Do.	(c) Per annum.
		Assistant Surgeons' quarters.	"	40 (d)		1st Dec.	End of Feb.	..	..	..	.	..	..	..	(d) Per Assistant Surgeon.
		Regimental married quarters.	"	40 (a)		Do.	Do.	5(e)	..	..	..	..	Monsoon	months	(e) Per Regimental family quarter.

Table 36.—Scale of fuel for warming and drying—*contd.*

Item No.	Stations.	Service for which required.	British or Indian.	For warming per diem.				For drying.							Remarks.
				Firewood.		Period.		Charcoal.					Period.		
				Large fireplace.	Small fireplace.	From	To	Per diem.	Per mensem.	Fire pans	Drying baskets or frames	Grates with tripods and ash-pans.	From	To	
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
2	Abu—*contd.*	Regimental libraries, reading rooms and schools.	British .	..	..	.	..	10(*f*)	..	1(*f*)		..	Monsoon	months .	
		Hospital store-keeper's stores.	„	..			.	10	..	..	..	1	Do .	Do. .	
		Store rooms . .	„	.	..	.	..	10(*g*)	.	.	.	2	Do. .	Do. .	(*a*) Per fireplace.
3	Agra .	Hospital (Indian troops)	Indian .	80		1st Dec.	End of Feb.	.	..	.	.	.	..	..	(*b*) Per five men or patients.
		Station family hospitals.	British	80	40	15th Dec.	31st Jan	..	..	.	..	..	..	..	(*c*) Per annum.
4	Allahabad .	Ditto . .	„	80	40	Do.	Do.	..	..	.	.	..	..	..	(*e*) Per Regimental family quarter.
5	Ambala .	Regimental married quarters.	„	..	40	Do.	15th Feb.	..	.	.	.	..	..	.	
		Hospital (troops) .	„	80	40	Do.	Do.	..	..	..	.	..	..	..	(*f*) Per 450— superficial feet.
		„ (troops and followers).	Indian .	80	40	Do.	Do.	..	..	..	..	..	..	..	(*g*) Per grate. (*h*) Per man.
6	Andamans .	Barracks (troops) .	„	..	..	..	..	..	12½ (*h*)	10% (*i*)	10% (*i*)	..	1st May	31st Oct.	(*i*) On strength annually.
7	Bannu .	Hospital (troops and followers)	„	160	80	1st Dec.	15th Mar	..	..	..	..	..	..	..	(*j*) For each of the two wood-burning stoves sanctioned for special wards.
		Quarters of Park Sergeant.	British .	..	40	Do. .	Do. .	..	..	..	..	..	..	..	

8	Bareilly .	Regimental married quarters.	..	40		15th Dec.	15th Feb.	..	..	.	..	..	..	..	(k) For one stove in each regimental hospital.
		Hospitals (troops)	,,	80 (j)		1st Dec	31st Jan.	.			.	..	.	..	(l) Per man at Maymyo.
		Ditto .	Indian .	80 (k)		Do. .	Do .	.		..	..	..	..	..	(m) Per fort for drying stores and telephone rooms. Firepans and drying baskets will be replaced biennially.
		Station family hospital.	..	80	40	15th Dec	Do .	.			..	.	.	..	
9	Belgaum .	Barracks and guard-rooms.	British .	.		..		10(b) .	..	1(b)(c)	..	..	Monsoon	months	
		Hospitals (troops) .	,,				.	10(b)	.	.		1(b) (c)	Do. .	Do. .	
		Regimental married quarters.	,,	.				5(e)			.		Do. .	Do. .	
10	Bhamo .	Barracks (troops) .	,,		.			.	25 (h)	10% (i)	10% (i)	.	Do	Do. .	
		Barracks (troops) .	Indian .		..			.	25 (h)	10% (i)	10% (i)	..	1st May	31st Oct.	
11	Bombay .	Barracks and Guard rooms.	British .	.	..		.	10(b)		1(b)(c)	.		Monsoon	months.	
		Hospitals (troops) .	,,	.			.	10(b)		.		1(b) (c)	Do	Do. .	
		Regimental married quarters.	,,		..	..		5(e)	.	.		..	Do. .	Do. .	
		Regimental libraries, reading rooms, and schools.	,,	..	.	.	..	10 (f)	..	1(f)	..	.	Do. .	Do .	
		Forts in the Bombay Defences.	,,	..		.	.	5(m)	..	1(m)	1(m)	..	Do. .	Do. .	
12	Burma (Lower) and also at Maymyo in Upper Burma.	Barracks (troops) .	Indian .	..	..	.	.	..	25 (h) 5(l)	10% (i)	10% (i)	..	Do .	Do. .	
13	Bara . .	Hospitals (troops and followers).	,,	80 (a)	40 (a)	16th Mar.	14th Oct.	..	..	..	.	..	..	..	
14	Dehra Dun .	Hospitals (troops and followers).	..	80	40	1st Dec.	15th Feb.	..	..	..	..	..	..	..	
15	Delhi . .	Regimental married quarters.	British .	..	40	15th Dec	Do. .	..	.	..	..	..	..	..	
		Hospitals (troops) .	,,	80	40	1st Dec.	Do. .	..	..	.	..	..	..	..	
		Hospitals (troops and followers).	Indian .	80	40	15th Dec.	Do. .	..	..	..	..	..	..	..	
	Dera Ismail Khan.	Hospitals (troops and followers)	,,	120	60	1st Dec	15th Mar.	..	..	..	..	..	..	..	

SUPPLIES BY S. AND T. CORPS.

Table 36.—Scale of fuel for warming and drying—*contd.*

Item No.	Stations.	Service for which required.	British or Indian.	For warming per diem. Firewood. Large fireplace.	Small fireplace.	Period From	To	For drying. Charcoal. Per diem	Per mensem.	Fire pans.	Drying baskets or frames.	Grates with tripods and ashpans.	Period. From	To	Remarks.
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
17	Dibrugarh	Hospitals (troops and followers).	Indian	80	40	1st Nov.	End of Feb.	..	..	..	.	..	..	..	† 40 lbs. per diem in winter and 20 lbs. per diem in summer. (*a*) Except *Darjeeling* where allowed from 15th October to 15th March 224 lbs per large and 112 lbs. per small fireplace, and from 16th March to 14th October 80 lbs per large and 40 lbs. per small fireplace; and Solon and *Subathu* allowed from 1st December to end of February 80 lbs. per large and 40 lbs. per small fireplace and from 10th June to 10th September 60 lbs. per large and 30 lbs. per small fireplace. (*b*) Except Simla where a daily issue of
17A	Drosh	N. C. O.'s of the S. & T. Corps and n. c. o.'s of the S. & M. companies	British	..	80(*h*)	Nov.	Feb.		.	..	.	..	..	.	
		Agents, store-keepers and hospital store-keepers	Indian	..	80(*h*)	Do.	Do.	.	..		..		..	.	
		Clerks	,,	..	80(*h*)	Do.	Do	.	..	..		.	.	..	
		Followers	,,	..	6(*h*)	Do.	Do.	.	..	.			.	.	
18	Himalayan Hill Stations; and also at Cherat. (*a*)	Quarters of Assistant Surgeons.	British	†	†	..	..	..	..	..	.	..	..	..	
		Barracks and hospitals (troops)	,,	160	80	15th Oct.	15th Mar.	..	..	.	..	.	..	..	
		Dagshai Detention barracks.	,,	80	40	16th Mar.	14th Oct.	..	..	..	..	..	..	..	
19	Himalayan Hill Stations, excluding Abbottabad (*b*) also at Cherat and Kohima.	Hospitals (troops and followers).	Indian	160	80	15th Oct.	15th Mar.	..	..	..	..	..	..	..	
				80	40	16th Mar.	14th Oct.	..	..	..	..	..	..	..	

20	Samana	Barracks (troops)	,,	5 (e)		1st Nov.	15th Dec.	..	..	..	..	..	..	..
						16th Mar.	31st Mar.	..	..	..	..	..	..	..
				10 (e)		16th Dec.	15th Mar.	..		..	..	..	..	..
		Followers	,,	3 (e)		1st Nov.	15th Dec.	..	.	..	..	..	..	..
						16th Mar.	31st Mar.	..	..	..	..	..	..	.
				6 (e)		16th Dec.	15th Mar.	..	..	..	..	.	..	..
21 22 23	Jandola, Drazinda, Malakand	Barracks (troops)	,,	5 (e)		1st Nov.	15th Mar.	..	.	.	..	.	..	.
		Followers	,,	3 (e)				.	..	..	..	..	..	..
24	Shillong (c)	Hospital (troops and followers).	,,	80	40	16th Mar.	14th Oct.	.		..	..	.	..	
				160	80	15th Oct.	15th Mar.	..	..	..	..	..	..	..
25	Jacobabad	Hospitals (troops)	,,	(d)	(d)	15th Nov.	Do.	..		.	..	..		..
26	Kamptee	Barracks	British	..	..	.	.	..	25 (c)	10% (f)	10% (f)	..	1st May	1st Oct.
		Hospitals (troops)	,,	..	..		..	5 (g)	..	..	..	1 (h)	Monsoon	months.
27	Kohat	Hospitals (troops and followers).	Indian	160	80	1st Dec.	Do.	..	..	..	..	..	..	..
		Quarters of British subordinates of the Supply and Transport Corps.	British	..	40 (i)	Do.	Do.	..	..		..	.	..	
		Quarters of the Park Sergeant.	,,	..	80 (j)	Do.	Do.	..	..	..	..	..	..	..
28	3rd (Lahore) Divn. (plains stations) except Ambala.	Barracks and Hospitals (troops)	,,	80	40	Do.	15th Feb.	..	..	..	..	..	..	..
		Hospitals (troops and followers).	Indian	80	40	Do.	Do.	..	..	..	..	..	..	..
29	Manipur	Hospitals (troops and followers)	,,	80	40	1st Nov.	End of Feb.	..	..	..	..	..	..	..
30	Maymyo	Barracks	British	80	40	1st Dec.	Do.	..	..	..	..	..	..	..
		Hospital (troops)	,,	100	40	1st Oct.	31st Mar.	..	..	..	..	..	..	..
				50	25	1st Apl.	30th Sep.	..	..	..	..	..	..	..
		Drying rooms in barracks.	,,	..	..	..	..	..	350 (k)	..	..	..	1st May	31st Oct.
		Do.	..	..	..	..	..	8 (l)	..	..	..	..	Do.	Do.
		Do.	..	..	..	..	..	10 (m)	..	..	..	..	Do.	Do.
		Regimental followers' hospital.	Indian	100	40	1st Oct.	31st Mar.	..	..	..	..	..	..	..
				50	25	1st Apl.	30th Sep.	..	..	..	..	..	..	..

2 mds. is allowed from 1st November to 1st March to the Indian Infantry detachment employed at the saluting battery, and the same allowance to the Indian troops and followers left at Jutogh.

(c) At Shillong from April to September an additional annual allowance of 16,800 lbs. of coal is authorized.

(d) As required, but cost not to exceed Rs. 16 per annum for the hospital of the regiment of cavalry.

(e) Per man.

(f) On strength annually.

(g) Per 5 men or patients.

(h) Per 10 men or patients per annum.

(i) Per man per diem.

(j) Includes 40 lbs. per diem for the armament office.

(k) Per company barrack room.

(l) Per Regimental married quarter.

(m) For guard room and Quartermaster's stores (3 rooms).

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 36.—Scale of fuel for warming and drying—*contd.*

Item No.	Stations.	Service for which required.	British or Indian.	For warming per diem. Firewood. Large fireplace.	For warming per diem. Firewood. Small fireplace.	For warming per diem. Period. From	For warming per diem. Period. To	For drying. Charcoal. Per diem.	For drying. Charcoal. Per mensem.	For drying. Fire pans.	For drying. Drying baskets or frames.	For drying. Grates with tripods and ashpans.	For drying. Period. From	For drying. Period. To	Remarks.
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
31	Meerut	Regimental married quarters.	British	80	40	15th Dec.	15th Feb.	.	..	..	.	..	..	..	(a) For each of the two stoves sanctioned for special wards.
		Hospitals (troops)	"	80	40	Do.	Do.	..	..		.	.	.	..	
		Hospitals (troops and followers).	Indian	80	40	Do.	Do	..	..	..	..	.	..	..	
32	Muttra	Station family hospital.	British	80	40	Do	31st Jan.	..	..	..	..	..	..	..	
33	Lucknow	Hospital (troops)	"	80 (a)		1st Dec.	Do	..	..	.	..	..	..	..	
34 35 36 37	Lucknow Cawnpore Fyzabad Sitapur	Station family hospitals.	"	80	40	15th Dec.	Do.	..	..	..	..	..	..	..	
38	Pachmarhi	Barracks and hospitals (troops).	"	80 60	40 30	1st Dec 10th June	End of Feb 10th Sep.	..	..	..	..	..	..	..	
		Quarters of Assistant Surgeon	"	..	40 30	1st Dec 10th June	End of Feb. 10th Sep.	..	..	..	..	..	..	..	

39	1st (Peshawar) Divn. (plains stations).	Barracks and hospitals (troops)	”	160	80	1st Dec.	15th Mar.	.	..	..	..	..	..	..	(b) Per fireplace.
		Peshawar Detention Barrack.	”	160	80	Do.	Do.	..	..	..	..	.	..	..	(c) Per 450 superficial foot.
		Hospitals (troops and followers).	Indian	160	80	Do.	Do.	..	..	..	..		..	..	(d) Per grate.
40	Purandhar	Barracks	British	40 (b)		Monsoon	months	15	..	10	10	3	Monsoon	months.	(e) Per Assistant Surgeon.
		Hospital (troops)	”	40 (b)		Do.	Do	10	.	..	.	2	Do.	Do	(f) Weekly, together with 950 lbs. of coke and 67½ lbs. of charcoal.
		Staff sergeants' quarters.	”	32 (b)		Do	Do			.	.		.		(g) Fuel for fireplaces of guard rooms of British troops at Quetta is authorised at the scale allowed for large fireplaces.
		Regimental libraries, reading rooms and schools.	”	..	..	..	.	10(d)	..	1(c)		..	Monsoon	months.	
		Store rooms	”	..	..		..	10(d)	.	..	.	2	Do.	Do.	
		Hospital Store-keepers' stores.	”	..	..	.		10	..	.		2	Do	Do.	
		Surgery	”	..	..	.	..	10	.	.	..	1	Do	Do.	
41	Baluchistan and Zhob.	Assistant Surgeons' quarters.	”	40 (e) 20 (e)		15th Oct 16th Mar 1st Oct	15th Mar. 31st Mar 14th Oct.	..	..	.	..	.	.	.	
		Barracks (g)	”	160 80	80 40	15th Oct 16th Mar 1st Oct.	15th Mar 31st Mar. 14th Oct.	..	..	.	..	.	..	..	
		Quetta Detention Barrack.	”												
		Hospitals	”	160 80	80 40	15th Oct. 16th Mar	15th Mar. 14th Oct.	..	..	..	..	..	..	..	
		Hospitals (troops and followers)	Indian	160 80	80 40	15th Oct 16th Mar. 1st Oct.	15th Mar 31st Mar. 14th Oct.	..	.	..	.	..	..	..	
		Gymnasium (Quetta)	..	80 160		Do. 1st Dec.	30th Nov. 30th Apl.	.. ..	.. ..	. ..	.. ..	.. ..	.. ..	.. ..	
		Church Clerks (Quetta).	..	40		Winter	months	..	..	..	..	..	..	..	
		St. Mary's Church (Civil charge)	..	31½ (f)		Do.	Do.	..	..	..	..	..	..	..	

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 36.—Scale of fuel for warming and drying—*contd.*

Item No.	*Stations.*	Service for which required.	British or Indian.	For warming per diem. Firewood. Large fireplace.	Small fireplace	Period. From	To	For drying. Charcoal. Per diem.	Per mensem.	Fire pans.	*Drying* baskets or frames.	Grates with tripods and ashpans.	Period. From	To	Remarks.
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
41	Baluchistan and Zhob —*contd.*	Roman Catholic Church.	..	*160 (h)* 80 (h)	*80 (h)* 40 (h)	*15th Oct* 16th Mar. 1st Oct.	*15th Mar.* 31st Mar 14th Oct.	..	..	..	..	..	..	..	(*a*) *Per man.* (*b*) On strength annually. (*c*) Per river fort.
		Divisional and Brigade Staff Offices.	..	20 (*i*) 40 (*i*)		1st Oct. 16th Mar. 16th Oct.	15th Oct. 31st Mar. 15th Mar.	..	..	..	..	..	..	..	(*d*) Except Sialkot where the scale is from 1st December to 15th February.
		Special heating apparatus for warming the guard detention rooms and detention cells in the lines of the Royal Artillery (Quetta).	British	420	210	15th Oct. 1st Oct. 16th Mar.	15th Mar 14th Oct. 31st Mar.	..	..	..	..	..	..	..	(*e*) *Except Sialkot* where the scale is 80 lbs. per large and 40 lbs. per small fireplace respectively.
		Ditto British Infantry (Quetta).	"	600	300	15th Oct. 1st Oct. 16th Mar.	15th Mar. 14th Oct. 31st Mar.	..	..	..	..	..	..	..	(*f*) Together with 1,804 lbs. of coke for the whole winter, subject to a maximum charge of Rs. 44 per annum for *fuel* and coolies.
42	Rangoon	Barracks	"	..	..	..	..	..	25 (*a*)	10% (*b*)	10% (*b*)	..	1st May	31st Oct.	
		River forts	..	..	..	..	..	3 (*c*)	..	1(*c*)	..	..	Whole	year.	
		Drying rooms in barracks.	British	..	..	..	..	8 (*k*)	..	..	..	..	1st May	31st Oct.	

43	2nd (Rawalpindi) Divn. except Abbottabad Brigade (plains stations).	Barracks and hospitals (troops).	"	160 (e)	80 (e)	1st Dec. (d)	15th Mar. (d)	..	..	..	..	..	..	..	(g) Per student.
		Sialkot Military Prison.	"	80	40	1st Dec.	15th Feb.	..	..	..	..	..	..	..	(h) Twice weekly.
		Hospitals (troops and followers)	Indian .	160 (e)	80 (e)	Do. (d)	15th Mar. (d)	..	..	..	..	..	..	..	(i) Per fireplace on working days.
		Cantonment Church (Civil charge), Rawalpindi.	..	800 (f)		Winter	months .	..	..	..	..	.	..	..	(j) Not applicable if Instructor is in receipt of Consolidated rates of pay sanctioned in A. D. No. 3 D, dated 3rd January 1910.
		Divisional Staff offices (4 fireplaces), Rawalpindi.	..	60 (i)		1st Dec.	15th Mar	.	..	..	..	..	..	..	(k) Per Regimental married quarter.
		Quarters of the British subordinates of the Supply and Transport Corps and of the Brigade Office clerks, Jhelum.	British .	..	40 (l)	Do.	End of Feb.	..	..	..	..	.	..	..	(l) Per man per diem.
44	Roorkee	Regimental married quarters	"	..	40	15th Dec.	15th Feb.	..	..	..	..	..	..	..	† 40 lbs. per diem in winter and 20 lbs. per diem in summer.
		Soldier students, Thomason College.	"	..	40 (g)	Do.	Do.	..	..	..	..	..	..	..	
		Hospitals (troops) .	"	80	40	Do.	Do.	..	..	..	..	..	..	..	
		Hospitals (troops and followers)	Indian .	80	40	Do.	Do.	..	..	..	..	..	..	..	
45	Sadiya . .	Hospitals (troops and followers).	"	80	40	1st Nov.	End of Feb.	..	..	..	..	..	..	..	
46	Shahjahanpur .	Station Family Hospitals.	British .	80	40	15th Dec.	31st Jan.	..	..	..	..	..	..	..	
47	Ootacamund .	Quarters of Assistant Surgeons.	"	†		..	..	..	..	..	..	..	..	..	
		Barracks . .	Indian .	..	..	..	..	..	25 (a)	10% (b)	10% (b)	..	Monsoon	months.	
		Sergeant Instructors of Volunteers. (j)	British .	..	40	1st June	End of Feb.	..	..	..	..	..	..	..	

Page 47, Table 32 is reconstructed as follows:— … (a) for rest barracks and camps

Page 48—

Table 34—

Item 13—Delete "Arkonam", "Guntakul", and "Wadi" in column 3. *Oct. Appx. / I. A. O.—1919.* / Q. M. G. 17385 / Q. 16-A.

Table 34.—Pages 52 and 53.

Item 55 (as amended by Oct Appx. / I.A.O.—1917) is *reconstructed* as follows:— *Oct. Appx. / I. A. O.—1919.* / Q. M. G. 33749.

55	Mosquito curtains. (b).	For all regimental ranks of regular British units serving at plains stations and in the hills in India (including Burma) but excluding the following stations:— All hill stations in the 2nd (Rawalpindi) Division, Dalhousie, Jutogh, Mussoorie, Naini Tal, Ranikhet, Landour, Chakrata, Darjeeling, Lebong. (c)	1	per man.
		For the wives and children of all regimental ranks of regular British units at plains stations and in the hills in India (including Burma) but excluding the following stations.— All hill stations in the 2nd (Rawalpindi) Division, Dalhousie, Jutogh, Mussoorie, Naini Tal, Ranikhet, Landour, Chakrata, Darjeeling, Lebong. (c)	1	per cot.
		For officers' guard rooms	1	per *officer* on guard.
		For the departmental warrant or non-commissioned officer performing night duty in the Rangoon Arsenal	1	
		For the departmental non-commissioned officer on detached duty at Ducklnsore Magazine	1	
		For Indian troops at stations where malaria is rife. (d).	1	per man.
		For public followers employed at the River Forts, Rangoon	1	per man.
		[illegible]	1	per man.

(b) Renewed as required through fair wear and tear.

(c) In the case of men, wives and children proceeding to other hill stations, they will take with them the mosquito curtain in their possession.

[illegible]

...as follows :—

Oct. Appx.
I. A. O.—1919.
Q. M. G. 9579-(16-B.)

Oct. Appx. ... Page 46 ...

Oct. Appx.
I. A. O.—1919.
Q. M. G. 9579-(16-B)

Page 46, Table 31 is *reconstructed* as follows :—

Table 31.—Equipment for the Cavalry School, Saugor.

Item No	Articles.	For what purpose.	Authorised proportion.	
	Section 11.			
1	Blocks, ~~choping~~, small	cook rooms	1	per cookroom.
	Section 12			
	Stools, close, F. A.—			
2	Pans	quarters of Br. officers other than students Commandant's office.	2	per quarter.
		quarters of Br. officer students.	1	per quarter
3	Tubs, ablution	quarters of Br. officers other than students.	2	per quarter.
		quarters of Br. officer students.	1	per quarter.
	Wash-hand, stands—			
4	Basins			
	Dishes, soap—			
5	covers	quarters of Br. officers other than students.	2	per quarter.
6	dishes			
7	drainers	quarters of Br. officers students.	1	per quarter.
8	Ewers			
9	Trays, brush			
	Section 13-C.			
10	Durries (*a*)	quarters of Br. officers other than students.	4	per quarter.
		quarters of Br. officers students.	2	per quarter.
		Commandant's office	3	..

(*a*) Sizes required to be stated in demands.

...., mean 1
Implements, butchers— 2
19 Steels . . .
20 Jacks, roasting 1
21 Ladles, cooks, barrack. 1
22 Machines, mincing, small 2
23 Machines, weighing, 14 lbs. (with weights 1 to ¼ lb. oz) . . . 6
24 Mill, coffee (or spice) 1
25 Moulds 1
...quired to be stated in demands. 6

(*f*) For carri...
Cavalry regt, 4 per R. H. ... R. F. A. Ammu...
Heavy battery and R. F. A. ...
(*g*) Per 2 camp kettles.

55	Thayetmyo	Barracks . . Thayetmyo Detention Barrack.	"	..	..	..	..	..	25 (a)	10% (b)	10% (b)	..	Do.	Do.	... per diem in winter and 20 lbs per diem in summer.
56	Stations other than the above in 4th, 5th and 6th Divns. and Aden Bde., excluding the Jhansi and Jubbulpore Bdes.	Hospitals (troops)	"	..	..	..	..	Half the scale allowed for Bombay Bde.					Do.	Do.	
		Barracks, guard rooms, reading rooms, libraries and schools.	"	..	..	..	..	Half the scale allowed for Bombay.					Do.	Do.	
		Karachi Military Prison, Hyderabad (Sind) Detention Barrack, Poona Combined Military Prison and Detention Barrack, and Aden Detention Barrack.	"	..	..	..	..	Half the scale allowed for Bombay.					Do.	Do.	
		Regimental married quarters	"	..	..	..	..	3 (c)	..	..	..	..	Do.	Do.	
57	Himalayan hill stations, Peshawar and Rawalpindi Divisions. Lahore Divn. excluding Ambala, Kohat, Bannu and Derajat Bdes., Pachmarhi, Baluchistan and Zhob.	N. C. Os of the Barrack and Ordnance Departments and S. and T. Corps; N. C. Os. of the corps of military staff clerks; sergeant-instructors of volunteers; N. C. Os. of veterinary department; station butchers not living in barracks; and wives of above when husbands are on command.	"	40 (d) 20 (d)		(e)	(e)	..	..	..	..	..	..	..	

Table of equivalents.

1. 1 lb. of coal = 3 lbs. of wood (2½ lbs. in Baluchistan) tentative only for two years from January 1914.
2. 1 lb. of peat = 2 lbs. of wood.

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 37.—Scale of fuel for other purposes than warming and drying.

Item No.	Services for which required.	Firewood.	Coal or Charcoal.	Kerosine oil.	Remarks.
		lbs.	lbs.	glls.	
1	For Warren's cooking ranges where these are in use by British troops	200	..	..	Per range cooking for 80 men and over.
		180	..	..	Per range cooking for 61 to 79 men.
		160	..	..	Per range cooking for 60 men and under.
2	For repairing arms, British troops only .	..	..	..	As required, cost to be met from fixed allotment.
3	For browning arms, all British Corps and Indian Corps in Burma.	840	112	..	Biennially per 100 stand of arms, cost to be met fron fixed allotment.
4	For cremating animals, the property of Government or on the establishment of Silladar units, dying from an infectious or contagious disease which cannot be verified by post mortem examination	1,040	..	⅓	Per horse, camel, or bullock. (a)
		640	..	⅓	„ mule, pony, or donkey. (a)
	For boiling drinking water at—				
5	Mandalay Station Hospital . .	100	..	..	Per diem from 1st April to 30th Sept.
		½	..	..	„ man per diem from 1st Oct. to 31st Mar.
6	Madalay, for British troops and families	25	..	..	„ diem per filter tub.
7	Other stations (b)	..	..	..	As required.
8	Rangoon (Monkey Point) for British troops.	½	..	..	Per man per diem.
9	For veterinary hospitals for horses, battery mules and bullocks	200	..	..	Per mensem per 100 animals in veterinary charge in the station.
10	For boiling tape or cane bottomed bedsteads.	..	..	..	As required, but cost not to exceed 2½ annas per cot per annum.
11	For drying apparatus	18	..	..	Per maund of earth dried.
12	For examination of ordnance, cleaning and repairing instruments, etc., at inland river and coast defences.	..	..	..	As required.
13	For fumigating purposes on outbreak of epidemic diseases or on other special occasions; and for boiling infected bed- [illegible]	..	..	..	As required.
14	[illegible]	120	..	..	Per 10 occupied beds per mensem
15	[illegible]	200	..	..	Per 100 blankets. In Divisions where it is more convenient and economical to use coal, a scale of 100 lbs. of coal per 100 blankets, with 5 lbs. of firewood for kindling will be allowed.
16	For lady nurses	5	..	..	Per diem for kitchen purposes. For each lady nurse present at the station.
17	For use in rest camp non-dieted station hospitals.	..	..	..	As required
18	For boiling water for tea at halting stations for troops and families proceeding to and from Indian ports.	1	..	..	Per adult.
19	For the hospital laundries at—				
	Peshawar	4,800	..	..	Per mensem.
	Dalhousie	4,800	..	..	Per mensem from 16th March to 14th October inclusive.
		1,600	..	..	Per mensem from 15th October to 15th March inclusive.
20	For boiling kulthi for transport animals at Belgaum and in the Secunderabad Division.	½	..	..	Per one lb. of kulthi to be boiled.

(a) When stable litter is not available. If fuel for this purpose is not procurable from the Supply and Transport Corps, it may be purchased regimentally and cost recovered.
(b) Also authorised for Indian troops and followers.
(c) At stations where Government disinfectors are not provided the disinfecting may be carried out under arrangements made by the Supply and Transport Corps, in disinfectors not owned by Government.

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 38.—Equipment and stores authorized for military prisons and detention barracks.

NOTE.—Renewed as required, except where otherwise stated.

Item No.	Articles.			Scale of issue.
1	Bags, grocery	Nos.	1	For every eight cells or fraction of that number.
2	Basins, washhand, steel	"	..	As required; fixed by Military Works Services.
3	Baskets, small	"	..	As required.
4	Baskets, ration, large	"	..	
5	Brooms, hair, long handled	"	1	Per two cells.
6	Brushes, hand, scrubbing	"	1	Per cell.
7	Brushes, long-handled	"	1	Per two cells [except at Hyderabad (Sind)]
8	Buckets, G. I., with lids and lips	"	1	For every eight cells or fraction of that number.
9	Bamboos		..	As required.
10	Bricks, bath	"	..	
11	Cans, milk	"	1	Per cook-house.
12	Chamber utensils, E. W.	"	1	Per cell.
13	Chicks	"	..	As required, where recommended by the medical authorities.
14	Chopping blocks, small	"	1	Per prison or detention barrack (except Aden)
15	Clocks	"	1	Per prison or detention barrack. Renewable every 10 years, if necessary.
16	Cooking utensils (a)	sets.	1	For every eight cells or fraction of that number.
17	Camphor	lbs.	..	As required.
18	Clay, pipe	"	..	
19	Chursahs, leather	No.	2	For Lucknow detention barrack only.
20	Frames, iron, for chursahs	"	2	
21	Glue	lbs	..	As required.
22	Jharans, cooks'	No.	..	
23	Hemp, country	lbs.	..	
24	Knives, kitchen	No.	1	Per cook.
25	Lime, unslaked	lbs.	..	As required.
26	Measures, milk	No.	1	Per cook-house.
27	Mops, long handles	"	1	Per two cells (except at Thayetmyo)
28	Oil, cocoanut	gals	..	As required
29	Pans, privy, earthen	No.	1	Per privy seat
30	Plates, dinner	"	1	Per cell.
31	Pokers, fire	"	7	For Quetta detention barrack only.
32	Purdahs	"	.	As required, when recommended by the medical authorities.
33	Paper, latrine	pkts.	..	As required.
34	Sheets, ration	No.	2	Per prison or detention barrack.
35	Shovels, fire	"	7	For Quetta detention barrack only.
36	Surahis, or chatties, water	"	1	Per cell.
37	Soap, country	ozs.	..	As required.
38	Soda, washing	lbs.	..	
39	Scissors, country	pr	1	Per prison or detention barrack.
40	String	..	..	As required.
41	Trays, urinal, earthen	No.	..	
42	Trays, ration	"	1	For every eight cells or fraction of that number. Renewed annually.
43	Tubs, G. I., without lids	"	..	As required; only where no tank is provided.
44	Urinals, earthen	"	..	As required.
45	Wicks, cocoanut oil	"	..	
46	Wax, bees	lbs	..	
47	Ropes, well, 110 feet, for chursahs	No.	2	For Lucknow detention barr

(a) Each set consisting of 1 oval camp [illegible], 2 gridirons, 1 chopper and 1 ladle.

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 39.—Showing the dandies, etc., authorized for units, etc., in cantonments.

NOTE—The S and T. Corps will be responsible only for the supply of dandies and bearers where the Army Bearer Corps cannot find them.

Item No.	Units, etc.	Dandies with covers. (d)	Jhampans.	Bearers. (d)	Remarks.
	British Troops.				
1	Battery or company of R. A.	1	..	4	
2	Regiment of cavalry or battalion of infantry	2 (a)	..	4	(a) One in use and one in reserve with the corps, or in use with its wing if detached, in which case 4 additional bearers are allowed
3	Detached wing of cavalry or infantry	1	..	4	
4	Sanitaria	1	1 (c)	4	(c) Except Secunderabad and Burma Divisions. (d) To be supplied to units to which carriages, ambulance stretcher, I. P., are not issued (*see Section II Table XI, item 67 A*). The number of bearers to be supplied to unit in possession of carriages, ambulance stretcher, I. P., is left to the discretion of the Divisional Commander
	Indian Troops				
5	Battery of mountain artillery	1	..	4	
6	Regiment of cavalry or battalion of infantry	2 (a)	..	4	
7	Detached wing of cavalry or infantry	1	..	4	

Table 40.—Stores supplied annually to Remount Depôts.

Item No	Articles.		Saharanpur.	Hapur.	Mona and Sargodha.	Calcutta.	Hosur.	Ahmednagar.
1	2		3	4	5	6	7	8
1	Alum	lbs.	30	32	60	4	16	16
2	Ammonia, muriate	"	120	128	240	10	64	61
3	Assafœtida	"	30	32	60	10	16	16
4	Blankets, country	No.	400	400	600	10	100	100
5	" for fomentations	"	60	64	120	5	32	32
6	Borax	lbs	16	16	60	2	8	8
7	Burners, lamp or lantern	No.	3	3	4	2	2	2
8	Chalk, white	lbs.	50	100	80	20	50	50
9	Coal tar	"	5,000	5,860	6,560	200	1,000	1,000
10	Cocumiel	"	..	..	..	..	8	8
11	Coir, fibre	"	164	164	216	82	82	82
12	Cotton, cleaned	"	30	30	30	10	15	15
13	Deccamell	"	..	..	..	..	16	16
14	Dubbing	"	300	300	400	50	200	200
15	Fat, or lard mutton	"	120	128	240	20	40	40
16	Gauze	yds.	150	160	300	20	80	80
17	Ginger, dry	lbs.	60	64	120	10	32	32
18	Gum, Arabic	oz.	60	64	120	10	32	32
19	Jaggery (gur)	lbs.	40	40	60	10	10	10
20	Linseed meal	"	150	160	300	80	80	80
21	Lead, ordinary, tea	"	0	75	85	10	40	50
22	" red	"	20	20	30	5	10	10
23	Mustard, Europe	"	90	96	180	10	48	48
24	Nets, fly	No.	10	10	20	3	3	6
25	Nitre, country	lbs.	150	160	300	10	80	80
26	Nuts, soap	"	60	64	120	10	32	32

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 40.—Stores supplied annually to Remount Depôts—*concld.*

Item No	Articles		Saharanpur	Hapur.	Mona and Sargodha	Calcutta	Hosur.	Ahmednagar.
1	2		3	4	5	6	7	8
	Oils—							
27	Castor	gals.	212	212	318	5¼	127	127
28	Cocoanut	,,	11	13	22	2¼	8¼	8¾
29	Kerosine	tins.	180	192	360	50	96	96
30	Linseed, boiled	gals.	22	22	33	6¼	11	22
31	,, raw	,,	33	33	50	11	11	17
32	Mustard	,,	219	219	548	6¼	22	22
33	Neats foot	botts	310	330	360	20	36	36
34	Neem	fl ozs	206	103	103	69	69	69
35	Paint, black	lbs	20	20	40	5	10	10
36	Phenyle	gals	25	20	30	3	24	24
37	Powder, carbolic, McDougall's	lbs.	240	240	320	640	160	160
38	Resin	,,	50	50	50	5	25	25
39	Rum	botts.	12	12	16	4	6	..
40	Scrapers, grass	No.			As required.			
41	Skins, sheep, with wool	,,	60	60	160	4	20	20
42	Soap, carbolic, country	lbs.	6	6	12	6	3	3
43	Soap, carbolic, Europe	,,	12	12	24	6	6	6
44	Soap, saddle, country	tins	70	70	90	11	60	60
45	,, soft	lbs.	250	250	250	50	200	200
46	,, yellow	bars	45	48	90	10	24	24
47	,, ,, country	lbs.	60	64	120	5	32	32
48	Solder	,,	100	100	100	5	25	25
49	Suet, mutton	,,	20	20	20	10	10	10
50	Sulphate of copper	,,	32	20	30	2	5	5
51	Sulphur	,,	32	90	50	5	10	10
52	Tape, brass, measure 9 ft.	No.	1	2	3	2	2	2
53	,, cotton, girth	yds.	150	70	100	20	50	50
54	,, ,, narrow	,,	150	200	200	..	80	80
55	,, newar	lbs	200	200	400	..	150	150
56	,, *woollen*	*yds.*	*90*	*90*	*100*	..	*50*	*50*
57	,, ,, broad	lbs.	10	10	12	..	5	5
58	Thread, country	,,	54	60	82	10	40	40
59	,, khaki	,,	24	24	24	10	10	10
60	,, plain	reels.	15	15	20	10	10	10
61	Treacle	lbs.	30	32	82	10	16	16
62	Turpentine, spirits of	,,	30	30	82	10	20	20
63	Vinegar	,,	30	32	60	10	16	16
64	Wax, bees	,,	100	100	100	5	50	50
65	Wick, lamp	yds.			As required.			

SECTION I I.

SUPPLIES BY S. AND T. CORPS.

Table 41.—Signalling stores supplied annually.

Item No.	Articles.		Signal Company.	Instructional Class.	British Troops. Company R. G. A.	British Troops. Cavalry Regiment	British Troops. Infantry Battalion.	British Troops. Siege Train Unit, Roorkee.	Indian Troops. Cavalry Regiment.	Indian Troops. Aden Troop	Indian Troops. Infantry Battalion.	Detached half battalion British or Indian (a).	Sanitaria (except Murree and Naini Tal) and standing Camps at Chakrata, Dalhousie and Ranikhet.	Forts. Bombay and Fort William.	Forts. Buxa Fort.	Forts. Chitral Fort	Forts. Other Fort Armament	Gantok.	Derajat Brigade	Peshawar (b).	Shabkadar (b).	Abazai (b) (d)	Fort Lockhart (c).	Kohat (d)	Thall (c).	Bannu Brigade.	Port Blair.
1	2		3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27
1	Charcoal	lbs.	..	120	..	..	..	..	..	..	..	..	..		..	.	..	..	..	.	..	..	..	..	..	..	..
2	Cotton Waste	"	100	40	6	12	12	12	12	6	12	6	6	12	6	6	6	6	18	6	6	3	6	3	3	..	6
3	Oil, Kerosine, ordinary	gallons.	60	15	9	30	30	12	24	6	24	12	12	18	.	..	9	6	42	6	6	6	6	6	6	60	6
4	" " 150° F. fire test	"	120	25	6	18	18	12	18	9	18	6	6	12	6	18	6	6	24	12	12	6	12	5	6	36	6
5	Wick, cotton, limelight	yards.	..	2	..	..	..	..	..	..	..	..	..	..	.	..	..	..	..	..	..	..	..	..	..	..	..
6	" round, for reading lamps	"	5	4	As required																						
7	" flat for "B. B" and "C C." lamps	"	8	6																							

(a) Also allowed for British infantry detachment, Kirkee, as station stores.
(b) For equipment maintained as station stores for communication between Peshawar, Shabkadar and Abazai.
(c) For equipment maintained as station stores for communication between Fort Lockhart, Kohat and Thall.
(d) The following are allowed as station stores at Abazai on charge of the Guides Cavalry, for communication between patrols and for use in case of troops moving out.—

Cotton, waste	lbs. 3
Oil, Kerosine, Ordinary,	gallons 6
" " 150° F. fire test,	gallons 3

NOTE.—The following is allowed for the signalling equipment maintained for communication between Fort Lahore and Lahore Cantonment :—

Wick, C. C. lamp	½ yd per lamp.
Oil, Kerosine, 150° F. fire test	1 tin per lamp.

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 42.—Periodical and petty supplies.

Item No.	Articles.	Where required and for what purpose.		Authorized proportion.
1	Alkali	For painting gun carriages and mounted slides . . . . . lbs.	3	Per annum per gun carriage and mounted slide
		For R. M. L. 2·5" camel battery . . lbs	20	Annually.
		For the care and preservation of 40-pr. R. M. L. guns on charge with heavy batteries, R. G. A. . . . lbs.	26	Per 2 guns, carriages and limbers Annually.
2	Alum	For precipitating sedimentary matter in turbid water before boiling To be supplied on recommendation of medical authorities under whose direction the alum will be used . . lbs.	42	Per horse or field battery. } Annually
		,,	37	,, company, R. G. A. } Annually
		,,	29	,, mountain battery. } Annually
		,,	26	,, heavy battery. } Annually
		,,	158	,, regiment, British Cavalry } Annually
		,,	263	,, battalion, British Infantry. } Annually
		,,	2	,, company, S. and M.(a) } Annually
		For the above purpose for rest camps and barracks— (i) for details proceeding to and from Bombay . . . . grains	12	Per diem for each British soldier halted. (b)
		(ii) for British corps and detachments marching	..	To be met regimentally from annual allowance.
3	Bamboos	For carrying urinals of British troops, Fort St. George . . . . No.	8	Per mensem.
		For military prisons and detention barracks	..	As required.
4	Baskets, bamboo	F [illegible] troops); and Detention Barracks, Thayetmyo . . . . No.	2	To each sweeper per mensem.
		For Royal Artillery and Army Schools, St. Thomas' Mount. . . . No.	18	Quarterly.
		For conservancy establishments of British troops, Secunderabad and Burma Divisions	..	As required. Cost to be met from fixed allotment.
5	Baskets, cane, small.	For Aden camel battery . . .	..	Ditto.
6	Baskets, ration	For sets of cooking utensils for British troops in use with— (i) Units, etc, having a fixed allotment	..	Ditto.
		(ii) Others . . . . . . No.	1	Per 35 men quarterly.
7	Bath bricks	For military prisons or detention barracks	..	As required.
		For time gun or instructional guns at Sanitaria	{ ½	Per B.-L. gun } Monthly.
			{ ¼	Per R. M.L. gun } Monthly.
		Cleaning materials, B.-L. 5" temporary heavy batteries . . .	108	Annually per battery.
		For R. M. L. 2·5" camel battery . .	6	Ditto.
		For saluting batteries	1	Per 4 guns annually.
		For the care and preservation of 40-pr R. M. L. guns on charge with heavy batteries, R. G. A.	13	Per 2 guns, carriages and limbers. Annually.
8	Bone dust	For browning arms, British and Indian troops, all services . . . . lbs	¼	Biennially per 100 stand of arms.
9	Borax, refined	Per set of armourer's tools issued free . ozs.	2	Replaced as necessary.
		Cavalry School, Saugor . . . ozs.	10	Annually.

(a) For British N. C. O

(b) On indent of officer in charge of rest camp.

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 42.—Periodical and petty supplies—*contd.*

Item No.	Articles.	Where required and for what purpose.	Authorized proportion.		
		[illegible]	No.	2	To each sweeper per mensem.
10	Brooms	[illegible]	No	24	Quarterly.
		For conservancy establishments of British troops			
		For cleaning barracks of Indian troops [illegible] ... rick ... bala		..	As required. Cost to be met from fixed allotment.
		[illegible] and Lucknow		..	As required.
11	„ bass	For kitchens of British troops where Indian cooks have been dispensed with		..	As required. Cost to be met from fixed allotment.
		[illegible]			
12	„ with long bamboo handles.	(British troops)	No.	2	Per mensem
		For barracks of British troops		..	As required Cost to be met from fixed allotment
		For 1st class gymnasia at Secunderabad, Lucknow, Poona and Ambala		..	As required.
13	Brushes, cocoanut fibre	For Aden Camel battery		..	As required. Cost to be met from fixed allotment.
14	Brushes, with long handles	For 1st class gymnasia at Secunderabad, Lucknow, Poona and Ambala		..	As required.
		For scrubbing barrack furniture		..	As required. Cost to be met from fixed allotment.
15	„ scrubbing coir	For scrubbing barrack furniture of garrison guards (British and Indian), Aurangabad, Belgaum, Secunderabad and Burma Divisions	No.	2	Per guard per annum.
16	„ tar	For applying tar to necessary utensils, urinals, etc, Aurangabad, Belgaum, Secunderabad and Burma Divisions	No.	1	Per two utensils, etc
		For cleaning mattress and pillow cases—			
17	„ washing	(i) Units, etc, having a fixed allotment		..	As required. Cost to be met from fixed allotment.
		(ii) Others	No.	20	Per 100 sets of mattress and pillow cases. (a)
18	Burners	For kerosine and vegetable oil lamps, using burners, authorized in table 24 for all services		..	As required. (b)
19	Bysakies, or props	For supporting tatties		1	Per tattie in use.
20	Candles	For magazine lamps in fort armaments	lb.	1	Per lamp annually.
21	Camphor	For military prisons and detention barracks		..	As required.
22	Carbolic acid	For preserving sponge heads of time guns and instructional guns at sanitaria	oz	1	Annually per sponge head.
		For saluting batteries	oz.	1	Per sponge head annually.

(a) Annually or longer if brushes remain serviceable.
(b) On the certificate of the O. C. the unit that the renewal is necessitated by fair wear and tear.

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 42.—Periodical and petty supplies—contd.

Item No.	Articles.	Where required and for what purpose.		Authorized proportion.	
23	Chalk, white	For cleaning lamps— (i) of units, etc., having a fixed allotment		..	As required Cost to be met from fixed allotment.
		(ii) for all other lamps supplied by the State	No.	2	Per lamp monthly.
		For cleaning time guns and instructional guns at sanitaria	lbs.	2	Per gun annually.
		For schools of musketry and sanitaria for musketry instruction	lb.	1	Annually per school (2 lbs. at Satara) or sanitarium, and 0 2 lbs. per machine gun in store per school.
		For the care and preservation of 40 pr R. M. L. guns on charge with heavy batteries, R. G. A	lbs	4	Per 2 guns, carriages and limbers. Annually.
		For saluting batteries	lbs.	2	Per gun annually.
24	Charcoal	Cavalry School, Saugor	lbs	456	Annually.
		[illegible]	[illegible]	1¼	Annually.
		[illegible]		1½	Per sigree per diem.
25	Charpoys	[illegible]		(b)	
		[illegible] medical authorities	No.	1	Per man
26	Chicks	[illegible]		..	As required.
		For British Infantry regimental school at Secunderabad.			
		For British Infantry hut barracks at Subathu	%	7	Per annum on the number in use
27	Chimneys	For Ditmar's lamps for night schools	%	5	Per mensem on number in use.
28	"	Duplex, for lamps, hanging, hospital	No.	1	Renewals 25 per cent. per mensem.
29	" pine-moon.	For kerosine lamps authorized for prayer rooms in table 24	%	5	Per annum on number in use.
		For lamps, lanterns, authorized in table 24 for lighting entrance gates of 1st class forts and defences; also for all single lamps		..	As required.
		For all other lamps, using these chimneys, authorized by table 24	%	25	Per annum on number in use.
30	Cloth, doosootie(c)	For cleaning lamps— (i) for units, etc, having a fixed allotment		..	As required Cost to be met from fixed allotment.
		(ii) for others	yds.	1	Monthly per 8 lamps.
31	Coir, fibre, loose	For 1st class and regimental gymnasia at Fort William, Barrackpore, Dum-Dum, Lucknow and Ambala and for gymnasia in Madras and Bombay where boarded floors are not provided	lbs.	13	Per 10 superficial feet of area every 10 years if actually necessary.
		[illegible]	lbs.	71½	Annually.
32	Cotton, waste	[illegible]	lbs	8	Monthly when pump is in use.
		[illegible]	"	8	Annually per gun.
		[illegible]	"	½	Annually per store in which guns are kept and dealt with.
33	Dolchies (d)	For watering tatties	No	1	Per 2 tatties if close together, otherwise 1 per tattie.

(a) See Army Tables, Medical
(b) Competent financial authority may, when necessary, increase this scale up to 3 lbs. per sigree per diem.
(c) Condemned hospital clothing or bedding will be supplied in lieu when available.
(d) Or if more economical empty meat tins or tins locally procurable.

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 42.—Periodical and petty supplies—*contd.*

Item No.	Articles.	Where required and for what purpose.			Authorized proportion.
		For the care and preservation of 40-pr R. M. L. guns on charge with heavy batteries, R. G. A.	lbs	16	Per 2 guns, carriages and limbers. Annually.
		For sanitaria for cleaning arms	lbs	6	Annually per sanitarium.
		For cleaning time guns or instructional guns at sanitaria	ozs.	2	Per gun annually.
34	Doosootie, old	For R. M. L. 2·5" camel battery	lbs.	28	Per battery annually.
		Cleaning materials for 5" B. L. temporary heavy batteries	lbs	10	Ditto.
		For cleaning maxim guns, harness, etc	lbs	3	Annually per gun.
		For browning arms, British and Indian troops, all services	lbs.	5	Biennially per 100 stand of arms
		For saluting batteries	lb	1	Per gun annually.
		For chursas (*b*)		..	As required. Cost to be met from fixed allotment
		" R. M. L. 2·5" camel battery	lbs.	312	Per battery annually.
		" each 5" B. L. temporary heavy battery	lbs	50	Annually.
		" each maxim gun with tripod mounting and harness	lbs	12	Annually.
35	Dubbing	" each machine gun at schools of musketry	lbs.	6	Annually, for preservation of harness, etc.
		" each time gun or instructional gun at sanitaria mounted on a travelling carriage	lb	1	Per gun annually.
		" M. I. Saddlery and line gear at D. I. Khan, Bannu, Abbottabad, Kohat, Samana and in Burma	"	..	1 1/10 lbs. annually per set of M. I. saddlery and line gear.
		For cleaning materials for 5" B. L. temporary heavy batteries	yds	(*a*) 320	Per battery annually.
		For R. M. L. 2·5" camel battery	yds	28	Ditto.
36	Dungaree, double, unbleached	" time guns and instructional guns at sanitaria	yds	20 10	Per B. L. gun annually. Per R. M. L. gun annually.
		For the care and preservation of 40-pr. R. M. L. guns on charge with heavy batteries, R. G. A.	yds.	64	Per 2 guns, carriages, and limbers. Annually.
37	Flannel	For cleaning machine guns, harness, etc.	yds.	1	Annually per gun.
38	Gear, well, *viz.*, bucket, leather; and rope.	For each Indian unit hospital at Nowshera	No	1	Of each quarterly.
		For 1st class gymnasium at Poona		..	As required
39	Ghurrahs	" Sassoon Dock, Bombay	%	20	Monthly on number in use.
		" holding water for fire purposes	%	25	Monthly on number in use.
40	Globes, hurricane lantern.	For hurricane lanterns authorized in Table 24	%	25	Per annum on number in use. For single lanterns as required.
41	Globes, for sunlight lamp	For sunlight lamps used in covered gymnasia	%	60	Per annum on number in use.
		For sanitaria for musketry instruction	lbs.	9	Annually per sanitarium.
		" schools of musketry	lbs	54	Annually per school, 108 lbs at Satara
42	Glue	" military prisons and detention barracks		..	As required.
		" each set of armourers' tools issued free	lb.	1	First issue only.
43	Grates, tripod, ash-pans complete	Cavalry School, Saugor	No.	4	Annually.
44	Grease, hot or cold weather	For schools of musketry	lbs.	3	Annually per machine gun.

(*a*) Or 240 lbs condemned clothing

(*b*) Castor oil may be drawn in lieu of dubbing where the chrome leather chursah is in use.

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 42.—Periodical and petty supplies—*contd*

Item No.	Articles.	Where required and for what purpose.			Authorized proportion.
45	Jars, water, or chatties.	For 1st class Gymnasia at Lucknow and Ambala		..	As required.
		In Secunderabad and Burma Divisions for— British and Indian guards; station staff offices; and military students, Civil Engineering College, Madras	No	3	Per mensem for each service.
		For detached places of arms for Indian troops, Bellary	„	1	Ditto
46	Jharans	For cook-house of British troops where Indian cooks have been dispensed with		..	As required Cost to be met from fixed allotment.
47	Kerosine oil tins	For holding water for fire purposes		..	To be replaced when worn out by fair wear and tear, but renewals of tins that have been in use for less than eighteen month will be made only under the sanction of the competent financial authority.
48	Latrine paper, pkts.	For military prisons and detention barracks		..	As required.
49	Lime, unslaked	For military prisons and detention barracks		..	As required.
50	Mops	For 1st class gymnasia at Secunderabad, Lucknow, Poona and Ambala		..	As required
		For barracks where authorized, and all cook-houses of British troops where Indian cooks have been dispensed with— (i) of units, etc, having a fixed allotment		..	As required. Cost to be met from fixed allotment.
		(ii) other services		..	Renewed when worn out.
51	Napthaline	For preservation of silk cartridges of time guns, also instructional guns at sanitaria	lbs	15	Annually per 100 cartridges.
		For the preservation of the kits of Indian Army and Transport reservists	lbs	10	Annually per 100 kits on charge.
		For the preservation of serge lined pack saddlery pannels in store:— British cavalry regiments and Indian non-silladar cavalry regiments.	lbs	3	Annually per regiment
		British and Indian infantry battalion in possession of mobilization equipment	„	2	Annually per battalion
52	Naunds	When supplied in lieu of tubs for watering tatties	%	10	Monthly on number in use.
53	Oil, common.	For greasing punkah pulleys and friction rollers— (i) of units, etc, having a fixed allotment		..	As required. Cost to be met from fixed allotment.
		(ii) for others	fl ozs.	2	Per month for each pulley and friction roller when in use.
		For thermantidotes		..	As required. From fixed allotment for unit having such allotment.
		For lubricating well machinery in Fort Jamrud	gals.	$2\frac{1}{16}$	Quarterly.
54	„ cocoanut	For cleaning materials for 5" B. L. temporary heavy battery	„	5	Per battery annually.
		For R. M. L. 2 5" camel battery	„	1½	Ditto.
		„ military prisons and detention barracks		..	As required
		„ time guns and instructional guns at sanitaria	gals.	¾	Per B. L. gun per annum.
		For saluting batteries	„	¼	Per gun annually
		For the care and preservation of 40-pr. R M L guns on charge with heavy batteries, R G A.	gns.	2¼	Per 2 guns, carriages, and limbers. Annually.

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 42.—Periodical and petty supplies—*contd.*

Item No.	Articles.	Where required and for what purpose.		Authorized proportion.
55	Oil, kerosine, ordinary.	For cleaning machine guns, harness, etc . . pts.	2	Annually per gun (½ pt. at schools of musketry).
		„ Wells' flare lights for Fort Lockhart, gals.	48	Per annum.
		„ Rippingille's dinner stoves authorised by Table LXXVII . . pint	1	Per stove per day.
		„ time guns and instructional guns at sanitaria . . . . . gals.	½	Per gun annually.
56	„ Kerosine, 150° F. fire test.	For working the engine in the Central Workshops, Aden . . .	..	As required.
57	„ linseed, country, boiled.	For painting gun carriages and mounted slides . . . . . . fl. ozs.	3½	Annually per gun carriage and mounted slides.
		For the care and preservation of 40-pr R. M. L. guns on charge with heavy batteries, R. G. A. . . .	6	Per 2 guns, carriages and limbers. Annually.
58	[illegible] raw.	For Cavalry School Secun[illegible] . . pint	⅛	Annually.
		[illegible] . . qts.	3	Per annum.
		[illegible] L tem- [illegible] gals.	24	Per battery annually.
		For the care and preservation of 40-pr R. M. L. guns on charge with heavy batteries, R. G. A. . pints.	2	Per 2 guns, carriages and limbers. Annually.
59	„ heavy, minerals	For oiling earthenware troughs in the urinaries of British troops . . „	½	Per mensem for double compartment urinary. Cost to be met from fixed allotment.
			¼	Per mensem for single compartment urinary. Cost to be met from fixed allotment.
60	„ lubricating (mineral, thin; and tallow, country).	For fire engines of— (i) Units, etc., having a fixed allotment	..	As required. Cost to be met from fixed allotment.
		(ii) Others { Mineral, thin . . gals.	½	Annual supply for fire-engine.
		(ii) Others { Tallow, country . . lbs.	7	Annual supply for fire-engine.
61	„ neats foot	For preservation of boots and shoes in regimental stores	..	As required. Cost to be met from fixed allotment.
62	„ sweet . .	[illegible] fl ozs	141	Monthly when pump is in use.
63	„ vegetable.	[illegible]	..	As required. Cost to be met from fixed allotment.
		Indian „ „ „ for artillery practice at night. fl ozs	2	Per night for 6 lamps all the year round
64	Paint, dry, black, lamp	For sanitaria for musketry instruction . lbs.	5	Annually per sanitarium.
		„ schools of musketry . . . . „	40	„ „ school.
65	[illegible]	[illegible]	..	Renewed as worn out.
	[illegible]	[illegible] %	25	Monthly on number in use.
		[illegible]fences. For lines of the escort of the Resident, Hyderabad, at Secunderabad.		

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 42.—Periodical and petty supplies—*contd.*

Item No.	Articles.	Where required and for what purpose.		Authorised proportion.	
66	**Pans, privy, earthen**—(*concld.*)	For servants' privies attached to officers' quarters and mess houses, the property of Government.	%	25	Monthly on number in use.
		For British troops undergoing musketry course at Pallaveram. For privies of all other services.		..	As required. (*a*)
		" 1st class gymnasia at Lucknow and Ambala and latrines of Indian troops attached to the latter	%	8	Monthly on number in use.
67	**Pepper, black** .	For preservation of silk cartridges of time guns, and instructional guns at sanitaria	lbs.	6¼	Annually per 100 cartridges.
68	**Pipe, clay** .	For cleaning materials for 5″ B. L. temporary heavy battery . . .	lbs.	24	Per battery annually.
		For military prisons and detention barracks		..	As required.
69	**Quicklime** . .	For cleaning surface drains and night urinals of British troops at Mandalay	lbs	300	Per mensem.
		For filth pits	ozs	20	Per pit daily. (*b*)
		" stables of the Viceroy's Body-guard while at Ballygunge or Dehra Dun .	mds.	4	Per mensem.
70	**Rags** . . .	For washing compartments . .		..	As required Cost to be met from fixed allotment.
71	**Reservoirs** . .	For kerosine and vegetable oil lamps authorised in Table 24 for all services .		..	As required. (*c*)
72	**Resin, black** . .	For armourers' tools issued to British units	lbs	¼	Per set.
73	**Scrubbers** . .	For 1st class gymnasia at Secunderabad, Lucknow, Ambala and Poona . .		..	As required.
74	**Sheeting, old** (*d*)	For browning arms, British and Indian troops, all services . . .	lbs.	24	Biennially per 100 stand of arms
		For cleaning rifles	ozs	2½	Per soldier annually.
75	**Soap, country** .	For washing mattress and pillow cases—(i) Units, etc., having a fixed allotment		..	As required Cost to be met from fixed allotment.
		(ii) Others	ozs.	4	Quarterly, per set of mattress and pillow cases.
		For military prisons and detention barracks		..	As required.
76	**Soda, washing** .	For military prisons and detention barracks		..	As required
		For cook houses of British troops where Indian cooks have been dispensed with		..	As required. Cost to be met from fixed allotment.
77	**Squeegees** . .	For 1st class gymnasia at Secunderabad, Lucknow, Ambala and Poona . .	No.	2	Per annum for each place.
78	**String** . . .	For military prisons and detention barracks		..	As required
79	**Stuffing coir, straw or grass.**	For mattresses in use in gymnasia .	mds	1	Per mattress if straw or grass is used (*e*) or 71¼ lbs. of coir.
80	**Surahis** . .	For cooling and distributing drinking water		..	As required. Cost to be met from fixed allotment.
		" military prisons or detention barracks at Sialkot, Agra, Lucknow and Aden	%	10	Monthly on the number in use.
		For garrison school, Fort St. George .		4	Quarterly.
		For Royal Artillery and Army schools at St Thomas' Mount . . .	No "	6	Quarterly.

(*a*) Cost debitable to fixed allotment in case of units, etc., having such allotment
(*b*) Not authorised ...

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 42.—Periodical and petty supplies—*contd.*

Item No.	Articles.	Where required and for what purpose.		Authorised proportion.	
66	Pans, privy, earthen—(*concld.*)	For servants' privies attached to officers' quarters and mess houses, the property of Government.	%	25	Monthly on number in use.
		[illegible]		..	As required. (*a*)
		[illegible]	%	8	Monthly on number in use.
67	Pepper, black	For preservation of silk cartridges of time guns, and instructional guns at sanitaria	lbs.	6½	Annually per 100 cartridges.
68	Pipe, clay	For cleaning materials for 5" B. L. temporary heavy battery	lbs.	24	Per battery annually.
		For military prisons and detention barracks		..	As required.
69	Quicklime	For cleaning surface drains and night urinals of British troops at Mandalay	lbs.	300	Per mensem.
		For filth pits	ozs.	20	Per pit daily. (*b*)
		„ stables of the Viceroy's Body-guard while at Ballygunge or Dehra Dun	mds.	4	Per mensem.
70	Rags	For washing compartments		..	As required. Cost to be met from fixed allotment.
71	Reservoirs	For kerosine and vegetable oil lamps authorised in Table 24 for all services		..	As required. (*c*)
72	Resin, black	For armourers' tools issued to British units	lbs	¼	Per set.
73	Scrubbers	For 1st class gymnasia at Secunderabad, Lucknow, Ambala and Poona		..	As required.
74	Sheeting, old (*d*)	For browning arms, British and Indian troops, all services	lbs.	24	Biennially per 100 stand of arms.
		For cleaning rifles	ozs.	2½	Per soldier annually.
75	Soap, country	For washing mattress and pillow cases— (i) Units, etc., having a fixed allotment		..	As required. Cost to be met from fixed allotment.
		(ii) Others	ozs.	4	Quarterly, per set of mattress and pillow cases.
		For military prisons and detention barracks		..	As required.
76	Soda, washing	For military prisons and detention barracks		..	As required.
77	Squeegees	[illegible]		..	As required. Cost to be met from fixed allotment.
		[illegible] Lucknow, Ambala and Poona	No	2	Per annum for each place.
78	String	For military prisons and detention barracks		..	As required.
79	Stuffing coir, straw or grass.	For mattresses in use in gymnasia	mds.	1	Per mattress if straw or grass is used (*e*) or 71¼ lbs. of coir.
80	Surahis	For cooling and distributing drinking water		..	As required. Cost to be met from fixed allotment.
		„ military prisons or detention barracks at Sialkot, Agra, Lucknow and Aden	%	10	Monthly on the number in use.
		For garrison school, Fort St. George	No	4	Quarterly.
		For Royal Artillery and Army schools at St. Thomas' Mount	„	6	Quarterly.

(*a*) Cost debitable to fixed allotment in case of units, etc., having such allotment.
(*b*) Not authorised where night-soil is buried under trench system.
(*c*) On the certificate of the O. C. the unit that the renewal is necessitated by fair wear and tear.
(*d*) When sheeting is not available doosootie or other suitable material will be given in lieu, 25 yards being considered the equivalent to 24 lbs. of sheeting.
(*e*) To be returned to S. and T. Corps when replaced by fresh supply.

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 42.—Periodical and petty supplies—*contd.*

Item No.	Articles.	Where required and for what purpose.		Authorised proportion.	
66	Pans, privy, earthen—(*concld.*)	For servants' privies attached to officers' quarters and mess houses, the property of Government.	%	25	Monthly on number in use.
		[illegible]		..	As required. (*a*)
		[illegible] attached to the [illegible]	%	8	Monthly on number in use.
67	Pepper, black	For preservation of silk cartridges of time guns, and instructional guns at sanitaria	lbs.	6½	Annually per 100 cartridges.
68	Pipe, clay	For cleaning materials for 5" B. L. temporary heavy battery	lbs.	24	Per battery annually.
		For military prisons and detention barracks		..	As required.
69	Quicklime	For cleaning surface drains and night urinals of British troops at Mandalay	lbs.	300	Per mensem.
		For filth pits	ozs.	20	Per pit daily. (*b*)
		„ stables of the Viceroy's Body-guard while at Ballygunge or Dehra Dun	mds.	4	Per mensem.
70	Rags	For washing compartments		..	As required. Cost to be met from fixed allotment
71	Reservoirs	For kerosine and vegetable oil lamps authorised in Table 24 for all services		..	As required. (*c*)
72	Resin, black	For armourers' tools issued to British units	lbs	½	Per set.
73	Scrubbers	*For 1st class gymnasia at Secunderabad,* Lucknow, Ambala and Poona		..	As required
74	Sheeting, old (*d*)	For browning arms, British and Indian troops, all services	lbs.	24	Biennially per 100 stand of arms
		For cleaning rifles	ozs.	2½	Per soldier annually.
75	Soap, country	For washing mattress and pillow cases—(i) Units, etc, having a fixed allotment		..	As required. Cost to be met from fixed allotment.
		(ii) Others	ozs.	4	Quarterly, per set of mattress and pillow cases.
		For military prisons and detention barracks		..	As required.
76	Soda, washing	For military prisons and detention barracks		..	*As required.*
		For cook-houses of British troops where Indian cooks have been dispensed with		..	As required. Cost to be met from fixed allotment.
77	Squeegees	For 1st class gymnasia at Secunderabad, Lucknow, Ambala and Poona	No.	2	*Per annum for each place*
78	String	For military prisons and detention barracks		..	As required.
79	Stuffing coir, straw or grass.	For mattresses in use in gymnasia	mds.	1	Per mattress if straw or grass is used (*e*) or 7½ lbs. of coir.
80	Surahis	For cooling and distributing drinking water		..	As required. Cost to be met from fixed allotment.
		„ military prisons or detention barracks at Sialkot, Agra, Lucknow and Aden	%	10	Monthly on the number in use.
		For garrison school, Fort St. George		4	Quarterly.
		For Royal Artillery and Army schools at St. Thomas' Mount	No. „	6	Quarterly.

(*a*) Cost debitable to fixed allotment in case of units, etc, having such allotment.
(*b*) Not authorised where night-soil is buried under trench system.
(*c*) On the certificate of the O C the unit that the renewal is necessitated by fair wear and tear.
(*d*) When sheeting is not available doosootie or other suitable material will be given in lieu, 25 yards being considered the equivalent to 24 lbs of sheeting.
(*e*) To be returned to S. and T. Corps when replaced by fresh supply.

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 42.—Periodical and petty supplies—*contd.*

Item No.	Articles.	Where required and for what purpose.			Authorised proportion.
		For servants' privies attached to officers'	%	25	*Monthly on number in use.*
66	Pans, privy, earthen—(*concld.*)			.	As required. (*a*)
		attached to the latter.	%	8	Monthly on number in use.
67	Pepper, black	For preservation of silk cartridges of time guns, and instructional guns at sanitaria	lbs.	6¼	Annually per 100 cartridges.
68	Pipe, clay	For cleaning materials for 5" B. L. temporary heavy battery	lbs.	24	Per battery annually.
		For military prisons and detention barracks		..	As required.
69	Quicklime	For cleaning surface drains and night urinals of British troops at Mandalay	lbs	300	Per mensem.
		For filth pits	ozs.	20	Per pit daily. (*b*)
		„ stables of the Viceroy's Body-guard while at Ballygunge or Dehra Dun	mds.	4	Per mensem.
70	Rags	For washing compartments		..	As required. Cost to be met *from fixed allotment.*
71	Reservoirs	For *kerosine and vegetable oil lamps* authorised in Table 24 for all services		..	As required (*c*)
72	Resin, black	For armourers' tools issued to British units	lbs	¼	Per set.
73	Scrubbers	For 1st class gymnasia at Secunderabad, Lucknow, Ambala and Poona		..	As required.
74	Sheeting, old (*d*)	For browning arms, British and Indian troops, all services	lbs.	24	Biennially per 100 stand of arms.
		For cleaning rifles	ozs.	2½	Per soldier annually.
75	Soap, country	For washing mattress and pillow cases—(i) Units, etc, having a fixed allotment		..	As required. Cost to be met from fixed allotment.
		(ii) Others	ozs.	4	Quarterly, per set of mattress and pillow cases.
		For military prisons and detention barracks		..	As required.
76	Soda, washing	For military prisons and detention barracks		..	As required
		For cook-houses of British troops where Indian cooks have been dispensed with		..	As required. Cost to be met from fixed allotment.
77	Squeegees	For 1st class gymnasia at Secunderabad, Lucknow, Ambala and Poona	No.	2	Per annum for each place.
78	String	For military prisons and detention barracks		..	As required.
79	Stuffing coir, straw or grass.	For mattresses in use in gymnasia	mds.	1	Per mattress if straw or grass is used (*e*) or 71¼ lbs. of coir.
80	Surahis	For cooling and distributing drinking water		..	As required. Cost to be met from fixed allotment.
		„ military prisons or detention barracks at Sialkot, *Agra, Lucknow* and Aden	%	10	Monthly on the number in use.
		For garrison school, Fort St. George		4	Quarterly.
		For Royal Artillery and Army schools at St. Thomas' Mount	No. „	6	Quarterly.

(*a*) Cost debitable to fixed allotment in case of units, etc , having such allotment.
(*b*) Not authorised where night-soil is buried under trench system.
(*c*) On the certificate of the O C. the unit that the renewal is necessitated by fair wear and tear.
(*d*) When sheeting is not available doosootie or other suitable material will be given in lieu, 25 yards being considered the equivalent to 24 lbs of sheeting.
(*e*) To be returned to S. and T. Corps when replaced by fresh supply.

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 42.—Periodical and petty supplies—*contd.*

Item No.	Articles.	Where required and for what purpose.		Authorised proportion.	
81	Tar (*c*)	For coating privy utensils in use— (*i*) For units, etc., having a fixed allotment		..	As required. Cost to be met from fixed allotment.
		(*ii*) For all other services where utensils are supplied by the State.	ozs.	6	Per mensem for each earthen utensil.
				8	Per mensem for each iron utensil.
				10	Per mensem for each wooden utensil.
		For special pattern urinals used in lines of British troops at Quetta	lbs.	2	Per urinal per mensem.
		For coating exterior of Crowley, Bradley and other pattern filth carts— (*i*) For units, etc., having a fixed allotment		..	As required. Cost to be met from fixed allotment.
		(*ii*) For others	lbs.	4	Quarterly per cart.
82	Tatties	For barracks, etc., and for thermantidotes		..	As may be fixed by Standing Barrack Committee.
		For places of public worship for which tatties were authorised prior to December 1870		..	Ditto.
83	Tin pots (1 pint)	For garrison school at Fort St. George	No.	4	Quarterly.
		" R. A. and Army schools, St. Thomas' Mount	"	4	
84	Trays, earthen	For 1st class gymnasia at Lucknow and Ambala	%	8	Monthly on number in use.
		For urinals— (*i*) Of units, etc., having a fixed allotment		..	As required. Cost to be met from fixed allotment.
		(*ii*) Other services	%	8	Monthly on number in use. For single urinals as required.
85	" iron	For iron urinals where used		..	Renewed as worn out. Cost to be met from fixed allotment if in receipt of such allotment.
86	Tubs, G. I., without lids, naunds or half casks.	For holding water for watering tatties.	No.	1	Per 2 tatties if close together, otherwise 1 per tattie.
87	Unguent (*c*) (grease 2 parts, tar 1 part).	For conservancy carts (old pattern) and water carts of— (*i*) Units, etc., having a fixed allotment		..	As required. Cost to be met from fixed allotment.
		(*ii*) Others	ozs.	8	Monthly per pair of wheels of conservancy carts.
				8	Monthly per water cart.
88	Unguent (*a*) (*b*) (*c*).	For Crowley, Bradley and other pattern filth and rubbish carts of— (*i*) Units, etc., having a fixed allotment		..	As required. Cost to be met from fixed allotment.
		(*ii*) Others	lbs. (*a*)	7	Quarterly per cart for coating interior.
			lbs. (*b*)	1	Monthly per cart.

(*a*) For interior of filth carts in proportion of pitch 5 lbs. and tar 2 lbs.
(*b*) For wheels in proportion of soap 12 ozs. and tar 4 ozs.
(*c*) Heavy mineral oil may, if desired, be drawn in lieu of tar or unguent; 16 fluid ozs. of heavy mineral oil being reckoned as the equivalent of 1 lb. of tar or 1 lb. of unguent.

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 42.—Periodical and petty supplies—*contd.*

Item No.	Articles.	Where required and for what purpose.		Authorised proportion.	
81	Tar (c).	For coating privy utensils in use— (i) For units, etc, having a fixed allotment		..	As required. Cost to be met from fixed allotment.
		(ii) For all other services where utensils are supplied by the State.	ozs.	6	Per mensem for each earthen utensil.
				8	Per mensem for each iron utensil.
				10	Per mensem for each wooden utensil.
		For special pattern urinals used in lines of British troops at Quetta	lbs.	2	Per urinal per mensem.
		For coating exterior of Crowley, Bradley and other pattern filth carts— (i) For units, etc, having a fixed allotment		..	As required. Cost to be met from fixed allotment.
		(ii) For others	lbs.	4	Quarterly per cart.
82	Tatties	For barracks, etc., and for thermanti dotes		..	As may be fixed by Standing Barrack Committee.
		For places of public worship for which tatties were authorised prior to December 1870		..	Ditto.
83	Tin pots (1 pint)	For garrison school at Fort St. George	No.	4	Quarterly.
		„ R. A. and Army schools, St. Thomas' Mount	„	4	
84	Trays, earthen	For 1st class gymnasia at Lucknow and Ambala	%	8	Monthly on number in use.
		For urinals— (i) Of units, etc, having a fixed allotment		..	As required. Cost to be met from fixed allotment.
		(ii) Other services	%	8	Monthly on number in use. For single urinals as required.
85	„ iron	For iron urinals where used		..	Renewed as worn out. Cost to be met from fixed allotment if in receipt of such allotment.
86	Tubs, G. I., without lids, naunds or half casks.	For holding water for watering tatties.	No.	1	Per 2 tatties if close together, otherwise 1 per tattie.
87	Unguent (c) (grease 2 parts, tar 1 part).	For conservancy carts (old pattern) and water carts of— (i) Units, etc., having a fixed allotment		..	As required. Cost to be met from fixed allotment.
		(ii) Others	ozs	8	Monthly per pair of wheels of conservancy carts.
				8	Monthly per water cart.
88	Unguent (a) (b) (c).	For Crowley, Bradley and other pattern filth and rubbish carts of— (i) Units, etc., having a fixed allotment		..	As required. Cost to be met from fixed allotment.
		(ii) Others	lbs (a)	7	Quarterly per cart for coating interior.
			lbs (b)	1	Monthly per cart.

(a) For interior of filth carts in proportion of pitch 5 lbs. and tar 2 lbs.
(b) For wheels in proportion of soap 12 ozs. and tar 4 ozs.
(c) Heavy mineral oil may, if desired, be drawn in lieu of tar or unguent; 16 fluid ozs. of heavy mineral oil being reckoned as the equivalent of 1 lb. of tar or 1 lb. of unguent.

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 42.—Periodical and petty supplies—*contd.*

Item No.	Articles.	Where required and for what purpose.		Authorised proportion.	
81	Tar (c).	For coating privy utensils in use— (i) For units, etc., having a fixed allotment		..	As required. Cost to be met from fixed allotment.
		(ii) For all other services where utensils are supplied by the State.	ozs.	6	Per mensem for each earthen utensil.
				8	Per mensem for each iron utensil.
				10	Per mensem for each wooden utensil.
		For special pattern urinals used in lines of British troops at Quetta	lbs.	2	Per urinal per mensem.
		For coating exterior of Crowley, Bradley and other pattern filth carts— (i) For units, etc, having a fixed allotment		..	As required. Cost to be met from fixed allotment.
		(ii) For others	lbs.	4	Quarterly per cart.
82	Tatties	For barracks, etc., and for thermantidotes		..	As may be fixed by Standing Barrack Committee.
		For places of public worship for which tatties were authorised prior to December 1870		..	Ditto.
83	Tin pots (1 pint)	For garrison school at Fort St. George	No.	4	Quarterly.
		„ R. A. and Army schools, St. Thomas' Mount	„	4	
84	Trays, earthen	For 1st class gymnasia at Lucknow and Ambala	%	8	Monthly on number in use.
		For urinals— (i) Of units, etc., having a fixed allotment		..	As required. Cost to be met from fixed allotment.
		(ii) Other services	%	8	Monthly on number in use. For single urinals as re-quired.
85	„ iron	For iron urinals where used		..	Renewed as worn ... to be met ... ment if in ... allotment.
86	Tubs, G. I., without lids, naunds or half casks.	For holding water for watering tatties.	No.	1	Per 2 tatties if ... otherwise 1
87	Unguent (c) (grease 2 parts, tar 1 part).	For conservancy carts (old pattern) and water carts of— (i) Units, etc., having a fixed allotment			
		(ii) Others			
88	Unguent (a) (b) (c).	For Crowley, Bradley and other filth and rubbish carts of— (i) Units, etc., having a ... ment			
		(ii) Others			

(a) For interior of filth carts in proportion of ...
(b) For wheels in proportion of soap 12 ozs. ...
(c) Heavy mineral oil may, if desired, be drawn ... equivalent of 1 lb. of tar or 1 lb. of unguent.

SECTION III.

SUPPLIES BY S. AND T. CORPS.

Table 42.—Periodical and petty supplies—*concld.*

Item No.	Articles.	Where required and for what purpose.		Authorized proportion.	
		For ambulances in regimental charge of—			
89	Unguent	(i) Units, etc., having a fixed allotment		..	As required. Cost to be met from fixed allotment.
		(ii) Others	ozs.	8	Per vehicle monthly.
90	Urinals, iron	For all services where authorized		..	As required. Cost to be met from fixed allotment if such received.
			%	20	Monthly on number in use.
91	Urinals, earthen	,, barracks and buildings of—			
		(i) Units, etc., having a fixed allotment		..	As required. Cost to be met from fixed allotment.
		(ii) For 1st class gymnasia at Ambala and Lucknow (iii) Others	%	8	Monthly on number in use. For single urinals as required.
92	Wash-hand basins, earthen.	For R. A. and army schools, St. Thomas' Mount	No.	6	Quarterly.
93	Wax, bees	For schools of musketry	lbs.	½	Annually per machine gun in use.
		For military prisons and detention barracks		..	As required.
94	Whiting, country	For sanitaria for musketry instruction	lbs.	50	Annually per sanitarium.
		,, *schools of musketry*	lbs.	402	,, ,, *school* (804 lbs. at Satara).
95	Wicks, 8" long	For Rippingille's dinner stoves, authorised by Table 34		1	Per stove quarterly. Cost to be met from allotment.
96	,, cotton	For the bulls'-eye lanterns in use with—guards of British units . and with—British mountain batteries		..	As required. Cost to be met from fixed allotment.
		Indian ,, ,, for artillery practice at night	ozs.	3	*Monthly.*
97	,, for solar lamps.	For lamps in use in Grant Medical College, Bombay	No.	1	Per lamp, every fourth night if necessary.

(a) Heavy mineral oil may, if desired, be drawn in lieu of tar or unguent; 16 fluid ozs. of heavy mineral oil being reckoned as the equivalent of 1 lb. of tar or 1 lb. of unguent.

SECTION IV.

SUPPLIES BY M. W. S. or P. W. D.

Table 43.—Equipment for barracks—general scale.

NOTE I.—The scale is for British troops unless otherwise stated.

II.—The scale for staff sergeants of British units is also applicable to staff sergeants with volunteer units, in departmental employ and station butchers occupying government quarters.

III.—In the Southern Army furniture is allowed for the Lieutenant General's escort and guard on the scale for other Indian guards. Soldier musicians of the band of His Excellency the Governor of Bombay on the scale allowed for British troops.

Item No.	Articles.	Scale.	
1	Boards, inventory, notice and order	...	According to requirements.
1-A	Boards, black 4′ × 3′ and easels (d)	1	Per sanitarium for musketry instruction.
2	Boxes, kit	1	per unmarried warrant officer (non-departmental), school master, schoolmistress, N. C. O. and private.
		2	per married warrant officer (non-departmental), schoolmaster, N. C. O. and private.
3	Carts, water	...	As required, if water supply fails.
4	Chairs, barrack	2	per single warrant officer (non-departmental), sergeant, schoolmaster, schoolmistress.
5	Chairs, cane bottomed	2	per married warrant officer (non departmental), schoolmaster, schoolmistress, n. c. o., and private.
6	Chairs, easy	1	
7	Cots, iron, trestle	1	I ... an odd number.
8	Forms without backs, 5′ (lecture-room)	2	per 5 men or less attending lectures at one time.
9	" " 10′	2	per plunge bath.
10	Gratings, 2′ × 2′	1	per ablution room.
11	Gratings	...	Sizes as necessary to cover drains in lavatories where such drains exist down the centre or under the place where the men have to stand.
12	Harness-racks (artillery harness)	...	*As required for temporary harness rooms.*
13	Jhamps with 2 poles each (temporary barrack buildings)	...	As required.
14	Ladders, bamboo	8	per fire engine for other than thatched barracks.
		15	" for thatched barracks.
15	" fire 1¼″, G. I. wire rope, with bamboo treads	...	For thatched roofs at 1 per 30 running feet of roof. Extra bamboo ladders as required.
16	" lamp	1	per barrack.
17	Padlocks and keys for kit boxes (a)	1	per unmarried warrant officer (non departmental), schoolmaster, schoolmistress, N. C. O. and private.
		2	*per married warrant officer (non-departmental), school-master,* N. C. O. and private.
18	Padlocks, with duplicate keys	1	set per kit box for holding pouch ammunition of British and Indian troops.
19	Punkah fringes, 18″ deep, ropes and canes (b)	...	As required in all public quarters except liquor bars.
20	Racks with drawers (quartermaster's stores)	7	per regt. of cavy. or battn. of infy.
21	" without drawers	5	per head quarters wing of cavy. and infy.
		3	per sanitarium.
		2	per detached wing of cavy. and infy.
		1	per battery or coy. of artillery.
22	*Racks, wooden for laundries—*		
	For dirty clothing room	...	For units for whom laundries are provided. (For details, see Type plan, No. 74 B. I. series.)
	For making-up room	...	
23	Skittles (pins and balls) (c)	1	set per skittle alley.
24	Stools, 2′ high	1	per private ablution room.
		1	per British artificer employed in saddler's shop.
25	Tables, 6′ × 2′ 10″, B. F., No. I.	1	per warrant officer (non-departmental), schoolmaster, schoolmistress, sergeant and married man.
26	Tables for laundries—		
	For dirty clothing room	1	Per cavalry and infantry regiment for whom laundries are provided. Per unit, for other units for whom laundries are provided.
	For making-up room	...	For all units for whom laundries are provided. (For details, see Type plan No. 74 B. I. series.)

(a) A padlock and key will be issued to each unmarried soldier on arrival or enlistment in India, and will thereafter be maintained at his own expense.
A married soldier on arrival in India will receive two padlocks and keys and similarly maintain them.
A single soldier on marriage in India will receive an additional padlock and key and similarly maintain them.

(b) Washed at the expense of the unit if required.

(c) Maintained at expense of unit after first issue.

(d) Three black boards and easels are allowed to the E. G. A. Company at Katajahar extructional purposes.

SECTION IV.

SUPPLIES BY M. W. S. or P. W. D.

Table 43.—Equipment for barracks—general scale—*contd.*

Item No.	Articles.		Scale.
27	Thermantidotes	...	As determined by Standing Barrack Committee.
28	Trestles, iron (store rooms of British and Indian troops)		As required.
29	Tubs, G. I., with hinged covers, padlocks and keys, and wooden stands	1	per building in the lines of British corps, except at Aden, in which a supply for drinking water is required, but where a pipe supply is laid on to barracks these tubs are authorised only when it is necessary to sterilise the drinking water before use.
30	Tubs, G. I., with lids	4	per company R. G. A. and 18 per battn., British infy., at Aden for the storage of the daily ration of condensed water.
31	Wash-stand	1	per married warrant officer (non departmental), schoolmaster, n. c. o., and private.
32	Wrenches	2	per battery or coy. R. A., or coy. of infy.
		4	per squadron of cavy.
		1	per 50 men at sanitaria.
	For armourers' shops, British and Indian troops at all stations and sanitaria		
33	Almirah, with padlock and key	1	per shop as fixtures
34	Arm-racks, for 80 or 100 stand of arms	1	per shop as fixtures
35	Bench, 32" high, 3' wide, with fittings for 2 vices and lathes	1	per shop as fixtures
36	Blocks, wood, anvil	1	per shop as fixtures
37	Frames, bellows	1	per shop as fixtures
38	Racks for tools, above bench	1	per shop as fixtures
39	Shelf for tools, above racks	1	per shop as fixtures
	For temperance rooms for units in barracks, excluding sanitaria		
40	Almirahs	1	per unit.
41	Cupboards	1	per unit.
42	Forms, with backs, 5'	8	per battery or coy. of artillery.
		28(a)	per unit, cavy. or infy.
43	Tables, iron trestle, 5' × 2' 6", B. F., No. 6.	4	per battery or coy. of artillery.
		14(a)	per unit, cavy. or infy.
	For writing and other purposes in barrack rooms where combined dining halls and cookhouses are provided in the lines.		
44	Forms, without backs, 5'	2	per dormitory for 16 men or less.
		4	per dormitory for 17 men or more.
45	Tables, iron trestle, 5' × 2' 6", B. F., No. 6	1	per dormitory for 16 men or less
		2	per dormitory for 17 men or more.
	For temperance rooms at sanitaria.		
46	Almirahs	1	per sanitarium.
47	Cupboards	1	per sanitarium.
48	Forms with backs, 5'	14	per sanitarium.
49	Tables, iron trestle, 5' × 2' 6", B. F., No. 6.	7	per sanitarium.
	For workshops.		
50	Benches	...	As required.
51	" with vices affixed	1	per battery for wheelers (carpenter's bench pattern with vice attached).
52	Blocks, anvil 2½ cwt. (or 2½ cwt.)	1	per battery or Ammn. Col.
53	Boards, cutting	1	per battery or R. H. A. Ammn. Col. 2 for R. F. A., Ammn. Col.
54	Composing frames	...	For printers, as required.
55	Frames, bellows	1	per battery or Ammn. Col.
56	Imposing table, with slab	...	For printers, as required.
57	Tables	...	As required.

(a) When regiments are divided a proportion of furniture to be given to each wing.

SECTION IV.

SUPPLIES BY M. W. S. or P. W. D.

Table 44.—Equipment for orderly, reading, and court-martial rooms, libraries, and sergeants' messes.

NOTE.—The scale is for British troops unless otherwise stated.

Item No.	Articles.	SCALE PER — ORDERLY ROOM. 3 or more batteries or companies, R. A.	2 or more batteries or companies, R. A.	Battery or company, R. A.	Regiment of British Cavalry	Battalion of British Infantry.	Detached wing of British Cavalry or Infantry.	Detachment of British Cavalry or Infantry under a wing.	Sanitaria of less than 200 men.	Sanitaria of over 200 men.	Library.	Reading-room.	Sergeants' mess.	Court-martial room.	REMARKS.
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
1	Boards, inventory . No.	.	.	..		...	...	...	..	...	...	...	..	...	As required.
2	Bookcases, library patt. „		..		...	...	...	.	...	..	(a)	...	...	...	
3	Chairs, barrack . „		...	..	.	...	...		...	...	...	...	(b)	..	
4	„ cane bottomed . „	3	3	3	3	3	3	3	3	3	...	...	...	8(c)	
5	Cupboards . „	..	...	..	..	...	...	..	..	...	...	...	1	...	If no fixed cupboards in walls of building.
6	Forms, with backs, 5′ „	8	4	2	8	8	4	2	2	4	(d)	(d)	...	..	
7	Ladders, lamp . „	..	...	...	...	.	...	..	.	...	...	..	...	...	One per building
8	Punkah fringes, 18″ deep ropes and canes (g). „	...	.	...	.	...	...	...	..	...	...	...	...	...	As required.
9	Receptacles, large, for wet refuse (for plains stations). „	.	...	.	.	...		...	...	...	.	...	2(i)	...	
10	Receptacles, filth, large (for plains stations). „	..	...			...	...		...	...	..	...	1	..	
11	Receptacles, small, for wet refuse (for hill stations) „	...	...	.	.	...	...	...	...	...	..	...	2(i)	...	
12	Receptacles, small, for dry refuse (for plains and hill stations). „	..		...	..	...	...	...	...	...	...	...	1	...	Per cookhouse.
13	Receptacles, small (Bradley pattern, for hill stations). „	...	...	..	...	...	...	...	...	...	...	..	1	..	
14	Tables, iron treatle, 5′ × 2′ 6″, B F. No. 6. „	4	2	2	4	4	2	2	2	2	(e)	(e)	(f)	2(c)	
15	Tables, 5′ × 2′ 10″, B F No. 1 „	...	...	..	...	...	...	..	...	...	..	..	..	1(c)	
16	Tables, cook-house, 3′ × 2′, B. F. No 3 (h). „	...	...	...	...	...	...	...	...	...	...	...	1	...	

(a) One per battery or company, R. A., wing of British cavalry or infantry and sanitarium, 2 per regiment, British cavalry or infantry (b) One per member of mess. (c) When located in buildings constructed for the purpose. (d) Two superficial feet per man. Number of men to be calculated at rate of 15 superficial feet of space per man. (e) Three superficial feet per men for whom there is space, calculated at 15 superficial feet of space per man. (f) One running foot per member of mess. (g) Washed at the expense of the unit if required. (h) Tables of smaller dimensions will be provided for use in those cases in which Tables, 3′ × 2′, cannot be conveniently issued. (i) Per cookhouse sink.

SECTION IV.

SUPPLIES BY M. W. S. or P. W. D.

Table 45.—Equipment for cookhouses and messes, rank and file.

NOTE.—The scale is for British troops unless otherwise noted.

Item No.	Articles.		Scale
1	Boards, inventory	...	As required.
2	Cupboards	1 1	per mess, rank and file per cookhouse. } Unless cupboards are fixed in walls.
3	Forms, without backs, 5′	2	per 6 men or less.
4	Receptacles, large, for dry refuse (for plains stations)	1 2	per cookhouse or kitchen for 65 to 128 men per cookhouse or kitchen for 129 to 248 men
5	Receptacles, small, for dry refuse (for plains stations).	1	per cookhouse or kitchen for 64 men or less.
6	Receptacles, small, for dry refuse (for hill stations)	1 2 4	per cookhouse or kitchen for 64 men or less. per cookhouse or kitchen for 65 to 128 men. per cookhouse or kitchen for 208 to 248 men.
7	Receptacles, small, for dry refuse (for plains and hill stations).	1	per cookhouse for regimental warrant officers, staff sergeants, and officers' quarters and mess houses when Government property
8	Receptacles, large, for wet refuse (for plains stations).	2 1	per sink for cookhouses of single men and officers' messes if Government property. per 3 families for cookhouses of married sergeants and rank and file.
9	Receptacles, small, for wet refuse (for plains and hill stations)	1	
10	Receptacles, small, for wet refuse (for hill stations)	2	
11	*Slop-pails (special pattern)*	1	per cookhouse of Nasirabad pattern.
12	Stools, 2′ high	2	per cookhouse for single men.
13	Tables, iron, trestle, 5′ × 2′ 6″, B. F. No. 6 .	1	per 6 men or less in mess.
14	„ 3′ × 2′ B. F., No. 3 (a)	3 1 1	per cookhouse for a full company. per cookhouse for quarters of warrant officers (non-departmental), staff sergeants, schoolmaster and schoolmistress. per cookhouse for married quarters

(a) See footnote (b) to Table 44.

SECTION IV.

SUPPLIES BY M. W. S. or P. W. D

Table 46.—Equipment for quarters of provost sergeant and assistant warder at Aden, (including naval cells and guard detention rooms) military prisons and detention barracks, guard and barrack detention rooms.

NOTE —The scale is for British troops unless otherwise stated.

Item Number	Articles	Guard room	Officers' Guard room.	Set of detention rooms.	Military Prisons and Detention Barracks: Dagshai	Peshawar.	Sialkot.	Lucknow	Quetta.	Thayetmyo	Trimulgherry.	Karachi	Hyderabad	Poona.	Aden, including naval cells and guard detention room	Quarters of provost sergeant and assistant warder at Aden.	Remarks.
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
1	Almirah, large			1	1	1	1	1	1	1	1	1	1	1	1		
2	Almirahs, small for books				1	1	1	1	1	1	1	1	1	1			
3	Apparatus, hot water					1			1								
4	Benches, workshop, 10′×4′										2						
5	,, ,, 14′×4′										2						
6	Bins, rubbish															2	
7	Blackboards and easels				1	1	1	1	1	1	1	1		1	1		
8	Boards, inventory, notice, order, etc	(a)	(a)	(a)	(a)	(a)	(a)	(a)	(a)	(a)	(a)	(a)	(a)	(a)	(a)	(a)	(a) As required.
9	Boxes, coal, small						2		7								
10	,, kit				1	1	1	3	1	1	1	1	1	6	1	4	
11	Carts, water							1									
12	,, filth (Crowley, Bradley or other suitable pattern)							1		1				1			
13	Carts, rubbish							1						1			
14	Carts, cookhouse water							1						1			
15	Chains, padlocks and keys	(c) 1															(b) Also for use in provost sergeants' quarters (c) Each guard room of British and Indian corps in which regimental treasure chest is kept.
16	Chairs, barrack	(d)					6	7	2		0	4		23	5(b)		(d) One allowed for each Indian officer in garrison guard rooms.
17	,, cane bottomed		6														(e) One allowed for each Indian officer on garrison guard and for Indian troops in Fort Allahabad
18	Charpoys	(e)	...														
19	Commodes		1														
20	Cots, trestle, complete	(f)													(g) 8		(f) Allowed for guard rooms of British corps in proportion of one for each man on guard and for Indian troops furnishing guards at the following stations:—
21	Cots, newar (with mosquito poles and frames)		1														
22	Couches															(h) 2	1st, 2nd and 3rd Divisions—Fort Govindgarh; the Fort and Government House at Lahore; Murree; the mobilization godowns at Peshawar and the Commander-in-Chief's residence at Simla
23	Cupboards				3	2	2	3	1	2	3	1	1	6			
24	Dressers, small														(b) 2		7th and 8th Divisions—Agra Fort, Cossipore; Dackinsore; Dum Dum, Gun Carriage Factory, Jubbulpore, Fort Fulta; Ishapore, Nos III and IV Redoubts, Lucknow.
25	Forms, without backs, 5′	(i)			12	6	8	12	6	8	12	4	2	30	(j) 12	..	

SECTION IV.

SUPPLIES BY M. W. S. or P. W. D.

Table 46.—Equipment for quarters of provost sergeant and assistant warder at Aden, (including naval cells and guard detention rooms) military prisons and detention barracks, guard and barrack detention rooms.

Item Number	Articles.	Guard room.	Officers' Guard room	Set of detention rooms	Military prisons and detention barracks										Aden, including naval cells and guard detention room	Quarters of provost sergeant and assistant warder at Aden	Remarks
					Dagshai	Peshawar.	Sialkot.	Lucknow.	Quetta	Thayetmyo.	Trimulgherry	Karachi.	Hyderabad.	Poona			
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
26	Padlocks and keys	.		.		40	60	100	23		65	24		203	(l)21	...	6th Division and Aden Bde —Aden and Butchers Island, Bombay
27	Poles for mosquito curtains sets	(r)	(r)1													..	(g) For guardroom, provost sergeant and assistant warders' quarters.
28	Punkah fringes, 6" deep. No. ropes and canes.	(k)														...	(h) Provost sergeant's quarters
29	Reading desks . . .													1			(i) Two running feet per man on guard, British and Indian.
30	Receptacles, large, for cook-houses . . .						2	6	2		2	2		10	(m)5		(j) Detention barracks, detention rooms, warder's quarters
31	Receptacles, filth, large for privies (for plains stations)	(n)		(n)		2	2	6			2	2		7	1	..	(k) For guardrooms as required. Washed at expense of unit.
32	Receptacles, filth, large, for urinaries (for plains stations)	(o)					2					1		11			(l) For detention barracks, store rooms, cook houses and almirahs
33	Receptacles, filth, small, for privies (Bradley pattern) for hill stations	(n)		(n)		2											(m) For detention barracks, provost sergeant and assistant warders' quarters.
34	Receptacles, filth, small, for urinaries (Bradley pattern) for hill stations.	(o)															(n) One per latrine to garrison or regimental guard and detention rooms.
35	Stands for tubs, galvanised iron										1			6			(o) One for each urinary
36	Stocks, prison														2		
37	Sentry boxes	(p)															(p) One per building not having a verandah on which a British sentry is regularly posted, and one per British squadron or battery when horses' lines are in the open Indian troops will only be supplied with sentry boxes in special cases under the sanction of the Divisional Commander.
38	Stools, prison				1	...	1	1	1	1	1	1	1	..		...	(q) One running foot per man.
39	Tables, iron trestle, 6'×2½', B F. No. 6.	(q)	2	2	6	3	4	12	2	4	10	1	1	15	2	..	
40	Tables, 5'×2'–10", B F. No 1									...						1	
41	" camps, B. F. No. 41						..		...	..					...	1	(r) 1 set of 4 poles per curtain, other than bell shaped authorised for guard rooms and officers guard rooms by Table 34.
42	" office, with drawers, B. F No 34.				1	1	1	1	1	1	1	1	1	2	..		
43	" cookhouses 3'×2'				1	1	1	1	1	1	1	1	1	1	..	..	
44	Thermantidotes . . .			(s)		..		..						..			(s) As determined by Standing Barrack Committee.
45	Tubs, galvanised iron . .			..	..	..	2	...	..	..	1			...	...		
46	Wood, teaks planks . .	...	...	..	...	..	..	...		...	..			25	...	...	

SECTION IV.

SUPPLIES BY M. W. S. or P. W. D.

Table 47.—Equipment for Army Schools and Inspectors.

NOTE.—The scale is for British troops unless otherwise stated.

Item No.	Articles.	SCALE FOR ADULT SCHOOLS. Thr[illegible] co[illegible] -eries or	Tw[illegible] co[illegible] -eries or	S[illegible]n co[illegible] or[illegible] -ttery or with its	Sin[illegible] co[illegible] -ttery or	Reg[illegible] lic[illegible] or batta-	Wi[illegible] or[illegible] cavalry try.	Det[illegible] inf[illegible] alry or g.	CONVALESCENT DEPÔTS: Exceeding 500 men.	CONVALESCENT DEPÔTS: From 200 to 500 men.	CONVALESCENT DEPÔTS: Under 200 men.	Schoolmaster.	Acting Schoolmaster's classes (h)	4 adults or growing children attending school at any one time	20 pupils attending school at any one time.	12 pupils attending school at any one time	8 pupils attending school at any one time.
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
1	Almirahs, large . No	...	...	...	...	...	...	...	...	...	...	...	...	...	..	...	...
2	Blackboards, and easels (g). „	5	4	2	3	5	4	3	5	4	3	...	4	...	...	...	...
3	Boards, inventory . „	..	...	...	..	..	.	..	...	.	...	...	...	...	...	...	...
4	Bookcases, library pattern (a) (g). „	2	1	1	1	2	1	1	2	1	1	...	2	...	...	...	...
5	Bookshelves . . „	..	...	...	.	...	...	...	...	...	...	...	...	...	...	...	..
6	Boxes kit, with padlocks and keys (d) „	...	..		...		...	...	...	...	...	...	..	.	...	...	...
7	Chairs, barrack (g) „	..		..	..	..		...	...	...	..	1	...	...	.	...	...
8	„ cane-bottomed (g). „	1	1	1	..	1	1	1	1	1	1	...	1	...	.	..	...
9	Desks, long . . „	...	...	..	.	.	..	..	.	.	...	...	8	1	...	...	...
10	„ 9′ long, 21″ high in front „	...	...	..	..	...	...	..	.	...	...	...	...	...	...	...	...
11	„ 3′ long, with dais B. F. No 32 „	...	..	..	...	...	.	...	..	..	...	1	1	...	..	...	...
12	„ lecturing . . „	...	...	..	.	..	...	...	...	...	...	...	1	...	...	...	...
13	Forms, with backs, 7½′ „	..	..	.	...	.	..	...	...	...	..	..	...	...	...	...	...
14	„ high, without backs, 2′ high and 9′ long. „	..	...	...	...	..	.	.	.	...	...	...	...	...	1	...	...
15	„ middling, without backs, 1′ 9″ high, 9′ long „		...	...	..	..			.	..	...	...	...	...	...	1	...
16	„ low, 1′ 6″ high, 9′ long	..	...	...	...	...	...	...	...	...	...	...	8	...	...	...	1
17	„ with backs, 6′ long, 15″ high „	...	..	...	...	.	...	...	..	..	...	...	...	...	...	...	...
18	Map stands . „	2	1	1	..	2	1	1	2	2	1	...	1	...	...	...	...
19	Map racks, with 10 hooks. „	1	1	1	.	1	1	1	1	1	1	..	...	...	...	...	...
20	Pointers, long . . „	4	3	2	2	4	3	2	4	3	2	...	2	..	...	...	...
21	„ short . . „	4	3	2	2	4	3	2	4	3	2	...	..	...	...	...	...
22	Punkah fringes 18″ deep ropes and canes (f). „	...	...	..	...	...	...	...	...	...	...	...	...	...	...	...	...
23	Tables 5′ × 2′ 10″ B. F. No 1. „	...	..	...	...	...	...	...	...	...	...	...	...	...	...	...	...
24	„ office with drawers B. F. No. 34. „	...	.	...	...	...	...	...	...	...	..	...	...	...	...	...	...
25	Trunks, camel, with padlocks, keys and box for industrial materials. „	3	2	1	1	3	2	1	2	2	1	...	...	...	...	...	...
26	Washhand stands „	...	..	...	...	...	...	...	.	...	...	...	...	...	...	...	...

[illegible] will be supplied [illegible]

SECTION IV.

SUPPLIES BY M. W. S. or P. W. D.

Table 47– Equipment for Army Schools and Inspectors.

NOTE.—The scale is for British troops unless otherwise stated.

SCALE FOR INFANT SCHOOLS.

or heavy battery or howitzer battery or mountain battery or company, R. G. A.	Battery, R. F. A., with ammunition column.	2 batteries, artillery with or without ammunition column, or 3 or 4 batteries, R. A., without ammunition column.	2 or more companies, R. A.	3 or 4 batteries, R. A., with ammunition column	Battalion of Infantry.	Battalion of Infantry, with 1 or 2 companies, detached	Wing of regiment of cavalry or battalion of infantry	Battalion of Infantry with 3 companies detached or 3 detached companies.	2 detached companies.	Convalescent depôts	Schoolmistress	6 infants attending school at any one time where no permanent gallery is provided.	Each Inspector's office.	REMARKS.
20	21	22	23	24	25	26	27	28	29	30	31	32	33	34
.	...	.		...	..	..	.	...	..	..	..	...	1	
..	..	1	1	1	1	.		...	.	1	.	..	...	
...		.	..	..		...	.			.		...	..	As required.
...	...	1	1	1	1	.	1	.	...	..	..		1(b)	
...	..	...		..	.	..	..	..		.	..	...	1(c)	
...	..			.	...	.	...	.	...	...	...	..	..	
	...	.	..	.	...		..	.	...	..	1	..	...	
...	..	1	1	1	1	..	1	..	...	1	...	..	1	
... 2	3	3	..	4	6	4	3(e)	3	2	3	..	...	..	
.	...		...	...	...	...	..	...	...	...	1	...	...	
...	...	...	...	..	.	..	...	.	..		...	...	...	
...	...	...	...	..	...	..	..		..	..		1(e)	...	
...	...	...	.	...	..	...		...		...	...	...	...	
...	...	...	...	...	...	..	..		...	...	...	...	...	
2	3	3	...	4	6	4	3(e)	3	2	3	...	...	...	
...	...	...	...	...	...	...	.	...	..	...	...	...	...	One per 3 elder girls attending infants school for needle work.
...	...	...	...	...	...	...	...	...	...	...	...	...	...	
...	...	...	...	...	...	...	...	...	...	...	...	...	..	
...	...	1	1	1	1	...	...	...	...	1	...	...	...	
...	...	1	1	1	1	...	...	...	...	1	...	...	...	As required Not allowed for inspector's office.
...	...	...	...	...	...	...	...	.	...	...	...	...	...	
...	...	...	...	...	...	...	...	...	..	..	...	...	...	2 per industrial school for cutting and needle work.
...	...	...	...	...	...	...	...	...	...	..	...	...	1	
...	...	...	...	...	...	...	...	...	...	...	...	..	...	
	...	...	...	...	...	...	...	...	...	...	...	...	...	1 per Infant and sewing school of British troops.

uld be of 4 different heights, viz., 9", 12", 15", and 18"; and issued in order from lowest to highest, e.g., if three forms
ed, three lowest in order, viz., 9", 12", and 15" are to be issued, if five forms are required two of lowest and one each of
'orms of 18" are to be supplied with foot rails 4" from the ground.

expense of unit if required.

to the scale given in column 3, 2 extra "Blackboards and easels" and one extra "Bookcase". "Chair—barrack"
r—cane bottomed" are authorised for the Royal Artillery School at Bangalore.

ndi, Meerut, Lucknow, Kirkee, and Bangalore.

aly.

SECTION IV.

SUPPLIES BY M. W. S. or P. W. D.

Table 48.—Equipment for gymnasia.

Item No.	Articles.	Scale of apparatus for 1st Class gymnasia. Fixed	1st Class gymnasia. Moveable.	Regimental or 2nd class gymnasia. Fixed.	Regimental or 2nd class gymnasia. Moveable.	Remarks.
1	Almirahs, large	1 (a)	...	..	..	(a) For Ambala.
2	Arm racks	1	..	...	..	
3	Bars, horizontal	1	...	1	.	
4	Bars, parallel	.	1		1	
5	Bars, wall	1 set of 20 stalls	..	1 set of 10 stalls	.	
6	Beams, double double	1 (b)		-	.	(b) One upright to be fixed to the wall.
7	Beams, single double	..	..	1 (b)	.	
8	Benches, 4' long × 3½' high × 1¼' wide (c)	.	1	.	1	(c) Made of stout wood, with very stout legs, to give weight and make it firm for working on.
9	Boards, spring (g)	.	2	..	1	(g) For vaulting horse.
10	Boxes, kit, with padlocks and keys	..	4		2	
11	Chairs, cane bottomed		8	.	.	
12	Forms, without backs, 5'		24		..	
13	Jumping standards		1	.	1	
14	Padlocks, iron, 3"		(d)		(d)	(d) Two for Ambala and one each for Poona and other gymnasia.
15	Do. do 2"	..	(e)	.	(e)	(e) Three for Ambala and one each for Poona and other gymnasia.
16	Padlocks, and keys, iron, with labels and split rings		(f)	...	.	(f) As required.
17	Ropes, vertical		6	..	2	
18	Shelves	1		1	...	
19	Tables, iron trestle, 5' × 2' 6" (B F No. 6)		4	...	2	
20	Vaulting horses		2	..	1	

Table 49.—Equipment for authorised prayer rooms.

Item No.	Articles.	Authorized proportion.	Remarks.
1	Bookshelves, or bookcases	2 per regt. of cavy., wing of infy. or sanitarium. 2 per battn. of infy. 3 per two battns. of infy. 1 additional for every two batteries [illegible] mpanies, R. A. 1 [illegible] itarium.	
2	Chairs, cane-bottomed	[illegible]	
3	Forms, with backs, 6'	[illegible] sanitarium. [illegible] per battn. of infy. 18 per two battns. of infy. 2 additional for each batty. or coy., R. A.	
4	Punkah fringes 18" deep with ropes and canes (a).	As required.	(a) Washed at the expense of the unit using the prayer room.
5	Tables, 6' × 3' 6" B. P. No. 37.	4 per regt. of cavy., wing of infy 5 per battn. of infy. 8 per two battns. of infy. [illegible] for each batty. or c[illegible]	

SECTION IV.

SUPPLIES BY M. W. S. or P. W. D.

Table 50.—Conservancy equipment other than carts

NOTE I.—The scale is for British troops unless otherwise stated.

(ii). The authorised scales of filth and rubbish carts are laid down in Tables 4, 5, 6, 7, 8, 12, 46, 53 and 68.

Item No	Articles	Scale
1	Boards, inventory	As required.
2	Buckets, G. I. (urine)	As required for hospitals of native troops equipped with portable latrines
3	Commodes	
4	Privy pans, G. I. (filth)	
5	Receptacles, filth, large (For privies in plains stations.) (a)	
6	Receptacles, filth, large (For urinaries in plains stations.)	
7	Receptacles, filth, small (Bradley pattern for privies in hill stations) (a)	men. 2 per latrine to barracks for single men accommodating under 50 men. 4 per barracks for married men with 20 sets of quarters or less 6 per barracks for married men with more than 20 sets of quarters. 1 per latrine to warrant officers (non departmental) and staff sergeant's quarters. 1 per set of 6 officers' quarters or their equivalent.
8	Receptacles, filth, small (Bradley pattern for urinaries in [illegible] tions.)	
9	Seats, necessary for latrines without fixed seats	
10	Stools, privy	
11	Tripods, iron 1' high (For urinaries not on the trough system.)	10 per horse or field battery, and squadron of cavalry. 5 per mountain battery, company of artillery, and company of infantry.

(a) Are also allowed according to requirements for servants' privies attached to officers' quarters and Government mess houses. For lines of British troops at Steamer Point, Aden, receptacles, filth, small, are supplied.

SECTION IV.

SUPPLIES BY M. W. S. or P.W. D.

Table 51.—Equipment for Standing Camps for British Troops at Ambala, Meerut, Chingri Khal and Bareilly

Item No.	Articles.	Where required and for what purpose.	Authorized proportion.
1	Almirahs	For temperance rooms	[illegible]
2	Arm racks—	Guards, etc	1 per 8 men (not authorised for Chingri Khal). 1 ,, quarter guard. 1 ,, rear guard.
3	Boxes, kit (a)	..	2 per company for ammunition. 1 ,, man or woman (not authorised for Chingri Khal).
4	Chairs, cane bottomed	Orderly rooms	4 per orderly room.
5	,, easy	For married quarters	1 per married warrant officer (non-departmental), schoolmaster, and schoolmistress, n. c. o., and private.
6	Cots, iron trestle	Guard, N C O's and *men.*	36 for the R. G. A. guard at Chingri Khal, if available from stock.
7	Cupboards	For temperance rooms	1 per wing of British infantry or cavalry detachment aggregating in strength to half a battalion and per batty. or coy of R. A. (or 2 batteries or companies, R. A., if encamped together.
8	Forms, with backs	Orderly-rooms Quartermasters' stores	2 per orderly room 2 quartermasters' stores.
9	,, with backs 5'	For temperance rooms (*b*)	14 per wing of British infantry or cavalry or detachments aggregating in strength half a battalion. 8 per batty, or coy., R. A. (or 2 batteries or companies, if encamped together).
10	,, without backs	Guards and sergeants' mess.	[illegible]
11	Receptacles, large (to be painted white)	Cook-houses	2 per cookhouse.
12	Tables, 3' × 2', B. F., No. 3(*c*)	Do.	1 ,, do
13	,, iron trestle, 5'×2'6", B. F., No. 6	Orderly-rooms Quartermaster's stores Men's mess Guards Do. Sergeants' mess	1 ,, orderly room. 1 ,, quartermaster's stores. 1 ,, 6 men or less, if available from stock 1 ,, quarter guard, if available from stock. 1 ,, rear guard, if available from stock. 1 ,, 8 sergeants, if available from stock.
14	,, 5'×2' 10", B. F., No 1	Married quarters	1 ,, married quarter
15	Tables, iron trestle 5'×2½', B. F, No 6	For temperance rooms (*b*)	7 ,, wing of British infantry or cavalry detachments aggregating in strength to half a battalion. 4 per batty. or coy., R. A, (or 2 batteries or companies, if encamped together).
16	Trestles, iron	Quartermaster's stores	6 per battalion of infantry. 1 ,, battery of artillery. 1 ,, company of infantry or battery of artillery.
17	Tubs, G. I. (with stands)	For drinking water	1 for whole of married quarters in each battalion or battery
18	Wash-stand	For married quarters	1 per married warrant officer (non-departmental), schoolmaster, schoolmistress, N.C.O., and private.

[illegible] latrine furniture and [illegible]

SECTION IV.

SUPPLIES BY M. W. S. or P. W. D.

Table 52.—"Equipment for British troops in camps at Camp Barian, Cherat, Dalhousie, Ghora Dhakka, Kailana, Chakrata, Khan Spur, Kasauli, Ranikhet and Upper and Lower Topa."

Item No.	Articles	Where required and for what purpose.	Authorized proportion.	
1	Almirahs	Temperance rooms	1	per wing of British infantry or cavalry detachments, aggregating in strength half a battn., and per batty. or coy. R. A., (or 2 batteries or companies if encamped together).
2	Arm-racks, with padlocks, keys, brass or copper, and metal labels	Guards, etc.	1	per tent.
			1	per quarter-guard.
			1	*per rear-guard.*
3	Black boards and easels	Schools	1	per camp.
3A	Boards, Black, 4′ × 3′ and easels	For musketry instruction	1	Per camp at Dalhousie, Kailana and Ranikhet.
4	Boxes, kit	Orderly rooms, etc.	2	*per married man and N.-C. O.*
			1	per single man.
			2	per orderly room.
5	Boxes, kit, with padlocks, keys, brass or copper, and metal labels.	For holding ammunition	2	per battery or company.
6	Chairs, barrack	Orderly rooms	2	per orderly room.
7	„ cane-bottomed	Orderly rooms	2	Ditto
		Married quartes		
8	Chairs, easy	Married quarters	2	*per married warrant officer* (non-departmental), schoolmaster, schoolmistress, N.C.O., and private.
9	Commodes	Quarters	1	per family
10	Cots, iron trestle, with iron planks	Do	2	per married man.
			1	for each child over 10.
			1	for every 2 children under 10
11	Cupboards	Temperance rooms		[illegible] together).
		Mess utensils	1	per cookhouse.
			1	*per sergeants' mess.*
12	Forms, with backs, 5′	Libraries, etc.		[illegible]
		Sergeants' mess		
		Temperance rooms (*a*)		[illegible] per 2 batteries or companies if encamped together).
13	„ without back 6′	Messes	2	per 6 men or less.
		Guards	1	*per quarter-guard.*
			1	per rear-guard.
14	„ high, without backs, 2′ high, 9′ long	Schools	3	per camp.
15	„ middling, without backs, 1′ 9′ high, 9′ long.	*Do*	2	Do.
16	„ low, without backs, 1′ 6′ high, 9′ long.	Do	3	Do.
17	*Receptacles, small*	*Cookhouses*	1	*per cookhouse.*
18	„ filth, small	Privies	1	per privy, if under 8 seats.
			2	per privy, if over 8 seats.
		Urinaries	1	per urinary.
19	Tables, iron trestle, 5′ × 2′ 6″, B. F., No. 6.	Quarters	1	*per married man and N. C. O.*
		Messes	1	per 6 men or less.
		Librar'es	4	per camp.
		Orderly room	2	per orderly room.
		Sergeants' mess	1	*per sergeants' mess.*
		Temperance room (*a*)	7	per wing of British infantry or cavalry detachment aggregating in strength half a battn; and batty. or coy R. A., (or per 2 batteries or companies if encamped together).
20	„ 3′ × 2′, B. F., No. 3 (*b*)	Cookhouses	1	per cookhouse.
21	Trestles, iron	Store rooms	6	per camp.
22	Tubs, G. I., with wooden stands	For drinking water	1	per battery or company.
23	Wash-stand	Married quarters	1	per married warrant officer (non-departmental), schoolmaster, schoolmistress, N.C.O., and private.

(*a*) For each complete regiment or battalion the numbers of forms and tables will be proportionately increased.
(*b*) See footnote (*b*) Table 44.

SECTION IV.

SUPPLIES BY M. W. S. or P. W. D.

Table 53.—Equipment for British soldiers temporarily employed on Government Military Farms.

Item No.	Articles.	Authorized proportion.
1	Boxes, kit	1 per single man. 2 per married man.
2	Chairs, barrack	1 per single man accommodated in permanent quarters. 2 per married man accommodated in permanent quarters or tent.
3	Chairs, cane bottomed	
4	Chairs, easy	1 per married man.
5	Commodes	1 per single or married man
6	Cots, iron trestle	1 per single man. 2 per married man. 1 for each child over 10 years and 1 per two children under 10 years.
7	Cupboards, mess	1 per cookhouse.
8	Forms, without backs, 5'	1 per 3 single men, or less, accommodated in tents.
9	Receptacles, filth	1 per tent or separate quarter.
10	Tables, cookhouse, 3' × 2', B. F., No. 3 (*a*)	1 per cookhouse.
11	Tables, iron trestle, 5' × 2', 6", B F, No 6	1 per single or married man accommodated in permanent quarters 1 per 6 single men, or less accommodated in tents. 1 per married man accommodated in tents.
12	Wash-stand	1 per married man.

(*a*) See footnote (*h*) to Table 44.

SECTION IV.

SUPPLIES BY M. W. S. or P. W. D.

Table 51.– Furniture authorized for the Staff College, Quetta.

Item No.	Articles.		Scale.	Remarks.
1	Almirahs, large	No.	14	
2	„ lamp	„	1 (a)	
3	„ small	„	1	
4	„ map	„	4 (a)	
5	Blackboards and easels	„	4	
6	Boards, name	„	8	
7	„ notice and easel	„	1 (a)	
8	„ notice	„	3 (a)	
	„ „	„	1	
9	Bookcases, glazed	„	57 (a)	
	„ „	„	8 (b)	
10	„ collapsible	„	2 (a)	
11	Bookshelves	„		As required.
12	„ open	„	1 (a)	
13	„ portfolio	„	1 (a)	
14	„ revolving	„	1 (a)	
15	Boxes, kit	„		
16	Cases, for maps	„	3 (a)	
17	Chamber pot stands	„	1	
18	Chairs, cane-bottomed	„	137	
19	„ arm, office	„	27	
20	„ easy	„	58 (a)	
21	Coal scuttles	„	1	per fireplace.
22	Curtain poles (c)	„	14 (a)	
	„ „	„	4 (b)	
23	Commodes	„	4	
24	Desks, standing	„	2 (a)	
25	„ with cupboard and flap	„	4	
26	Fenders	„	1	per fireplace.
27	Fireguards	„	1	Do
28	Fire irons	Sets	1	Do.
29	Forms, with backs, 5′	No	3	
30	„ without backs, 5′	„	15	
31	Ladders, 16′	„	1	
32	„ 10′	„	1	
33	„ 14′, bamboo	„	2	
34	„ folding 6½′	„	2 (a)	
35	„ lamp	„	3	
36	Platforms, with steps	„	4	
37	Racks, record	„	...	As required.
38	„ pigeon hole	„	8	
39	„ book	„	1 (a)	
40	„ map	„	1 (a)	
41	„ letter	„	1	
42	„ office table	„	1 (a)	
43	„ hat	„	4 (a)	
44	Receptacles, cookhouse, dry refuse	„	61	
45	„ „ wet refuse	„	53	
46	Screens, folding	„	5	
[illegible]	[illegible]	„	1	
[illegible]	[illegible]	„	3	
[illegible]	[illegible]	„	4	
[illegible]	[illegible]	„	2 (a)	
51	Tables, 5′ × 3′ (d)	„	60	
52	„ 12′ × 6′	„	1	
53	„ iron, trestle, 5′ × 2′, 6· B. F., No. 6	„	10	
54	„ war game, 36′ × 12′	„	1	In 12 pieces.
55	„ 3′ × 2½′	„	93	
56	„ 9′ × 4′	„	1 (a)	
57	„ 7′ × 3½′	„	1 (a)	
58	„ writing	„	2 (b)	
59	Teapoys	„	11 (a)	
60	Washstands	„	1	

(a) For general library. (b) For library for directing staff. (c) Brackets to carry the curtain poles will be provided as fixtures to the building. (d) or other smaller convenient sizes.

NOTE.—Such articles of furniture as are not included in the above table will be bought under the authority of the Commandant and paid for from the contingent grant of the college.

SECTION IV.

SUPPLIES BY M. W. S. or P. W. D.

Table 55. Equipment for Cavalry School, Saugor.

Item No.	Articles.	For what purpose.	Authorised proportion.	
1	Almirahs	Quarters of—		
		British officers other than students	2	per quarter.
		British officer students	1	Ditto.
2	Almirahs, large	Commandant's office	2	
3	Benches	Workshops	1	per workshop.
4	Blackboards, and easels	Lecture halls	2	per hall.
5	Boards, inventory	Officers' and other quarters, except liquor bar.	1	per quarter.
6	Bookshelves	Commandant's office	4	
7	Boxes, kit	British N. C. O. students	1	per single N. C. O.
		Commandant's office	2	
		Lecture halls	1	per hall.
		Riding school office	1	
		Ammunition-British and Indian ranks	4	
8	Carts, watering	Manages	1	per manage
9	Chairs, barrack	British N. C. O. students	1	per single N. C. O.
		Commandant's office	5	
		Fencing hall	1	
		Lecture hall No. 2	21	
		Sergeants' mess	1	per member
10	Chairs, cane bottomed	Quarters of—		
		British Officers other than students	6	per quarter.
		British officer students	3	per quarter
		Commandant's office	8	
		Lecture hall No. 1	52	
		Riding school office	12	
11	Chairs, easy	Quarters of—		
		British officers other than students	2	per quarter.
		British officer students	1	per quarter.
12	Commodes			
			2	per quarter.
			1	per quarter.
			1	
13	Cots, iron trestle	British N. C. O students	1	per single N. C. O.
14	Cots, newar, with poles	Mess rooms	1	per mess room.
		Sergeants' mess cookhouse	1	
15	Cupboards	Quarters of—		
		British officers other than students	2	per quarter.
		British officer students	1	per quarter
16	Desks, long	Lecture hall No 2	8	
17	Forms, with backs, 5′	Commandant's office	1	
18	Forms, without backs, 10′	Lecture hall No 2	15	
		Plunge baths	2	per plunge bath.
19	Ladders, bamboo	Fire engine	8	
20	Ladders, lamp	Barracks	1	per barrack.
21	Locks			As required.
22	Map, stands	Lecture halls	2	per lecture hall.
23	Map, racks with 10 hooks	Ditto	1	per lecture hall.
24	Punkah fringes, 18″ deep, ropes and canes	British troops barracks except liquor bar.	...	As required.
25	Pointers, long	Lecture halls	2	per lecture hall.
26	Racks, with drawers	Quartermaster's stores	3	
27	Racks, without drawers	Ditto	3	
28	Receptacles, large, cookhouse, for wet refuse.	Officers' and sergeants' messes	2	per cookhouse sink.
29	Receptacles, small, cookhouse, for wet refuse.	Quarters of British officer students	1	per cookhouse sink for each 6 quarters.
30	Receptacles, small, cookhouse, for dry refuse.	Cookhouses for officers' and sergeants' messes and permanent staff.	1	per cookhouse.
		Quarters of British officer students	1	per cookhouse for each 6 quarters.
31	Receptacles, large, filth	Latrines	1	per latrine.
32	Tables, writing	Quarters of—		
		British officers other than students	2	per quarter.
		British officer students	1	per quarter.
		Commandant's office	3	

SECTION IV.

SUPPLIES BY M. W. S. or P. W. D.

Table 55.—Equipment for Cavalry School, Saugor—*contd.*

Item No.	Articles.	For what purpose.	Authorised proportion.	
33	Tables, dressing, with mirror	[illegible]		
		[illegible]	2	per quarter.
		[illegible]	1	per quarter.
34	Tables, toilet	[illegible]		
		[illegible]	2	per quarter.
		[illegible]	1	per quarter.
35	Tables, 5′ × 2′—10″ B F. No. 1	British N. C. O. students	1	per single N. C. O.
		Commandant's office	6	
		Quartermaster's stores	1	
		Lecture hall No 1	25	
		Riding school office	1	
		Fencing hall	1	
36	Tables, iron trestle 5′ × 2′ 6″ B F No 5.	Sergeants' mess	1	Running foot per member.
37	Teapoys	Quarters of—		
		British officers other than students	2	per quarter
		British officer students	1	per quarter.
38	Trestles, iron	Quartermaster's stores	12	
39	Tubs, G I. hinged covers and wooden stands	Barracks	1	per barrack.

NOTE.—The permanent subordinate staff will be supplied with furniture on the scale laid down for the various ranks in the Tables concerned in section IV

SECTION IV.

SUPPLY BY M. W. S or P. W. D.

Table 56.—Equipment for Divisional, Brigade and station Staff Offices, and for station staff offices where the staff officers receive no office allowance.

Item No.	Articles.	For what purpose.	Authorised proportion.	Remarks.
1	Almirahs, large and small	For stationery, forms, maps and valuable records.	As required. Number to be fixed by Divisional or Brigade Commander.	
2	Book-cases, library pattern	For office books	Ditto.	
3	Book-shelves	Ditto.	Ditto.	
4	Boxes, kit (with padlocks and keys)	For confidential papers	Ditto.	
5	Boxes, tin	For holding stationery for courts-martial and confidential papers	Ditto.	
6	Chairs, barrack	For clerks	1 per clerk and 2 spare	
7	„ cane-bottomed	For officers	2 per officer.	
8	„ cushion, arm	Ditto	1 per office of Divisional or Brigade Commander.	
9	Commodes	Ditto.	1 per officer's water closet	
10	Dressing tables	Ditto	1 for officer's bath room, for all offices	
11	Forms, without backs, 5′	For orderlies	2 per office	
12	Pigeon-holes (sets of six)	For clerks	1 per clerk.	
13	Punkah fringes, 18″ deep, ropes and canes (a)	....	As required.	(a) To be washed at expense of office
14	Press tables	....	1 per office.	
15	Racks for stationery	For officers' tables	1 per officer.	
16	Racks for records	......	As required. Number to be fixed by Divisional or Brigade Commander.	
17	„ „ maps	....	As required.	
18	Tables, office, with drawers, B. F No. 34	For officers, head clerks and superintendents.	1 per officer, head clerk or superintendent.	
19	Tables, office 5′3″ × 2′9″ × 2′6,″ with drawers on one side, B. F. No 49.	For clerks.	1 per clerk. 1 spare	
20	Tables, bedside, H. F. No. (	Ditto.	1 per officer and 1 per clerk and one spare.	
21	„ drawing	Ditto	When considered necessary by Divisional or Brigade Commander.	
22	Towel racks	For officers	1 per office.	
23	Wash-hand stand	Ditto	Ditto	

NOTE.—All other articles considered necessary by the General Officer Commanding which are not usually supplied by the Military Works services, may be bought under his authority and paid for from the contingent grant of the office concerned.

SECTION IV.

SUPPLIES BY M. W. S. or P. W. D.

Table 57.—Equipment for Supply and Transport Offices

Item No.	Articles.	For what purpose	Authorised proportion.	Remarks.
1	Almirahs, large and small	Stationery, forms, maps and valuable records.	As required Number to be fixed by Divisional or Brigade Commander.	
2	Benches, wooden	For contractors	2 per Divisional and Station Supply office.	
3	Boards	For notices	1 per Divisional and Station Supply office.	
4	Book-cases, library pattern	For office books	As required. Number to be fixed by Divisional or Brigade Commander	
5	Book-shelves	Ditto	As required. Number to be fixed by Divisional or Brigade Commander.	
6	Boxes, kit, with padlocks and keys.	For confidential papers	As required. Number to be fixed by Divisional or Brigade Commander.	
7	Boxes, wooden	For tenders	1 per Divisional and Station Supply office.	
8	Chairs, cane-bottomed	For officers	2 per officer	
9	Chairs, barrack	For apprentices	6 per Divisional and 1 per Station Supply office	
		For clerks	1 per clerk and subordinate 4 spare per Divisional and 2 per Station Supply office.	
10	Commodes	For officers	1 per officer's water closet,	
11	Dressing tables	Ditto	1 per officer's bathroom.	
12	Forms, without backs 5'	For orderlies	2 per office.	
13	Pigeon-holes (sets of six)	For clerks	1 per clerk and subordinate	
14	Punkah fringes, 18" deep, ropes and canes (a)	... ..	As required.	(a) To be washed at the expense of office.
15	Press tables	......	1 per office	
16	Racks, for stationery	For officers' tables	1 per officer.	
17	Racks, for records	......	As required. Number to be fixed by Divisional or Brigade Commander.	
18	,, for maps	.. ...	As required. Number to be fixed by Divisional or Brigade Commander.	
19	Tables, office with drawers B. F. No. 34.	For officers, head clerks and superintendents.	1 per officer, clerk or Superintendent.	
20	Tables, office 5'3" × 2'9" × 2'6" with drawers on one side, B. F. No 49	For clerks and subordinate	1 per clerk or subordinate. 1 spare.	
21	Tables, bed-side B. F. No. 66	For officers and clerks	1 per clerk and subordinate 1 spare	
22	Tables, iron trestle 5' × 2' 6" H F No. 6.	For apprentices	6 per Divisional and 1 per Station Supply office.	
23	Towel racks	For officers	1 per office.	
24	Wash-hand, stand	Ditto	1 per office.	

NOTE—All other articles considered necessary by the General Officer Commanding which are not supplied by the Military Works Services under this Table, may be bought under his authority and paid for from the contingent grant of the office concerned.

SECTION IV.

SUPPLIES BY M. W. S. or P. W. D.

Table 58.—Equipment for schools of musketry.

Item No.	Articles.		Scale per Lecture room, School of musketry.	Scale per Each officer's quarter at Changla Gali and Pachmarl.	Remarks.
1	Almirahs, large	No	...	1	
2	Arm-racks	,,	3	...	
3	Black boards and easels (*a*)	,,	2	...	5 additional boards and easels are allowed per school of musketry, except Satara which is allowed 10 additional.
4	Blocks, anvil, 1¼ cwt	,,	1		Fixture.
5	Chairs, cane-bottomed	,,	2	2	
6	,, folding, Kabul pattern	,,	30	...	To be replaced as worn out by chairs, cane bottomed
7	Commodes	,,		1	
8	Cots, newar	,,		1	
9	Forms, with backs	,,	10		
10	Tables, office, with drawers and cup-boards, B F, No 42	,,	2	..	
11	Tables, 5′ × 2′ 10″, B. F, No. 1	,,	30	1	
12	,, dressing	,,	..	1	
13	Wash-hand stands	,,	..	1	

(*a*) Black boards, with easels, are issued on loan to the Musketry School when at Rawal Pindi in order to avoid risk of damage to these stores during the move of the School from Changla Gali to Rawal Pindi.

Table 59.—Equipment for the Musketry Camps at Jafferpore and Hebbal (Bangalore).

Item No.	Articles.	Scale. For Jafferpore.		Scale. For Hebbal.	
1	Arm racks, with G I., padlocks and duplicate keys	1	per guard	1	per guard.
2	Boxes, kit, with brass padlocks and duplicate keys	1	for pouch ammunition	1	for pouch ammunition.
3	Carts, cookhouse	1	...	..	Nil.
4	Carts, water, drinking	5	...	1	.
5	Cots, iron trestle	200	if available from stock	200	if available from stock.
6	Cupboards, mess	2		2	..
7	Forms, 5′, without backs	2	per 6 men	2	per 6 men.
8	Receptacles, cookhouse (wet refuse)	3	per cookhouse	2	per cookhouse.
9	(dry refuse)	2	per cookhouse	2	per cookhouse.
[illegible]	[illegible]	2	per latrine	2	per latrine.
[illegible]	[illegible]	6	...	6	..
[illegible]	[illegible]	2	per company or detachment.	2	per company or detachment.
13	Tables, iron trestle, 5′ × 2′ 6″, B F., No 6	1	per 6 men	1	per 6 men.
14	,, cookhouse, 3′ × 2′, B. F, No. 3 (*a*)	2	per cookhouse	2	per cookhouse.
15	Tubs, G I, with hinged covers, padlocks and keys and wooden stands for drinking water	2	per company	2	per company.

(*a*) See footnote (*k*) to Table 44.

SECTION IV.

SUPPLIES BY M. W. S. or P. W. D.

Table 60—Equipment for Sappers and Miners survey school at Bangalore, and telegraph school at Trimulgherry.

Item No.	Articles		Scale for Survey school, Bangalore.	Scale for Telegraph school, Trimulgherry.	Remarks.
1	Almirahs, large, with locks and keys, 6′ × 4′ × 3′	No.	1	...	For drawing paper, etc
2	Black boards and easels	„	1	1	
3	Chairs, barrack	„	2	3	
4	Cots, iron trestle	„	...	1	
5	Cupboards, fitted with shelves, let down door, locks and keys, 5′ × 4′ × 1′ 6″	„	1	...	For plans.
6	Forms, without backs, 5′	„	..	16	
7	„ 6′ 6″ × 1′ × 1′ 6″	„	20	...	
8	Safes, wooden, with shelves, locks and keys, 6′ × 4′ × 3′	„	1	..	For scientific instruments.
9	Tables, 5′ × 3′ × 2′—7 with drawers, locks and keys	„	1	...	For instructor
10	„ drawing, 6′ 6″ × 4′ × 2′ 7″ with drawers, locks and keys	„	10	...	For students
11	„ 10′ × 3′	„	...	6	
12	„ 5′ × 2′ 10″, B F, No 1	„	...	7	
13	Tubs, G I, with stand, cover, padlock and key	„	...	1	For drinking water

Table 61.—Scale of furniture for the Commandant's and Engineer's offices of the Indian Central flying school, Sitapur.

Item.	Articles.	Scale for Commandant's office	Scale for Engineer's office.
1	Almirahs, large	2	1
2	Book cases, library pattern	1	1
3	Bookshelves	1	*Nil*
4	Boxes, kit, with padlock and key	1	1
5	„ tin	2	*Nil*
6	Chairs, barrack	4	2
7	„ cane, bottomed	2	1
8	„ cushion, arm	1	*Nil*
9	Commodes	1	1
10	Dressing table	1	*Nil*
11	Forms, without backs	2	1
12	Pigeon-holes, sets	2	1
13	Punkah fringes, 18″ deep, ropes or canes	As required	As required
14	Press table	1	*Nil.*
15	Racks for stationery	1	*Nil.*
16	Racks for records	1	*Nil.*
17	Racks for maps	1	*Nil.*
18	Tables, office, with drawers	4	*Nil.*
19	Tables, bedside	4	*Nil*
20	„ 5′ × 2′ × 10″	*Nil*	3
21	Towel racks	1	*Nil.*
22	Wash-hand stand	1	1
23	Boards inventory	*Nil*	1
24	Drawers for plans, sets	*Nil*	1

NOTE.—All other articles considered necessary by the Commandant of the School which are not usually supplied by the Military Works Services, may be bought under his authority and paid for from the contingent grant of the office.

SECTION IV.

SUPPLIES BY M. W. S. or P. W. D.

Table 62.—Equipment for riding schools of British troops and non-silladar cavalry.

Item No.	Articles.	Scale.
1	Balls, sword practice	2 per cavalry regiment and Govr.'s Bodyguard, Madras.
2	Bars, leaping, 24'	1 per cavalry regiment, and stations at which Artillery Riding Masters are located.
3	Necks for practice posts	As required for Governor's Bodyguard, Madras.
4	Posts for leaping bars	2 per cavalry regiment.
5	Stands, military practice post, complete sets of 12 pieces each, viz. *Four posts, with heads for cavalry cuts* [illegible] [illegible] [illegible]	1 set for Governor's Bodyguard, Madras.
6	[illegible] d Units.	1 per British cavalry regiment and 1 per R. A. Bde. if the barracks are close together. Where the barracks are scattered, and at stations having one or two Batteries of Artillery, one cart may be provided for each Battery at the discretion of the G. O. C.

Table 63.—Equipment for each of the central signalling schools at Kasauli and Poona.

Item No.	Articles.	Where required and for what purpose.	Authorized proportion.	Remarks.
1	Book cases, library pattern	For custody of instruments, papers, books, etc.	2	
2	Black boards	For class room	2	
3	Chairs, cane-bottomed	For office	2	
		For class room	2	
4	Forms, without backs, 5'	For class room	23	
5	Tables, office, with drawers and cupboards, B. F., No. 42	For Inspector	1	
		For Asst. Inspector	1	
6	Tables, office, with drawers B. F., No. 34	For lectures	1	
7	" iron trestle, 5' × 2' 6" B. F., No. 6	For class room	23	
8	Punkah fringes, 18" deep, ropes and canes. (a)	For office of I. A. Signalling Southern Circle only.	As required.	(a) Washed at the expense of school.

Table 64.—Equipment for each signalling class for Indian N. C. O's. (on loan).

Item No.	Articles.	No. per class.	Remarks.
1	Black boards and easels	1	
2	Chairs, cane-bottomed	1	For superintending officer.
3	Forms, without backs, 5'	6	per 10 men.
4	Tables, 5' × 2'—10", B. F., No. 1	1	For superintending officer and 3 per 10 men.

SECTION IV.

SUPPLIES BY M. W. S. or P. W. D.

Table 65.—Equipment for school of cookery at Poona.

Item No.	Articles.	Scale.	Item No.	Articles.	Scale.
1	Almirahs, large . . No	2	5	Chairs, barrack . . No.	25
2	Boxes, kit (a) . . . „	1	6	Tables, 5′ × 2′ 10″, B. F., No. 1 (b) . . . „	1
3	Black boards and easel (a) . „	1	7	Tables, iron trestle 5′ × 2′ 6″, B. F., No. 6. . . „	11
4	Bricks, kiln dried (a) . „	500			

(a) Cost of renewals or repair should be met from the accessories grant.
(b) For use as a desk.

Table 66.—Equipment for British cavalry pioneering classes.

Item No.	Articles.		Scale: For instruction at stations in the plains where one or more regiments are stationed.	Scale: For instruction at Kasauli, Kailana, Murree and Wellington	Remarks
1	Nails, iron, spike, No 183 (6″)	lbs	50		For two spiked trestles.
	Timber—				
2	braces, 14′ × 9″ × 1½″ or 2″	No	4	...	For two spiked trestles. (items 2–5)
3	ledgers, 14′ × 6″ × 1½″ or 2″	„	2	...	
4	standards, 12′ × 8″ × 4″	„	4	...	
5	transoms, 12′ × 9″ × 2½″ to 3″	„	4	...	
6	road bearers, 15′ to 20′ × 6″ dia.	„	10	...	For 25 ft. of roadway. (items 6–7)
7	shore transoms, 12′ × 6″ dia.	„	2	...	
8	1½″ plank (chesses), 10′ long, 12″ wide . .	„	25	..	To be issued with square ends cut away to facilitate rack lashing.
9	spars, for ribands, 12′ × 3″ dia	„	4	...	For 25 ft. of roadway. (items 9–10)
10	„ for hand rails, 15′ × 3″ dia	„	4	...	
	Timber, spar bridging—				
11	diagonals, 16′ × 3″ or 4″ dia.	„	4	...	For two-lashed trestles. (items 11–14)
12	ledgers, 16′ × 4″ dia.	„	2	...	
13	standards, 15′ × 6″	„	4	...	
14	transoms, 14′ × 8″	„	4	...	
	Timber, bridging stores—				
15	standards 25′ × 6″ dia. at the top	„	...	8	
16	„ 22′ × 6″	„	...	4	
17	transoms, (fork) 16′ × 10″ dia throughout . . .	„	...	2	
18	„ 16′ × 6″ dia. throughout	„	...	6	
19	ledgers 16′ × 6″ dia. throughout	„	...	4	
20	diagonal braces, 20′ × 3″ dia. throughout . . .	„	...	8	
21	shore transoms 16′ × 5″ „ „	„	...	10	
22	road beams, (stout for bearers) 20′ × 6″ dia. throughout	„	...	20	
23	road beams (slight for ribands) 20′ × 3″ dia. throughout	„	...	10	100 c. feet for Murree and Wellington. (items 23–24)
24	plank for roadway, 10′ × 1′ × 2″	„	...	60	
25	pickets, 5 ft. (for bollards)	„	10	20	For 25 ft. of roadway.
	Plant, railway, old—				
26	chairs (with two trenails and two spikes to each) .	„	..	10	For hasty demolitions. (items 26–31)
27	fishplates	sets	...	4	
28	rails, as may be available	No.	—	4	
29	sleepers, 9′ × 9″ × 4½″, or as may be available . .	„	14	7	
	Telegraph line—				
30	wire, iron, soft, No. 11 W. G.	yds.	100	100	
31	„ „ „ „ 22 W. G.	lbs.	2	2	
32	insulators, porcelain, white, shackles (with bolts and nuts)	No.	3	...	One intermediate and two terminal.
33	insulators, porcelain, shackles, with bolts and nuts .	„	...	3	One intermediate and two terminal.
34	telegraph poles	„	...	2	

SECTION IV.

SUPPLIES BY M. W. S. or P. W. D.

Table 67.—Equipment authorized for Remount Depôts.

Item No.	Articles.		Saharanpur.	Hapur.	Mona and Sargodha.	Calcutta.	Hosur.	Ahmednagar.	Remarks.
1	2		3	4	5	6	7	8	9
1	Almirahs, large	No.	4	4	5	2	2	2	
2	" small	"	4	4	5	2	2	2	
3	Bedsteads	"	28	20	40	6	12	...	For hospital purposes.
4	Boxes, kit	"	3	3	3	2	2	2	For N. C. O's.
5	Carts, filth	"	4	4	6	3	2	2	
6	" rubbish	"	3	3	4	1	2	2	
7	Chairs, barrack	"	21	21	21	5	9	9	
8	" cane-bottomed	"	3	3	3	3	3	3	
9	Cots, iron trestle	"	3	3	3	2	2	2	For N. C. O's
10	Forms, without backs, 5′	"	6	6	6	3	3	3	
11	Frames, diet sheet	"	.	..	..	30	.	..	
12	Ladders, lamp	"	1	1	1	1	1	1	
13	Mallets, dry earth	"	...	...	...	...	...	...	
14	Padlocks, brass	"	32	32	50	20	24	20	2 per syce.
15	Receptacles, filth, large	"	10	10	12	5	16	8	
16	Screens, moveable	"	1	1	1	1	1	1	
17	Stands, for 8 ghurrahs	"	1	1	1	1	1	1	
18	" " 2 surahis	"	1	1	1	1	1	1	
19	" wash-hands	"	2	2	4	1	1	2	
20	Stools, wooden	"	6	6	6	4	4	4	
21	Tables, bedside, H. F., No. 66	"	30	20	40	12	12	...	
22	" dispensing, H. F., No. 68	"	2	2	4	2	2	2	
23	" iron trestle, 5′ × 2′ 6″, B. F., No. 6	"	13	13	13	8	12	12	
24	Tables, cookhouse, 3′ × 2′, B. F., No. 3 (a)	"	2	2	3	2	2	2	
25	Trays, dressing	"	7	7	16	7	6	8	

(a) See footnote (h) to Table 44.

SECTION IV.

SUPPLIES BY M. W. S. or P. W. D.

Table 69.—Furniture, etc., for officers' quarters at Forts Peshawar and Jamrud—*contd.*

Item No.	Articles.	Scale per station		Remarks.
		Fort Peshawar	Fort Jamrud.	
18	Footboards	2	1	
19	Forks	4	2	
20	„ flesh	1	1	
21	Frying pan	1	1	
22	Gridiron	1	1	
23	Gurrahs and surahis	12 each.	2 (Gurrahs.)	
24	Jugs, milk, half pint	2	1	
25	Kettle iron (oval camp) with cover and lifter	1	1	
26	Knives, table	4	2	
27	„ butcher	1	1	
28	„ kitchen	1	1	
	[illegible]	12	8	One per room.
	[illegible]	1	1	
	[illegible]	2	1	
	[illegible]	4	2	(a) Washed at the expense of the officers concerned
33	Purdahs	14	..	1 per outer door and window and inner bath-room doors.
34	Saw, butcher	1	1	
35	Spoons, dessert	4	2	
36	„ kitchen	2	1	
37	„ table	4	2	
38	„ tea	2	1	
39	Sugar basins with lids	2	1	
40	Tables, 5′ × 2′ 10″	4	2	
41	Table cloths, white (a)	2	2	
42	Teapots, pints	2	1	
43	Teapoys	4	2	
44	Tea trays	2	1	
45	Towels, horse	2	1	
46	Tubs, G. I., without lids	1	1	
47	Washhand stands	2	1	

SECTION IV

SUPPLIES BY M. W. S. or P. W. D.

Table 70 —Furniture, etc., authorised for the military posts at Zam, Jatta, and Drazinda in the Derajat Brigade and the rest-houses attached thereto.

Item No.	Articles.	Scale.	
	(Per Rest-house)		
1	Almirahs, large with padlock and key	1	
2	Bedsteads	2	
3	Candle-sticks, with shades	2	
4	Carpets, (durries)	1	per room.
5	Chairs cane bottomed	4	
6	Chamber utensils	2	
7	Chicks	1	per door and window.
8	Commodes, complete (a)	1	per bath room.
9	Cooking utensils, set	1	
10	Cook-room, requisites set (a)	1	
11	Crockery, cutlery, spoons and glass set (a)	1	
12	Dressing Table, with looking glass	1	
13	Fenders	1	per fire-place.
14	Footboard	1	per bath room.
15	Gurrahs and surahies	...	As required.
16	Mat, coir door	1	per room.
17	Meat safe	1	
18	Punkahs, complete, with fringes 18″ deep, ropes and canes	1	per room.
19	Purdahs	1	per outer door and window and for inner bathroom door.
20	Tables, 5′ × 2′ 10″, B. F., No. 1	2	
21	Teapoys	2	
22	Towel horse	1	per bathroom.
23	Tubs, G. I. without lids	1	
24	Washhand stands, complete, with crockery	1	per bathroom.
	(Per Post)		
1	Cots (charpoy)	1	per combatant and follower. Cost not to exceed Rs. 2 each.

(a) As detailed in the annexure to A. D. letter No. 6433-3 (Q. M. G. 3), dated 6th December 1913.

SECTION IV.

SUPPLIES BY M. W. S. or P. W. D.

Table 31.—Equipment for the building at Chandipore which serves as a rest house for officers of the Proof Department, Balasore.

Item No.	Articles.	Scale.
1	Bedsteads	2
2	Commodes	2
3	Cook room requisites (a)	...
4	Crockery (a)	.
5	Cutlery (a)	.
6	Glassware (a)	...
7	Mattresses (a)	2
8	Mirrors	2
9	Toilet sets	2
10	„ tables	2
11	Tubs, G I	2
12	Washstands	2

(a) As detailed in the annexure to A. D. No 13582-3 (Q M. G. 3), dated 8th January 1914.

SECTION IV.

SUPPLIES BY M. W. S. or P. W. D.

Table 72.—Equipment for Bodyguards.

Item No.	Articles.		SCALE FOR: Viceroy's Bodyguard. At Ballygunge	At Wellesley Place.	At Dehra-Dun	At Barrackpore.	Governor's Body-guard, Madras.	Governor's Body-guard, Bombay.	Remarks.
1	Almirahs, large	No.	.	. .	1	. .	...	1	
2	„ small, for poisons	„	1	.	1	..	.	...	
3	Arm-racks	„	. .	..	...	..	..	2	
4	Apparatus, hot water	„	1	. .	1	..	.	...	
5	Boards, inventory, etc	„	.	...	..	..	...	.	As required.
6	Boxes, kit	„	120		120	..	(a)	...	(a) 1 per man with padlock and key.
7	Chairs, cane-bottomed	„	2	...	2	...	..	2	(b) 1 per man.
8	Charpoys,	„	127	(b)	4	15	...	...	
9	Cots, iron, planks for	„	..	.	..	..	...	213	
10	„ „ trestles	„	..	...	.	...	...	112	
11	Forms, with backs, 5′	„	1		1	. .	...	...	
12	„ without backs, 6′	„	..	...	..	...	..	3	
13	Padlocks, and keys	„		.	...	..	..	{ 2 10	At Parol. At Ghanesh Khind
14	Tables, dispensing, H. F. No. 68	„	1	..	1		. .	...	
15	„ camp, pieces, H. F. No. 67 D	„	..	.	. .	...	...	3	
16	Trestles, iron	„	4	...	8	..	. .	...	
17	Trunks, camel	„	...	. .	2	...	...	...	

Table 73.—Equipment for Commissioned and Warrant Officers of the Unattached List.

Item No.	Articles.	Where required and for what purpose.	Authorized proportion.		Remarks.
1	Punkah, fringes, 18″ deep, ropes and canes (a)	When occupying public quarters	...	As required.	(a) Washed at the expenses of individual concerned.
2	Receptacles, small, for wet refuse	Cook-houses	1	per sink for plains and hill stations.	
3	Receptacles, small, for dry refuse.	Ditto	1	per cook-house in the plains or hills.	
4	Receptacles, filth, large	Latrines with 3 or 4 seats attached to public quarters	1	per latrine in the plains.	
		Latrines with single seats attached to public quarters	1	„ „ „ „	
5	„ „ small	Latrines with 3 or 4 seats attached to public quarters	2	per latrine in the hills.	
		Latrines with single seats attached to public quarters.	1	„ „ „ „	

Table 74.—Equipment for ladies' waiting-room and officers' mess at the Sassoon Dock, Bombay.

Item No.	Articles.	No.	Item No.	Articles.	No.
1	Benches, teakwood, 12′ long, stuffed, and covered with oil cloth	2	7	Tables, teakwood, large, round	1
			8	„ dressing, large	1
2	Chairs, easy	5	9	„ washhand-stand	1
3	„ rocking	1	10	„ writing, teak wood	1
4	Couches, Cleopatra	1	11	„ small round, folding	1
5	Screens, teakwood	1	12	Tables, Gynæcological	1(a)
6	Stools, Gynæcological	1(a)	13	Towel horse	1

(a) For Medical Inspection room, Colaba.

SECTION IV.

SUPPLIES BY M W S or P. W. D.

Table 75 —Equipment for trooping shed at Keamari, Karachi,

Item No.	Articles.	For what purpose.		Scale.
1	Almirahs	For trooping office	No.	1
2	Boxes, kit, with brass padlocks duplicate keys		,,	1
3	Chairs, cane-bottomed		,,	4
			,,	2
			,,	3
			,,	40
4	Chairs, cane, arm		,,	10
5	Forms, with backs, 5'		,,	4
6	Forms, without backs, 5'		,,	2
			,,	20
		For men's shed and Invalids' room	,,	150
7	Looking glasses	For bath-rooms	,,	5
8	Tables, camp, B F, No 41	For trooping office	,,	4
		For Medical Inspection room	,,	1
		For Ordnance and Supply and Transport Office	,,	2
9	Tables, iron trestle, 5' × 2'6", B. F, No 6	For women's waiting room	,,	15
		For men's shed and Invalids' room	,,	75
10	Tables, office, with drawers, B. F., No 34	For trooping office	,,	2
11	Wash hand stand	For trooping office	,,	1

Table 76 --Equipment for Telegraph Department signallers

Item No.	Articles.	Where required and for what purpose	Authorized proportion.		Remarks.
1	Boxes, kit	..	2	per married signaller.	
			1	per unmarried do.	
2	Chairs, cane bottomed	.. ..	2	per married do.	
3	,, easy	Married quarters	1	ditto do	
4	Commodes	....	1	ditto do.	
5	Cots, iron trestle	....	2	ditto do	
			1	per child over 10	
			1	per unmarried signaller.	
			1	per 2 children under 10	
6	Cupboards	....	1	per 16 men or less	
7	Forms, with backs, 5'	......	...	Two running feet per unmarried signaller.	
8	Tables, 5' × 2' 10", B. F, No 1	....	1	Per married signaller.	
9	Tables, iron trestle 5' × 2' 6", B F., No 6	Mess	...	One running foot per unmarried signaller.	
10	Wash-stand	Married quarters	1	Per married signaller.	

Table 77 —Stores allowed for the instruction of infantry in Field training.

Details of one set. (a)

Item No.	Articles.		Scale.	Remarks.
	Spars, rough, for teaching lashing—			
1	15' × 10" dia.	No.	2	(a) For distribution, see Army Tables Miscellaneous Services, Part II.
2	15' × 6" ,,	,,	6	

SECTION IV.

SUPPLIES BY M. W. S. or P. W. D.

Table 78.—Equipment for offices of fort armaments and Inspectors of Ordnance Machinery.

Item No.	Articles	Scale for Aden	Agra	Ahmednagar	Allahabad	Attock	Bannu	Bareilly	Bombay	Chingrikhal	Delhi	Fort William	Jhansi	Karachi	Kirkee	Madras	Mhow	Rawalpindi	Rangoon	Inner and outer sub-district officers Quetta, and sub-district officers, Bombay (each).	Remarks.
	For Fort Armament Offices.																				
1	Almirahs, large . . No	1	1	1	1	1	1	1	1	1	1	1	1	1	.	1	1	..	1	1	
2	Boards, inventory, etc. . ,,	...	.	.	...	...					..	.	.		.	..	.	..	.	...	As required
3	Book cases, library pattern ,,	1	1	1	1	1	.	1	1	..	.	1	1	1		1	1	..	1	1	
4	Boxes, kit, with padlocks and keys . . . ,,	1	1	..		1	.	1	1		1	1	1	1	..	1	1	.	1	1	
5	Boxes, map . . . ,,	..	...	.	.			.			...		1		.		...	...	1	1	
6	Chairs, barrack . . ,,	4	1	1	1	2	1	1	4	2	3	2	1	1		3	1	.	4	1	
7	Do. cane-bottomed . ,,	1	1	1	1	1	1	1	1	1	1	1	1	1	..	1	1	..	..	1	
8	Forms, with backs, 5′ . ,,	1		.		1		.	1	..	1	1	1	1	.	1	...	...	1	...	
9	Pigeon holes, sets . ,,	5	1	1	1	1		1	5	2	..	3	1	2	...	4	2	..	4	2	
10	Tables, 5′ × 2′ 10″ (B F. No. 1) ,,	5	1	1	1	2	1	1	5	2	1	3	1	2	...	4	1	...	4	2	
11	Wash-hand stands . ,,	1	..		..	1		.	1	.	.	1	1	1	..	1	1	...	1	1	
	For offices of Inspectors of Ordnance Machinery.																				
12	Almirahs, large, with padlock and key . . .	..	.	..		..	.	.	1		.	1	..	..	1		...	1	..	1	
13	Chairs, cane-bottomed .	..		.	.			..	2		.	2	...	..	3		...	2	.	2	
14	Punkah fringes, 15″ deep, ropes and canes (a) .	.	...				.		..	..				..			...	.	..	...	As required.
15	Racks, stationery . .			.		.	.		1	.	.	1	.		1		.	1	.	1	(a) To be washed at expense of the office.
16	Tables, office, with drawers (B F. No 34) . .	..	.	.		.		.	1	.	..	1	..	.	1		..	1	.	1	
17	Tables, 5′ × 2′ 10″ (B F. No 1)	...				...	.	.	1	.	.	1	..	..	1		..	1	..	1	
18	Washhand stands .		...			..	.	.	1	...	...	1	..	..	1	..	...	1	..	1	

Table 79.—Equipment for certain special services.

Item No.	Articles	Where required and for what purpose.	Authorized proportion.	
1	Adapters . .	For stand posts and hydrants if the screws on the hose supplied by Ord. Dept. are not . .		As required, 1 specially allowed for hydrant in S. and T. Corps stores at Bangalore.
2	Barrels, G. I., gals each	. . . .	100	
3	Boxes, coal	. . . .	1	One large rectangular galvanised iron box capable of holding 80 lbs. of coal for each large fireplace and one small coal scuttle capable of holding 40 lbs for each small fireplace.
4	Boxes, kit, japanned, steel, with locks and non-interchangeable keys	For sea service, No. 4, external measurements 2′ 2″ × 1′ 3″ × 1′.	1 1	per woman embarking. per widower with children embarking.
5	Chains, padlocks and keys	For locking together arms of British troops when in tents.	1	Set per 30 rifles in the 1st, 2nd, 3rd, 4th and 7th Divns.
		For arm racks in guard rooms in Manora Fort	6	
		,, ,, ,, Marsh Fort, Manora .	2	
		,, ,, ,, I. Infy. battalion, Fort Sandeman.	42	
6	Chairs, cane-bottomed	Telegraph office, 1st S. and M. Roorkee .	4	For use of clerks and telegraphists.
		Family quarters at sanitaria . . .	1	per each soldier's family of more than 3 children.
7	Cots, iron, trestle .	Persian Gulf	1	per man of detachment I. I.
		Simla	1	Ditto ditto.
		Fort St. George	70	For wing of British Infantry (a)

(a) For use of details attached or passing through Madras.

SECTION IV.

SUPPLIES BY M. W. S. or P. W. D.

Table 79.—Equipment for certain special services—*contd.*

Item No.	Articles.	Where required and for what purpose.	Authorized proportion.	
9	Padlocks and keys, brass or copper, with labels, split rings and locks which are in large "suites" passed by master keys.	For magazines forming part of defence works in class I forts.	...	As required.
10	Padlocks, with duplicate keys with labels and split rings for the labels	For securing safety arms-racks other than racks of the Biggs' pattern, for British and Indian troops.		As required.
		For securing the arms of the British cavalry	34	
1[illegible]	[illegible]	[illegible]	...	As required.
1[illegible]	[illegible]	[illegible]	...	As required.
	[illegible]	[illegible]	...	As required
	[illegible] keys.			
14	Padlocks and keys.	For use in Sassoon Dock, Colaba, during trooping season.	8	
15	Padlocks with duplicate keys, labels and split rings	For bells of arms of Indian Troops in which pouch ammunition is stored.	...	As required.
16	Padlocks iron— [illegible]	[illegible]	8	
			16	
			3	
			1	Set per curtain.
	[illegible]	[illegible]	1	Set per curtain.
		British Infantry detachment at Bhamo.		
18	Safes, single door, 36" × 26" × 24" fitted with Chubb's lock	For office of officers in charge of Defence Light Sections at Aden, Bombay, Calcutta and Karachi.	1	Per office.
19	Receptacles, filth, small, for hill stations.	For latrine at saluting battery, Simla.	1	
20	Tripods, iron, 1' high		1	
21	Tanks, G. I. (fire)	For all barracks and buildings in the hills having thatched or wooden roofs.	1	Per room of 16 men. (a)
		For all barracks and buildings, which have neither thatched nor wooden roofs but have wooden walls, at stations, in the hills or plains where there are no fire engines, stand-pipes or hose.	...	As required.
		British Infantry Battalion, Aden.		
22	Boxes, kit	For families	24	To obviate moving articles with families.
23	Cots, iron, trestle		16	
		For Divine Service at Isthmus Position, Aden.		
24	Chairs, barrack	......	12	
25	Cupboards	......	1	
26	Forms, without back, 6'	......	6	
27	Padlocks and keys, iron.	......	1	

(a) For family quarters, warrant officers and staff sergeants' quarters, and other regimental buildings to which this rule cannot be applied the number of tanks required will be fixed by the Asst. C. R. E.

SECTION IV.

SUPPLIES BY M. W. S. or P. W. D

Table 79.—Equipment for certain special services—*contd.*

Item No.	Articles	Where required and for what purpose.	Authorized proportion.	
		Tower Gate, Isthmus Position, Aden.		
29	Padlocks and keys, brass	To secure gate	1	
		For Indian troops serving in the Burma Division		
30	Boards, inventory	..	...	As required
31	Boxes, dry earth, large size	For latrines and urinaries	1	Per latrine and urinary.
32	Ladders, lamp	For lighting lamps in barracks	1	per barrack.
33	Receptacles, filth	For latrines	2	per latrine.
34	" iron	For urinaries	1	per urinary.
35	Scoops, dry earth	Urinaries	1	per urinary.
		Latrines	1	per seat in latrines.
		For offices of 1st and 2nd class barrack-masters in Secunderabad and Burma Divns.		
36	Almirahs, with pigeon holes, 5′ 6″ × 4′ 6″ and 1′ 10″.	.	1	*For office records.*
37	Benches 4′ 6″ × 1′ 2″	..	2	per office.
38	Boxes, large, with lock and key.	.	1	For security of barrack articles.
39	Chairs, without arms	....	1	per barrack sergeant attending office.
40	" with arms	...	2	per 1st class barrack master and 1 per 2nd class barrack master.
41	Desks, low	....	1	for each accountant.
42	Tables, with two drawers, covered with blue cloth, with a shelf (1′ above table), dimensions 4′ 6″ × 3′ 6″ × 2′ 6″.	......	1	per barrack master.
43	Tables plain, with drawers, 4′ 6″ × 3′ × 2′ 6″.	......	1	per barrack sergeant attending office.
		For war game building, Poona.		
44	Almirahs	For use of players, etc.	1	
45	Benches, high		4	
46	Chairs		9	
47	Desks		5	
48	Tables		2	
		For Kriegspiel room, Rawal Pindi.		
49	Chairs	For committee and examination purposes	24	
50	Tables		12	
		Hot water apparatus.		
51	Apparatus for heating water.	For ablutionary purposes at the following stations:— *1st, 2nd and 3rd Divisions.* Peshawar, Nowshera, Risalpur, Attock, Rawal Pindi and Murree Hills, Sialkot, Campbellpore, Lahore Cantt. and Fort Lahore, Ferozepore, Amritsar, Multan, Jullunder, Dalhousie, Ambala, Kasauli, Solon, Dagshai, Subathu, and Jutogh.	1	per band and squadron of British Cavalry; band and coy. of Brit. Inf'y; coy. and batty. of R. A. The cost of heating and distributing the water is borne by the unit.

SECTION IV.

SUPPLIES BY M. W. S. or P. W. D.

Table 79.—Equipment for certain special services—*concld.*

Item No.	Articles.	Where required and for what purpose.	Authorized proportion.	
		4th, 5th and 6th Divisions.		
51	Apparatus for heating water—(concld.)	Quetta, Nasirabad, Jubbulpore, Belgaum, Poona, Ahmednagar, Mount Abu, Deolali, Pachmarhi, Jhansi, Mhow, Kirkee, Colaba, Purandhar and Nowgong.	1	Per band and squadron of British Cavalry; band and coy. of Brit. Infy. coy and batty. of R. A. The cost of heating and distributing the water is borne by the unit.
		7th and 8th Divisions		
		Meerut, Delhi, Chakrata, Muttra, Roorkee, Bareilly, Ranikhet, Chaubattia, Lucknow, Cawnpore, Fyzabad, Allahabad, Lebong, Darjeeling, Katapahar, and Jalapahar	1	
		9th Division.		
		Wellington	1	
		Aden Brigade.		
		British troops at Aden	10	For whole garrison.
		For orderly officer's Quarters, Fort Ferozepore.		
52	...	Almirah, small	1	
53	...	Chairs, cane bottomed	3	
54	...	Chairs, easy	1	
55	...	Commodes	1	
56	...	Cots, newar	1	
57	...	Cupboards, mess	1	
58	...	Meat safe	1	
59	...	Racks, towel	1	
60	...	Tables, cookhouse	1	
61	...	" dressing	1	
62	...	" writing, 3' × 1'—8"	1	
63	...	" Teapoy	1	
64	...	Wash-hand stand	1	
		For use in case of fire at the following stations in the 7th and 8th Divisions.		
65	Fire ladders	Chakrata	6	
		Ranikhet	8	
		Almora	4	
		Chaubattia	4	
		Naini Tal	4	
		Bareilly	4	
		Shahjahanpur	4	
		Kailana	5	

SECTION IV.

SUPPLIES BY M. W. S. or P. W. D.

Table 80.—Table of stores supplied periodically.

Item No.	Stores.		No. or quantity.	For what purpose.
1	Brushwood	mds.	75	Supplied annually for each class of instruction for pioneers of each British cavalry regiment in the plains, and for classes held at Kasauli, Kailana, Murree and Wellington.
2	Grass, for thatching	bundles	500	
3	Nails, iron, spike, No 183. 6" long	lbs.	25	
4	Railway plant, old chairs, with two trenails and two spikes to each	No.	10	
5	Fish plates and bolts	sets	4	
6	Rails, as available	lengths	4	
7	Sleepers, 9' × 9" × 4½" or as available	No.	7	
8	Railway plant— old rails (2' long)	ft.	24	Supplied annually for explosive classes held at Kohat, Bannu and D. I. Khan.
9	Railway plant, old chairs, with two trenails and two spikes to each	No	5	Supplied annually to each Indian cavalry regiment, exclusive of those located at Kohat, Bannu and D. I. Khan, and the Aden troop, for instruction in the use of explosives.
10	Fish plates and bolts	sets	2	
11	Rails, as available	lengths	2	
12	Sleepers, 9' × 9" × 4½" or as available	No	4	

SECTION V.

SUPPLIES BY MEDICAL STORE DEPARTMENT.

Table 81.—Equipment authorized for the Cavalry School, Saugor

Item No.	Articles.		Scale.	Remarks.
1	Field Medical panniers	Prs.	1	
2	" " companion . . .	No	1	
3	" Surgical havresack . . .	"	1	
4	" " cavalry bag . . .	"	1	
5	Wallets, veterinary	"	1	
6	Veterinary equipment as allowed for a class 1, Station Veterinary Hospital, for 500 animals.			

Table 82.—Field medical equipment for the Recruiting Depot, Gorakhpore.

Item No.	Articles.		Scale.	Remarks.
1	Field Medical panniers . .	Pair.	1	
2	" " companion . . .	No.	1	
3	" Surgical havresack . . .	"	1	

SECTION V.

SUPPLIES BY MEDICAL STORE DEPARTMENT.

Table 63.—Equipment authorized for Veterinary Hospitals of Remount Depots.

Item No.	Articles.	Saharanpur.	Hapur.	Mona and Sargodha.	Calcutta.	Hosur.	Ahmednagar.	Remarks.
1	2	3	4	5	6	7	8	9
	Surgical Instruments.							
1	Aspirator, with stop cork . . No.	1	1	1	1	1	1	
2	Bistouries, cache . . . . "	2	2	2	1	1	1	
3	" probe, pointed . . "	1	1	2	1	1	1	
4	" sharp . . . "	1	1	2	1	1	1	
5	Cans, bleeding, zinc, graduated . "	1	1	2	1	1	1	
6	Cases, dental, large . . . "	...	...	1	...	1	1	
7	Castrators, Arnold's Reliance . "	1	1	2	...	1	1	
8	Catheters, elastic, gum, male . . "	1	1	2	1	1	1	
9	" " pewter, female . "	1	1	2	1	1	1	
10	Chisels, broad, 12" long . . "	1	1	2	1	1	1	
11	" tooth (Gowing's) . . "	1	1	2	1	1	1	
12	Clams, castrating . . . . prs.	1	1	2	1	1	1	
13	*Directors, for bistouries* . . . *No*	1	1	2	1	1	1	
14	Ecraseurs . . . . "	1	1	2	1	1	1	
15	Extractors, tooth, molar . . prs	1	1	2	1	1	1	
16	Fleams . . . . . "	1	1	2	1	1	1	
17	Forceps, artery . . . . "	1	1	2	1	1	1	
18	" bone . . . . "	1	1	2	1	1	1	
19	" bullet . . . . "	1	1	2	1	1	1	
20	" dissecting . . . "	1	1	2	1	1	1	
21	" dressing, bow . . . "	1	1	2	1	1	1	
22	" pin, cutting . . . "	1	1	2	1	1	1	
23	" polypus . . . . "	1	1	2	1	1	1	
24	" sandcrack . . . "	1	1	2	1	1	1	
25	" tooth . . . . "	1	1	2	1	1	1	
26	" torsion . . . . "	1	1	2	1	1	1	
27	Gags, mouth, Ferguson's . . No	1	1	2	1	1	1	
28	Holders, caustic . . . . "	2	2	4	1	2	2	
29	" needle . . . . prs	2	2	4	1	2	2	
30	Instruments, dressing . . pocket case	1	1	2	1	1	1	
31	" dissecting . . . cases	1	1	2	1	1	1	
32	" trephine . . . "	1	1	2	1	1	1	
33	Irons, balling, screw pattern . . sets	1	1	2	1	1	1	
34	" firing, sets of six . . . "	1	1	2	1	1	1	
35	*Irrigators, quart, with appliances* . "	1	1	2	1	1	1	
36	Knives, butchers', P.M.E., with sheaths No.	1	1	2	1	1	1	
37	" neurotomy . . . . "	6	6	8	4	4	4	
38	" periosteotomy . . . "	1	1	2	1	1	1	
39	" tendon . . . . "	1	1	2	1	1	1	
40	Lancets, abscess, common . . "	2	2	4	1	2	2	
41	" bleeding . . . . "	1	1	2	1	1	1	
42	" eye . . . . . "	2	2	4	1	2	2	
43	Lens, magnifying . . . . "	1	1	2	1	1	1	
44	Machines, docking . . . "	1	1	2	1	1	1	
45	Microscopes, complete . . . "	1	1	2	1	1	1	
46	*Mirrors, dental* . . . . "	1	1	2	1	1	1	
47	Needles, curved, for thread sutures . "	45	43	90	15	24	24	
48	" " " wire . . "	30	32	60	10	16	16	
49	" of sizes and kinds . . "	30	32	60	10	16	16	
50	" Seton . . . . sets	1	1	2	1	1	1	
51	Obstetric . . . . . . No	1	1	2	1	1	1	
52	Ophthalmoscope, with lens, discs, and mirrors in case . . . . "	1	1	2	1	1	1	
53	Patent, Reeds . . . . "	...	...	...	...	1	...	
54	Probangs . . . . . "	1	1	2	1	1	1	
55	Probes, of sorts and sizes . . "	2	2	4	2	2	2	

SECTION V.

SUPPLIES BY MEDICAL STORE DEPARTMENT.

Table 83.—Equipment authorized for Veterinary Hospitals of Remount Depots—*contd*

Item No.	Articles.		Saharanpur.	Hapur.	Mona and Sargodha.	Calcutta.	Hosur.	Ahmednagar.	Remarks.
1	2		3	4	5	6	7	8	9
	Surgical Instruments—concld.								
56	Rasps, tooth	No.	1	1	2	1	1	1	
57	Saws, butchers', P.M.E., with sheaths	„	1	1	2	1	1	1	
58	Scalpels, in case with forceps	cases	1	1	2	1	1	1	
59	Scissors, dressing	prs.	1	1	2	1	1	1	
60	„ rowelling	„	1	1	2	1	1	1	
61	„ trimming	„	1	1	2	1	1	1	
62	Searchers, double edged	No.	1	1	2	1	1	1	
63	Spatula	„	2	2	4	2	2	2	
64	Speculæ, eye	„	1	1	2	1	1	1	
65	„ mouth	„	1	1	2	1	1	1	
66	„ vaginal	„	1	1	2	1	1	1	
67	Staff, sound and forceps, stone	„	...	...	...	...	1	...	
68	Steel, butchers', P. M. E.	„	1	1	2	1	1	1	
69	Stethoscope, wooden	„	1	1	2	1	1	1	
70	Sticks, blood	„	1	1	2	1	1	1	
71	Syringes, brass	„	...	3	3	...	3	2	
72	„ hypodermic, veterinary	„	1	1	2	1	1	1	
73	„ pewter	„	1	1	2	1	1	1	
74	Tenaculus (Assalin's)	„	1	1	2	1	1	1	
75	Thermometers, clinical	„	7	8	15	3	4	4	
76	Tourniquets	„	1	1	2	1	1	1	
77	Trocars	„	1	1	2	1	1	1	
78	Tubes, trachœtomy	„	2	2	4	2	2	2	
79	„ rubber tubing for drainage	yds.	4	4	6	2	2	2	
	Necessaries—permanent.								
80	Bandages, rubber	No.	2	2	4	2	2	2	
81	Bottles, drenching	„	2	2	4	2	2	2	
82	Dredgers, for iodoform	„	1	2	4	1	2	1	
83	Funnels, enema	„	1	1	2	1	1	1	
84	„ glass	„	1	1	2	1	1	1	
85	„ tin	„	1	1	3	1	1	1	
86	Hones	„	1	1	2	1	1	1	
87	Horns, drenching	„	2	2	4	2	2	2	
88	Inhalers, chloroform	„	1	1	2	1	1	1	
89	Measures, brittanic, of sizes	„	2	2	4	2	2	2	
90	„ glass „	„	1	1	2	1	1	1	
91	„ pewter „	„	2	2	4	2	2	2	
92	„ zinc „	sets	1	1	2	1	1	1	
93	Pestles, iron	No.	2	2	4	2	2	2	
94	„ marble	„	2	2	4	2	2	2	
95	„ and mortars, brass, medium	„	1	1	2	1	1	1	
96	„ „ wedgewood, pint	„	1	1	2	1	1	1	
97	Pots, decoction, tin	„	1	1	2	1	1	1	
98	„ infusion „	„	1	1	2	1	1	1	
99	Scales and weights, deep, copper	sets	1	1	2	1	1	1	
100	„ „ of sizes	„	1	1	2	1	1	1	2 lbs., 4 oz., grains.
101	Slabs, wedgewood, 6¼" × 6¼"	No.	1	1	2	1	1	1	
102	Spatula, bolus	„	2	2	4	2	2	2	
103	Strops	„	1	1	2	1	1	1	
	Necessaries—consumable.								
104	Corks, phial	No.	150	195	360	60	96	96	
105	„ pint	„	150	195	360	60	96	96	

SECTION V.

SUPPLIES BY MEDICAL STORE DEPARTMENT.

Table 63.—Equipment authorized for Veterinary Hospitals of Remount Depots—*contd.*

Item No.	Articles.		Saharanpur.	Hapur.	Mona and Sargodha.	Calcutta.	Hosur.	Ahmednagar.	Remarks.
1	2		3	4	5	6	7	8	9
	Necessaries—consumable—concld.								
106	Corks, quarts	No	180	195	360	60	96	96	
107	Gallipots, country	„	180	195	360	60	96	96	
108	„ English	„	...	32	150	...	28	...	
109	Gauge, plain	yds.	15 yds. per cent. of strength.						
110	„ double cyanide	„	Ditto		Ditto				
111	Ligature, flax	hanks.	10	10	30	5	8	8	
112	„ silk	ozs.	7½	8	15	2½	4	4	
113	Materials, for mounting and staining microscope		...	...	.		...	...	As required.
114	Phials, common, English, N.M	No.	45	48	90	15	24	24	
115	„ „ „ W.M.	„	45	49	90	15	24	24	
116	Pins, common	papers	4	4	6	2	2	2	
117	„ safety	No.	6	6	12	6	6	6	
118	Sponges	lbs.	7½	8	15	2½	4	4	
119	Tape, of sizes	pieces	4	4	8	2	2	2	
120	Tow, carbolized	lbs.	90	96	180	..	48	48	
121	„ English	„	15	16	30	6	8	8	
123	Twine, English	balls	6	6	8	3	3	3	
123	Wire, for sutures	lbs.	2½	2½	5	½	1½	1½	
124	Wool, absorbent	„	15	16	30	5	8	8	
125	„ antiseptic	„	5	6	10	2	3	3	
126	„ carbolized	„	5	6	10	2	3	3	
	Medicines.								
127	Acidum, aceticum	lbs.	15	16	30	5	8	8	
128	„ arseniosum	oz.	19	20	38	5	8	8	
129	„ benzoicum	„	32	52	80	10	18	18	
130	„ boricum	lbs.	10	16	..	...	12	..	
131	„ carbolicum, B.P.	„	30	32	60	10	16	16	
132	„ „ com.	„	...	64	..	...	...	...	
133	„ citricum	oz.	...	22		...	9	9	
134	„ gallicum	„	...	23	...	...	7	7	
135	„ hydrochloricum	„	7	4	100	...	8	8	
136	„ hydrocyanicum	„	19	2	38	...	2	2	
137	„ nitricum	„	19	20	38	5	8	8	
138	„ salicylicum	„	19	20	38	5	8	8	
139	„ sulphuricum	„	19	20	38	6	8	8	
140	„ tannicum	lbs.	30	32	60	10	16	16	
141	„ tartaricum	oz.	32	52	80	16	18	18	
142	Aloes, barbadensis	lbs.	30	32	60	10	16	16	
143	Alumen	oz.	32	40	31	16	101	101	
144	Ammonii, carbonas	lbs.	30	33	60	10	16	16	
145	„ chloridum	„	5	5½	10	1¼	2½	2½	
146	Antimonium, tartaratum	„	5	5½	10	1¼	2½	2½	
147	Argenti nitras	oz.	7	8	16	2	4	4	
148	Camphora	lbs.	15	16	30	5	8	8	
149	Camphorodyne, or chlorodyne	oz.	38	40	80	10	20	20	
150	Cantharis pulv	lbs.	5	5½	10	1¼	2½	2½	
151	Ceraflava	oz.	33	40	80	10	20	20	
152	Chloral hydras	„	38	40	80	10	20	20	
153	Chloroformum	lbs.	10	10½	20	2½	5½	5½	
154	Cocainai, hydrochloras	oz.	2½	3½	7	1	1½	1½	
155	Creasotium	„	19	20	38	5	8	8	
156	Creta præparata	lbs.	15	16	30	5	8	8	

SECTION V.

SUPPLIES BY MEDICAL STORE DEPARTMENT.

Table 83.—Equipment authorized for Veterinary Hospitals of Remount Depots—*contd.*

Item No.	Articles.		Saharanpur.	Hapur.	Hosur and Sargodha.	Calcutta.	Hosur.	Ahmednagar.	Remarks.
1	2		3	4	5	6	7	8	9
	Medicine—contd.								
157	Cupri, sub acetas	lbs.	10	10	15	5	8	8	
158	„ sulphas	„	15	16	30	5	8	8	
159	Dextrine	„	..	.	10	...	...	...	
160	Extractum, belladonnæ	oz	38	40	80	10	20	20	
161	„ canabis Indicæ	„	1¼	1¼	2½	½	1	1	
162	„ hyoscyami	„	38	40	80	10	20	20	
163	„ nucis vomicæ	„	19	20	38	5	8	8	
164	Ferri et quininæ	lbs	5	5¼	10	1¼	2½	2½	
165	„ iodidum	oz	38	40	80	10	20	20	
166	„ sulphas	lbs	30	32	60	10	16	16	
167	Flax, collodium	oz.	3½	4	7½	1	2	2	
168	Gentinæ radix pulv	lbs.	15	16	30	5	10	10	
169	Glycerinum	„	30	32	60	10	16	16	
170	Hydrargi, iodidum rubrum	oz.	38	40	80	10	20	20	
171	„ perchlor (corrosive sublimate)	„	3½	4	7	1	2	2	
172	„ subchloridum (calomel)	„	19	20	38	5	8	8	
173	Iodoformum	lbs.	5	5¼	10	1¼	2½	2½	
174	Iodum	oz.	19	20	38	5	8	8	
175	Ipecacuanhæ, pulvis	„	3½	4	7	1	2	2	
176	Liquor, ammoniæ	lbs.	15	16	30	5	8	8	
177	„ arsenicalis	„	15	16	30	5	8	8	
178	„ strychninum	oz.	1½	2	3½	½	1	1	
179	„ zinc chloride	lbs.	10	10½	20	3½	5¼	5¼	
180	Magnesii sulphas	„	105	112	210	35	56	56	
181	Morphia, hypodermic injection	oz.	3½	4	7	1	2	2	
182	Morphinæ, hydrochloridum	„	7	8	15	2½	4	4	
183	Nux vomicæ	„	38	40	80	10	20	20	
184	Oil, cheerpine	lbs.	60	64	120	20	32	32	
185	Oleum, arachis	„	1	1½	2	1	4½	1	
186	„ crotonis	oz.	3½	4	7	1	2	2	
187	„ eucalyptus	„	3½	4	7	1	2	2	
188	„ linseed	lbs.	..	9½	...	...	...	..	
189	„ menthæ piperitæ	oz.	¾	1	1½	½	½	½	
190	„ mustard	„	...	...	...	...	8	..	
191	„ petræ	lbs.	15	16	3	5	8	8	
192	„ ricini	„	45	48	90	15	24	24	
193	„ sesami	oz.	6	8	16	3	6	6	
194	„ terebinthinæ	lbs.	60	64	120	20	32	32	
195	Opii pulvis	„	5	5¼	10	1¼	2½	2½	
196	Physastigmena	oz.	...	14	...	.	...	...	
197	Pix, burgundica	lbs.	15	14	30	5	8	8	
198	„ liquida (Stockholm tar)	„	60	64	120	20	32	32	
199	Plumbi acetas	„	10	10½	20	3½	5¼	5¼	
200	Potassæ caustica	oz.	7	8	15	2½	4	4	
201	Potassii chlora	lbs.	5¼	6	60	2	2½	2½	
202	„ iodidum	oz.	38	40	80	10	20	20	
203	„ nitras	lbs.	15	16	30	5	8	8	
204	„ permanganas	oz.	5¼	6	11	1¼	3	3	
205	Quininæ, sulphas	lbs.	10	10½	20	3½	5¼	5¼	
206	Resina	„	15	16	30	5	8	8	
207	Santoninum	oz.	20	24	40	10	19	19	
208	Sapo duris	„	..	..	..	.	16	.	
209	Sapo mollis	lbs.	5	5¼	10	1¼	2½	2½	
210	Sodii, bicarbonas	„	30	32	60	10	16	16	
211	„ salicylas	oz.	4	6	8	2	3	3	
212	Solution, antiseptic	„	52	54	104	34	51	51	
213	Spiritus, ammoniæ aromaticus	lbs.	15	16	30	5	8	8	

SECTION V.

SUPPLIES BY MEDICAL STORE DEPARTMENT.

Table 83.—Equipment authorized for Veterinary Hospitals of Remount Depots—*concld.*

Item No.	Articles.		Saharanpur.	Hapur.	Mona and Sargodha.	Calcutta.	Hosur.	Ahmednagar.	Remarks.
1	2		3	4	5	6	7	8	9
	Medicines—concld.								
214	Spiritus, ætheris	lbs.	15	16	30	5	8	8	
215	" " nitrosi . . .	"	30	32	60	10	16	16	
216	" rectificatus . . .	"	15	16	30	5	8	8	
217	Strychnina	oz	3½	4	7	1	2	2	
218	Sulphur, sublimatum . . .	lbs.	30	32	60	10	16	16	
219	Terebinth, venetiæ . . .	oz	.	...	...	. .	8	8	
220	Tinctura, aconite	"	19	20	38	5	8	8	
221	" arnicæ	"	35	40	80	16	20	20	
222	" assafœtidæ . .	lbs.	30	32	60	10	16	16	
223	" canabis Indicæ . . .	oz.	38	40	80	10	20	20	
224	" camphoræ . . .	lbs.	3	3¼	6	2	2½	2½	
225	" cardamomi composita .	"	30	32	60	10	16	16	
226	" digitalis	"	5	5¼	10	1¼	2½	2½	
227	" ferri perchloridi . .	"	10	10½	20	3¼	5¼	5¼	
228	" iodi	"	5	5¼	10	1¼	2½	2½	
229	" myrrhæ et aloes . .	"	30	32	60	10	16	16	
230	" nuxis vomicæ . .	"	..	...	...	...	1¼	..	
231	" opii	"	40	42	80	13	21	21	
232	Unguentum, acidi borici (Lister's)	oz.	38	40	80	10	20	20	
233	" hydrargyri . . .	"	38	40	80	10	20	20	
234	" hydr. oleat . . .	"	19	20	38	5	8	8	
235	" resinæ	lbs	5	5¼	10	1¼	2½	2½	
236	Vaseline (paraffinum molle) . .	"	15	16	30	5	8	8	
237	Zinci, oxidum	"	5	5¼	10	1¼	2½	2½	
238	" sulphas	oz.	38	40	80	10	20	20	

SECTION V.

SUPPLIES BY MEDICAL STORE DEPARTMENT.

Table 84.—Stores supplied periodically to certain railway rest camps and all military prisons and detention barracks.

Item No.	Articles.	Scale.	Camps (a) (b) and prisons (b) at which allowed.		Remarks.
1	Permanganate of potassium	Not to exceed 10 grains per diem per British soldier halted.	Jhansi . .	Rangoon . .	(a) For use of details proceeding to and from Bombay. (b) For treating drinking water after being boiled or when in wells, and for the daily cleansing of vessels used for storing or conveying water
2	Ditto . . .	As required . .	All military prisons and detention barracks		

Table 85.—Disinfectants for British Troops.

Item No.	Articles.	Scale.	Remarks.
1	Saponified cresol	One gallon per 100 men per month.	Where the wet system of conservancy is in force.
2	Ditto	17½ gallons per month . .	To be supplied to Garrison Quarter Master, Fort St. George, Madras, for use in latrines and urinals in his charge.

Table 86.—Stores supplied annually to Mounted Infantry in Burma.

NOTE —These are obtained from the Medical Store Depot, Rangoon, on indents sanctioned by the S.V.O., Burma Division, and are kept at head-quarters of Salutries packed in medicine chests for issue as prescribed.

Item No.	Articles.	Scale per 100 ponies.	Item No.	Articles.	Scale per 100 ponies.	Item No.	Articles.	Scale per 100 ponies.
	Medicines.			*Medicines—concld.*			*Necessaries—concld.*	
			18	Opii pulvis . . oz.	1	35	Corks, phial . . No.	6
1	Acidum boricum . oz.	8	19	Phenyle. . . lb.	2	36	„ pint . . „	6
2	„ carbolicum B. P. . lbs.	1	20	Pix burgundica . „	1	37	Gallipots, country . „	6
3	Aloe barbadensis . „	1	21	„ liquida (tar Stockholm) . . „	2	38	Gauze, antiseptic . yds.	2
4	Ammonii carbonas . „	1	22	Plumbi acetas . . „	1	39	Ligature, flax . . oz.	¼
5	Argenti nitras . . oz.	¼	23	Potassii nitras . . „	1	40	„ silk . . . „	¼
6	Camphora . . . „	8	24	Solution antiseptic (a) oz.	4	41	Lint, carbolised . . „	8
7	Cantharis pulv. . „	2	25	Spiritus ammoniæ aromaticus . „	8	42	Phials, common-English, N. M. . No.	3
8	Creta præparata . lb.	1	26	„ ætheris nitrosi lb.	2	43	„ common-English, W.M. . „	3
9	Cupri sulphas . . oz.	8	27	Sulphur sublimatum . „	1	44	Pins, common . . paper	¼
10	Extractum, belladonnæ „	2	28	Tinctura myrrhæ et aloes . oz.	8	45	„ safety . . No.	6
11	Ferri sulphas . . lb.	1	29	„ opii . . lb.	1	46	Sponge . . . oz.	3
13	Gentianæ radix pulv. oz.	8	30	Vaseline (paraffin molle) „	1	47	Tape, broad . . pieces	1
13	Glycerinum . . lb.	2	31	Zinci oxidum . . oz.	8	48	„ for sutures ½" . „	1
14	Hydrargyri iodidum rubrum oz.	1	32	„ sulphas . . lb.	1	49	Tow, carbolised . . lb.	1
15	„ subchloridum (calomel) „	1		*Necessaries.*		50	„ English . . „	2
16	Iodoformum . . „	1	33	Bandages, hand loom . No	6	51	Twine, English . . balls	1
17	Oleum sesami . . lb.	1	34	„ puttee cloth „	2	52	Wool, absorbent . . lb.	1
						53	„ boric . . oz.	2

(a) Antiseptic solution is made of perchloride of mercury 240 grs., chloride of sodium 240 grs., glycerine 8 fluid ounces, rectified spirit 4 fluid ounces. One ounce diluted up to 5 pints with water makes a solution of perchloride of mercury equal to 1 in 2,000 parts.

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attains majority during the pendency of the suit, he cannot claim to file a fresh written statement so as to supersede that filed by his guardian *ad litem* [2] **O. 6 R. 7 Notes 1-3**

2. New ground of claim. — Where a plaint is defective, it cannot be supplemented by a subsequent statement [1] *A* claimed one half of £500 alleging that *B* the defendant, had received it as trustee for himself and the plaintiff *A* in equal shares *B* pleaded that he received only £311, half of which he paid into Court *A* thereupon replied that *B* *ought to have* received the full £500, and that having wrongfully compromised with the debtor, is liable for half of £500 It was held that this was a new ground of claim which could not be allowed [2]

3. Inconsistent allegations. — A party cannot in subsequent pleading make any allegation inconsistent with what he has alleged originally [1] Thus if a statement of claim (*i e*, plaint) alleges merely a negligent breach of trust, the reply must not assert that such breach of trust was fraudulent [2] If such inconsistent allegations are made in a subsequent pleading without obtaining leave to amend, the Court will be justified in ignoring it, and the fact that a formal order rejecting it is not passed will not be a ground for remanding the case for retrial [3] But where both parties understand the real point in issue and give evidence, the fact that a pleading subsequent to the plaint and the evidence is at variance with the original pleading is immaterial [4]

R. 8. [New.] Where a contract is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract alleged or of the matters of fact from which the same may be implied, and not as a denial of the legality or sufficiency in law of such contract. **O. 6 R. 8**

Denial of contract

[R. S. C., O. 19 R. 20.]

1. Denial of contract. — Where the defendant disputes the legality or sufficiency in point of law of the contract set up by the plaintiff, he must plead specifically

('16) AIR 1916 Mad 903 (905)
('29) AIR 1929 Oudh 204 (206, 207)
('28) AIR 1928 Sind 103 (104) 23 Sind L R 370 (Change of case at last moment without amendment—Disallowed)

2. ('37) AIR 1937 Pat 625 (626) (AIR 1935 Mad 117, Relied on)

Note 2

1 ('02) 1902 All W N 85 (85)
[*See* ('36) AIR 1936 P C 27 (29) (P C) (It is *pessimi exempli* to admit a new head of claim without a proper amendment of pleadings)]

2 (1876) 3 Ch D 254 (259) Earp v Henderson

Note 3

1 (1851) 5 Moo Ind App 271 (290) (PC)
('32) AIR 1932 Pat 332 (333) (Court should not allow parties to make a new case at a late stage in the suit)
('18) AIR 1919 Lah 136 (137)
('13) 18 Ind Cas 553 (554) (Lah)
('36) AIR 1936 Cal 465 (468)
('37) AIR 1937 Lah 795 (796)
[*See* ('37) AIR 1937 All 783 (785) (Partition suit — Plaintiff mentioning weight and value of ornaments listed with plaint—In such case, such mention cannot be considered conclusive or irrebuttable)]
[*See also* ('39) AIR 1939 Sind 137 (142) I L R (1939) Kar 330 (New defence raised which cuts at the root of proceedings and which does not arise from pleadings—Pleadings should be amended and proceedings conducted in fair and proper manner)]
[**But see** ('13) 21 Ind Cas 81 (82) (All) (Inconsistency in the defence not considered)]

2. (183) 9 L R Ir 364 Kingston v Corker

3 ('30) AIR 1930 Nag 147 (148)

4 ('14) AIR 1914 All 479 (481)
[*See also* ('3) AIR 1936 Lah 173 (134)]

O. 6 R. 8
Note 1

the grounds of his objection, it is not sufficient merely to traverse any allegation the plaintiff may have made[1] Thus, where in a suit on a contract of mortgage the defendant denied the consideration for the mortgage it was held that he could not at the trial contend that the mortgage was not *duly* attested, and was therefore invalid[2] But no Court will enforce an *illegal contract,* if the illegality is duly brought to the notice of the Court and if the person invoking the aid of the Court is himself implicated in the illegality, it matters not whether the defendant has or has not pleaded the illegality[3] The reason is that a Court will not assist a plaintiff where his own case discloses the illegality of the transaction

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O. 6 R. 9

Effect of document to be stated

R. 9. [New.] Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material.

[R S C, O 19 R. 21.]

Synopsis

1 Scope of the Rule | 2 Precise words when necessary

1 Scope of the Rule. — Rule 2 of this Order provides that every pleading shall contain a statement in a concise form of the material facts on which the party pleading relies Where such a material fact is mentioned in a *document* it is sufficient under this rule to state the *effect* of the document as briefly as possible without setting out the whole or any part thereof Thus in an action brought by the devisee of land under a will for the recovery of the land devised, it was held that it was not necessary to set out the precise words of the will[1] A party is however, bound to state the nature of the deeds on which he relies in deducing his title from the person under whom he claims[2] It is not enough for him to say simply that by virtue of a certain deed he is entitled to the property claimed by him[3]

2. Precise words, when necessary. — In an action for libel or slander the precise words complained of are material and should always be set out *verbatim*[1]

Order 6 Rule 8 — Note 1

1 (32) AIR 1932 All 199 (202 203) 53 All 963 (Suit on unconditional acknowledgment—Limitation must be specifically pleaded in regard to

(04) 27 All 266 (270 271) (Facts showing illegality elicited in cross examination of defendant by plaintiff's pleader)

(1897) 2 Q B 724 731 732) Scott v Brown

Order 6 Rule 9 — Note 1

1 (1896) 1 Q B 554 (558) Darbyshire v Leigh

2 (16) AIR 1916 Cal 659 (659)

3 (1878) 4 Q B D 127 (135 136) Phillips v Phillips

Note 2

1 (1879) 4 C P D 125 (128 129) Harris v Warre [*See also* (1882) 7 App Cas 741 (772) Capital and Counties Bank v Henty]

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R. 10. [New.] Wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred. **O. 6 R. 10**

Malice, knowledge, etc.

[R. S. C., O. 19 R. 22. See Rr. 2 and 4 above.]

Synopsis

1. Scope of the Rule.	3. Fraudulent intention
2. Malice.	4. Knowledge

1. Scope of the Rule. — The circumstances from which malice, fraudulent intention or other condition of the mind is to be inferred, constitute really the *evidence* in proof of such condition of mind, and need not therefore be pleaded, in accordance with the rule enacted in Rule 2 *ante* that only the material *facts* should be pleaded, but not the *evidence* by which they are to be proved But, where a certain condition of mind such as insanity is relied on by a party for his claim or defence, he must allege it as a fact in his pleading and where he does not do so, and the fact of the existence of such state of mind is only brought out in the evidence, the Court should not act on such fact [1]

2. Malice. — Where malice is a material ingredient of the plaintiff's case as being a necessary part of his cause of action, as in suit for damages for slander or malicious prosecution, it should be alleged specifically in the plaint [1] Similarly, where a mistaken *bona fide* belief and good faith are the grounds for applying the rule of equitable subrogation, they must be distinctly alleged in the pleadings and proved [2]

3. Fraudulent intention. — See O 6 R 4 Note 2 *ante* Where there is fraud there is no room for the doctrine of acquiescence to operate which is only a form of estoppel [1] As to the requisites of an acquiescence, see the undermentioned case [2]

4. Knowledge. — If knowledge or the absence of it is a material factor in the case, it should be expressly alleged [1] Thus, where insanity is set up as a defence to an action for breach of contract, it must be alleged and proved that, at the time of the contract, the plaintiff had knowledge of such insanity [2]

Order 6 Rule 10 — Note 1

1. (38) AIR 1938 Nag 204 (208) (Plea of insanity to avoid the effect of a deed — Circumstances

1. (04) 6 Bom L R 704 (720, 721)
(01) 28 Cal 591 (593)
(1833) 5 B & Ad 588 (596) Mitchell v Jenkins [*See also* (1881) 8 Q B D 167 (170), Hicks v Faulkner
(07) 31 Bom 37 (45) (Suit for damages against Election Officer for refusal to receive nomination paper — Malice necessary to be alleged)]
2. (31) AIR 1931 Mad 110 (113)

Note 3

1. (30) AIR 1930 Cal 678 (684)
2. (30) AIR 1930 Oudh 235 (243).

Note 4

1

and ignorance of servant must be

(1896) 2 Q B 109 (111) Osborne v Chocqueel (In

2

Stone

O. 6 R 11

Notice

R. 11. [New.] Wherever it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, are material

[R S C., O. 19 R 23 See S. 80]

1. Notice — Wherever the giving of a notice is a condition precedent to the exercise of the right of suit the plaintiff must plead and prove that the notice had been given and the condition precedent fulfilled [1]

O. 6 R 12

Implied contract, or relation

R. 12. [New.] Whenever any contract or any relation between any persons is to be implied from a series of letters or conversations or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations or circumstances without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative

[R S. C, O. 19 R 24]

1. Implied contract or relation. — In an action brought on a contract the contract and the breach thereof must be alleged and proved [1] If the contract is an implied contract the facts should be stated from which the plaintiff contends that a contract is to be implied This rule enacts that where the contract is to be implied from a series of letters or conversations or from a number of circumstances such letters conversations or circumstances need be referred generally and not in detail

O 6 R. 13

Presumptions of law

R. 13. [New] Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side unless the same has first been specifically denied (*e g*, consideration for a bill of exchange where the plaintiff sues only on the bill and not for the consideration as a substantive ground of claim)

[R S C, O 19 R 25]

Order 6 Rule 11 — Note 1

1 (24) AIR 1924 Nag 162 (163)

Order 6 Rule 12 — Note 1

1 (24) AIR 1924 All 449 (450) 46 All 85 (Pre-emption suit)

1. Presumption of law. — As to the presumption in the case of a bill of exchange, see Section 118 of the Negotiable Instruments Act (XXVI of 1881) **O. 6 R. 13 Note 1**

Where the plaintiff is or was in possession of any land, it is sufficient as against a wrongdoer, to aver possession only, he need not set out his title as the same will be presumed, in accordance with the maxim *omnia præsumuntur contra spoliatorem*—every presumption is made against a wrongdoer [1]

R. 14. [Ss. 51, 115.] Every pleading shall be signed by the party and his pleader (if any): Provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf. **O. 6 R. 14**

Pleading to be signed.

[1877, S. 51; 1859, S. 27. See S. 2, cl. 20.]

Synopsis

1. Pleading to be signed
2. Signature by persons duly authorized.
3. Omission to sign pleadings — Effect.

Other Topics (miscellaneous)

"Absence or other good cause" See Note 2
Duty of Court to see to signature of parties See Note 1
Signature by mukhtear See Note 2

1. Pleading to be signed.—The object of requiring every pleading to be signed by the party is to prevent, as far as possible, disputes as to whether a suit was instituted with the plaintiff's knowledge and authority [1] Judges are bound to see that the pleadings are signed properly [2] In cases where the plaint contains allegations of fraud which must be false or true to the knowledge of the plaintiff, the defendant can insist on the plaintiff himself signing the plaint [3] There is no difference between vakalats, affidavits and pleadings as to the procedure by which they can be signed [4]

This rule is made applicable to proceedings under the undermentioned local Acts [5]

2. Signature by persons duly authorized. — Under the corresponding Sections of the Codes of 1859 and 1877, there were no provisions for the signing and verification of the pleading by the authorized agent of the party, but it was held, by applying Section 36 of the Code of 1877 (now O 3 R 1), that an authorized agent could validly sign the pleading on behalf of the party [1] In view of these decisions the

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Order 6 Rule 13 — Note 1

1 1 Sm L C (12th Edn) 396 Armory v Delamirie

Order 6 Rule 14 — Note 1

1 (25) AIR 1925 Sind 275 (278)
2 (14) AIR 1914 Low Bur 195 (199)
3 (87) 9 All 505 (507 508)
4 (28) AIR 1928 Mad 175 (176) 51 Mad 212
5 The Bengal Tenancy Act VIII of 1885, S 143 clause (2)

The Orissa Tenancy Act II of 1913 Ss 70 (2), 156 (2) and 211 (4)

The Bengal Drainage Act VI of 1880 S 51 R, Sub-s (3) cl (g)

Note 2

1 (79) 3 Cal L Rep 579 (580)
(80) 4 Bom 408 (471)
(79) 3 Cal L Rep 15 (16)
(66) 6 Suth W R 213 (215)

O. 6 R 14 Notes 2-3

Legislature expressly added a proviso in Section 51 of the Code of 1882 (now O 6 R 14) under which an authorized agent may validly sign a pleading under certain circumstances namely, where the party pleading is by reason of *absence* or for *other good cause* unable to sign the pleading[2] The absence must be of such a kind as makes it impossible for the party to sign the pleading e g absence on a sea cruise or a journey into unknown regions where communication is impracticable the words other good cause are however of wider significance and leave the matter entirely to the discretion of the Court[3]

The question as to *when a person can be said to be duly authorized* by the party depends upon the circumstances of each case[4] A pleading signed by an unauthorized person is not valid[5] but in such a case the Court may permit the party himself to sign it later[6] or if the person signing it is subsequently authorized treat the original plaint itself as valid provided there is no question of limitation[7]

As to the signing and verification of pleadings in suits by or against corporations, see O 29 R 1 Note 8 and as to the signing and verification of pleadings in suits by or against firms see O 30 R 1 Note 13

3 Omission to sign pleadings—Effect — An irregularity in the signature or verification of a plaint is a mere defect of *procedure*[1] and does not affect the *jurisdiction* of the Court[2] An omission or mistake in the signature is not fatal to the suit but is capable of being cured by appropriate amendments[3] In fact the proper course in such cases is not to dismiss the suit or reject the plaint but to get the plaint amended[4] An

('66) 6 Suth W R Misc 59 (60)
2 ('03) 25 All 431 (435)
('91) 1891 All W N 152 (152)

enacts that it applies only where there is no other provision to the contrary this rule is a provision to the contrary in so far as the authorized agent can sign only under specified circumstances)
('14) AIR 1914 Low Bur 173 (175) (Agent can

('94) 16 All 420 (423)
('99) 1899 Pun Re No 5 p 23 (Principal residing within jurisdiction — Agent cannot sue unless specially authorised)
('03) 2 Low Bur Rul 41 (42 43)
6 ('14) AIR 1914 Low Bur 191 (192 193)
('22) AIR 1922 Bom 113 (113) 46 Bom 150
7 ('03) 25 All 635 (637)

Note 3

1 ('27) AIR 1927 All 514 (514 515) ... The

... signing the plaint—Defendant may waive objection)

2 ('31) AIR 1931 All 507 (512) 54 All 57 (S B)
('11) 10 Ind Cas 731 (732) (Nag)
('15) AIR 1915 Cal 444 (449)
3 ('17) AIR 1917 All 90 (91) 39 All 343
('25) AIR 1925 Mad 660 (668 669) (Plaint signed by agent without leave—But leave subsequently obtained cures the defect)
('12) 17 Ind Cas 580 (581) (Mad)
('96) 6 Mad L Jour 213 (213) (Plaint initially presented without plaintiff s signature but later on presented with signature before time fixed by Court)
4 ('98) 20 All 442 (445)
('96) 18 All 396 (399 400) (If the defect is discovered in appeal the Appellate Court may send

objection to such a defect if not taken by the defendant at the earliest possible opportunity cannot be allowed to be raised for the first time in appeal[5] Where several persons institute a suit it is not necessary that all should sign the plaint It is sufficient that one of them signs the plaint with the other plaintiffs *knowledge and authority*[6] In *Mohini Mohan Das* v *Bungsi Buddan Saha Das* I L R 17 Calcutta 580 their Lordships of the Privy Council said 'There is no rule providing that a person named as co plaintiff is not to be treated as plaintiff unless he signs and verifies the plaint

Where however the authority and knowledge of the plaintiffs not signing the plaint are not established the institution of the plaint will not be valid[7]

Local Amendment

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Insert the following

'R 14A —Every pleading when filed shall be accompanied by a statement in a prescribed form, signed as provided in Rule 14 of this Order of the party s address for service Such address may from time to time be changed by lodging in Court a form duly filled up and stating the new address of the party and accompanied by a verified petition The address so given shall be called the registered address of the party and shall until duly changed as aforesaid be deemed to be the address of the party for the purpose of service of all processes in the suit or in any appeal from any decree or order therein made and for the purpose of execution and shall hold good subject as aforesaid for a period of two years after the final determination of the cause or matter Service of any process may be effected upon a party at his registered address in like manner in all respects as though such party resided thereat **O 6 R 14A (Calcutta)**

R. 15. [Ss 51, 52, 115] *(1)* Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case **O 6 R. 15**

Verification of pleadings

[*See* (37) AIR 1937 Pesh 17 (18) (The defect

sion und r S 53 of old Code — Not good law aft r 18 All 390)]

5 (1900) 22 All 55 (61 64)

(0) 11 C W N 871 (872) (Written statement received by the Court and objected to by the plaintiff though not signed and verified according to law)

(30) AIR 1930 Pat 636 (638) (Petition under O 21 R 6 signed by karpardaz of the decree holder)

(96) 1896 Pun Re No 48 p 133 (Objection raised at a late stage)

(29) AIR 1929 Mad 790 (791) (High Court will not ordinarily interfere in revision)

(11) 10 Ind Cas 731 (732 733) 7 Nag L R 33

(23) AIR 1923 Rang 206 206) 1 Rang 42 (S 99 C P C applies to such a case)

6 (32) AIR 1932 Sind 9 (10) 26 Sind L R 167

(24) AIR 1924 Pat 104 (106) 3 Pat 67

(37) AIR 1937 Pesh 17 (18)

[*See* (39) AIR 1939 Nag 242 (244) I L R (1939) Nag 515 (If it is found that a mortgage suit was duly authorised by a non signing mortgagee the question whether his signature was made by him or by somebody else on his behalf becomes immaterial—17 Cal 580 Followed)]

7 (14) AIR 1914 Mad 430 (431)

O. 6 R. 16
Notes 2-3

embarrassing[1] Merely unnecessary pleading without its being scandalous or otherwise objectionable will only affect the cost of the pleading[2] But where the pleading in addition to its being unnecessary also attributes improper motives to the defendant[3] or charges the defendant with dishonest conduct[4] or makes it embarrassing for the defendant[5] it will be ordered to be struck out Where however a plaint[6] or a written statement[7] is unnecessarily prolix and verbose or argumentative or is full of matter which is wholly irrelevant or non understandable it can be dealt with under this rule

3 "Scandalous" — A Court has a general jurisdiction to prevent any of its processes being used for the purpose of disseminating scandalous and irrelevant matter[1] Where such matter is introduced in the pleadings the Court may order the same to be expunged[2]

Allegations made in a pleading for the mere purpose of abusing or prejudicing the opposite party and any indecent or offensive matters are scandalous[3] Very often if allegations made are *unnecessary* they will likewise be scandalous[4] Thus where a plaintiff alleges in his plaint dishonest conduct against the defendant but no relief is sought on that ground the allegations will be struck out as scandalous and embarrassing[5] Where in an action by a wife against her husband for rectification of her marriage settlement a statement was made in the plaint that the plaintiff declined to live with the defendant on account of his having committed an assault on a young girl the allegation was held to be scandalous and was ordered to be struck out[6] Allegations as to partiality against the Judge made in a memorandum of appeal were expunged by the High Court in the undermentioned case[7]

But a pleading or allegation which is alleged to be scandalous cannot be struck out if it is *necessary* or *relevant* to the issue or one of the issues in the action[8] Indeed a matter cannot be considered as scandalous at all if it is *material* to the issue (*i e* will affect the result of the action if proved to be true) however grave the imputations may be whether of immorality or otherwise[9] The Court will not in an application to expunge or strike out allegations alleged to be scandalous go into the question of their truth or falsehood The only question is are they *relevant* to the issues in the suit[9] If they are they cannot be expunged[10]

Note 2

1 (1888) 38 Ch D 263 (270 271) Knowles v Roberts
(1887) 84 L T Jour 45 Rock v Purshell

2

3

4

5 (1878) 7 Ch D 473 (486) Davy v Garrett
6 (67) 8 Suth W R 295 (297 298)
(29) 114 Ind Cas 906 (907) (All)
7 (67) 7 Suth W R 212 (213)
(74) 12 Beng L R App 19 (20) (Plea of offer without prejudice irrelevant)
(69) 3 Beng L R App 12 (12)

Note 3

1 (1884) 54 L J Ch 205 (206) Re Miller (Certain parts of the bill of costs were ordered to be expunged.)
(91) 15 Bom 488 (490 491) (Application for bail — Defamatory allegations against the trying

suit)
Story s Equity Pleadings 10th Edn S 270 (Even though the point is raised by a stranger)
3 (1873) 8 Ch 499 (504) Christie v Christie
(09) 14 Cal W N 153 (156)
4 (1886) 55 L T 343 Brooking v Maudslay
(09) 14 Cal W N 153 (157)
(1879) 40 L T 455 Coyle v Cuming
5 (1886) 55 L T 343 Brooking v Maudslay
6 (1879) 40 L T 455 Coyle v Cuming
7 (99) 22 Mad 155 (160)

10 (1873) 8 Ch 499 (503) Christie v Christie
(09) 4 Ind Cas 380 (381) (Cal)

4. "Or which may tend to prejudice, embarrass or delay the fair trial." — The question whether a pleading is embarrassing is, in each case, a question for the Judge to decide in view of the facts and circumstances of the particular case [1] "The rule that the Court is not to dictate to the parties how they should frame their case, is one that ought always to be preserved sacred But that rule is, of course, subject to the modification and limitation that the parties must not offend against the rules of pleading which have been laid down by the law and if a party introduces a pleading which is unnecessary, and it tends to *prejudice, embarrass* and delay the trial of the action, it then becomes a pleading which is beyond his right" [2] A claim or defence which a party is not entitled to make use of,[3] or a pleading which is ambiguous or unintelligible,[4] or a pleading which contains unnecessary or irrelevant allegations,[5] is embarrassing and may be struck out But a pleading cannot be struck out as irrelevant unless the irrelevancy is quite clear [6] Nor is a pleading necessarily embarrassing merely because of the fact that it states *inconsistent* or *alternative allegations* [7] Where the plaint was verbose, extremely long, involved and impossible to understand, and did not raise any fact which would show that the Judge had jurisdiction to hear the case, it was held by the High Court of Allahabad[8] that the proper course was to strike out the plaint under this rule or to make an order for its amendment Similarly, where particulars are called for from a defendant under O 6 R 5 and he fails to comply with the order, the defence may be struck out under this rule, if without the particulars his pleading is obscure, incomplete and embarrassing [9]

This rule applies to a pleading which *tends to prejudice or embarrass or delay* a party at the *actual trial* of the suit as well as one which tends to embarrass him at *any stage* of the action [10]

5. Matter may be struck out or amended at any stage of the proceeding.— The rule empowers the Court to strike out or compel the amendment of any pleading *at any stage* of the proceeding [1] But the rule being discretionary the Court may refuse to exercise its power unless the application is made at the earliest opportunity [2] An objection under this rule is no ground for interference when the point is taken for the first time in appeal [3]

Note 4

1 (1918) 2 K B 200n (206n) Russel v Stubbs (Per Lord Halsbury)
2. (1888) 38 Ch D 263 (270 271) Knowles v Roberts (Per Bowen, L J)
('17) AIR 1917 Oudh 389 (389 390)

[illegible]

lain
(1888) 38 Ch D 263 (269), Knowles v Roberts (Claim which a plaintiff is not entitled to raise)
(1876) 1 Ex D 361 (363) Preston v Lamont (Defence which a defendant is not entitled to make)
4. (1878) 7 Ch D 473 (486) Davy v Garrett
('10) 7 Ind Cas 166 (169) (Cal)
(1884) 49 L T 772 Lumb v Beaumont
5 (1876) 1 Q B D 571 (575 576) Rassam v Budge
('78) 10 Bom H C R 425 (428)
6 (1914) 111 L T 512 (514) London Corporation v Horner (Pickford L J — Striking out allegations from a defence—Irrelevancy must be apparent at the first glance)
(1887) 57 L T 858, Tomkinson v S E Ry Co
7. (1887) 35 Ch D 492 (500), In re Morgan Owen v Morgan
(1878) 7 Ch D 473 (489) Davy v Garrett

[illegible]

8 ('29) 114 Ind Cas 906 (907) (All)
9 [illegible]

1 [illegible]

Note 5

1. ('18) AIR 1918 Oudh 463 (464) 20 Oudh Cas 192
('17) AIR 1917 Oudh 389 (389 390) (Revision against order to elect out of two inconsistent allegations—Allowed)
2 ('85) 9 Bom 373 (381)
3 ('17) AIR 1917 Mad 954 (955) (Objection as to alternative pleas cannot be taken for the first time in appeal)

O. 6 R. 16
Notes 2-3

embarrassing[1] Merely unnecessary pleading without its being scandalous, or otherwise objectionable, will only affect the cost of the pleading[2] But where the pleading in addition to its being unnecessary also attributes improper motives to the defendant,[3] or charges the defendant with dishonest conduct,[4] or makes it embarrassing for the defendant,[5] it will be ordered to be struck out Where, however, a plaint[6] or a written statement[7] is unnecessarily prolix and verbose, or argumentative, or is full of matter which is wholly irrelevant or non understandable, it can be dealt with under this rule

3. "Scandalous." — A Court has a general jurisdiction to prevent any of its processes being used for the purpose of disseminating scandalous and irrelevant matter[1] Where such matter is introduced in the pleadings, the Court may order the same to be expunged[2]

Allegations made in a pleading for the mere purpose of abusing or prejudicing the opposite party and any indecent or offensive matters are scandalous[3] Very often, if allegations made are *unnecessary*, they will likewise be scandalous[4] Thus, where a plaintiff alleges in his plaint dishonest conduct against the defendant, but no relief is sought on that ground, the allegations will be struck out as scandalous and embarrassing[5] Where, in an action by a wife against her husband for rectification of her marriage-settlement, a statement was made in the plaint that the plaintiff declined to live with the defendant on account of his having committed an assault on a young girl, the allegation was held to be scandalous and was ordered to be struck out[6] Allegations as to partiality against the Judge, made in a memorandum of appeal, were expunged by the High Court in the undermentioned case[7]

But a pleading or allegation which is alleged to be scandalous cannot be struck out, if it is *necessary* or *relevant* to the issue or one of the issues in the action[8] Indeed a matter cannot be considered as scandalous at all, if it is *material* to the issue (*i e*, will affect the result of the action if proved to be true), however grave the imputations may be, whether of immorality or otherwise[9] The Court will not, in an application to expunge or strike out allegations alleged to be scandalous, go into the question of their truth or falsehood The only question is are they *relevant* to the issues in the suit[9] If they are they cannot be expunged[10]

Note 2

1 (1888) 38 Ch D 263 (270 271) Knowles v Roberts
(1887) 84 L T Jour 45 Rock v Purshell
[*See also* ('73) 10 Bom H C R 425 (428)]
2 [illegible]
2 [illegible]
4 [illegible]
5. (1878) 7 Ch D 473 (486), Davy v Garrett
6 ('67) 8 Suth W R 295 (297 298)
('29) 114 Ind Cas 906 (907) (All)
7. ('67) 7 Suth W R 212 (213)
('74) 12 Beng L R App 19 (20) (Plea of offer 'without prejudice' irrelevant)
('69) 3 Beng L R App 12 (12)

Note 3

1. (1884) 54 L J Ch 205 (206) Re Miller (Certain parts of the bill of costs were ordered to be expunged.)
('91) 15 Bom 488 (490, 491). (Application for bail — Defamatory allegations against the trying [illegible]

2 [illegible] suit)
Story's Equity Pleadings 10th Edn S 270
[illegible]
(1879) 40 L T 455, Coyle v Cuming.
5. (1886) 55 L T 343, Brooking v Maudslay.
6 (1879) 40 L T 455, Coyle v. Cuming
7. ('99) 22 Mad 155 (160)
8 [illegible]
10. (1873) 8 Ch 499 (503) Christie v Christie.
('09) 4 Ind Cas 880 (881) (Cal)

Other Topics (miscellaneous)

1. Scope of the Rule. — Section 53 of the old Code which dealt with amendment, return and rejection of the plaint ran as follows

'The plaint may, at the discretion of the Court, —

(a) at, or any time before, the settlement of issues, be rejected, if it does not disclose a cause of action,

(b) at, or any time before, the settlement of issues be returned for amendment within a time to be fixed by the Court and upon terms as to the payment of costs occasioned by such amendment as the Court thinks fit, if it —

(i) is not signed and verified as hereinbefore required,

(ii) does not state correctly and without prolixity the several particulars hereinbefore required, or contains particulars other than those so required,

(iii) is wrongly framed by reason of non joinder or misjoinder of parties or joins causes of action which ought not to be joined in the same suit, or

(iv) is not framed in accordance with the provisions of Section 42,

(c) at any time before judgment, be amended by the Court upon such terms as to the payment of costs as the Court thinks fit

Provided that a plaint shall not be amended either by the party to whom it is returned for amendment, or by the Court, so as to convert a suit of one character into a suit of another and inconsistent character

When a plaint is amended under this Section, the amendment shall be attested by the signature of the Judge '

The amendment of proceedings in Courts have been dealt with under this Code in various parts thereof —

1 Section 152 deals with amendments of *judgments, decrees and orders*

2 Section 153 confers a general power on the Court to amend any defect or error in *any proceeding in a suit*

3 Order 1 Rule 10 provides for the amendment of a plaint by striking off or adding *parties* to a suit

4 Order 6 Rule 16 deals with the compulsory amendment of the *opponent's* pleading

5 The present rule deals with the amendment with the leave of the Court, by a party of his *own* pleading

O. 6 R. 17 Note 1

6 Order 14 Rule 5 deals with the amendment of the issues framed in the case

It will be seen from a comparison of Section 53 of the old Code with the present rule, that the latter is very much wider in terms than the old Section It consists of two parts —

(a) the Court *may*, at any stage of the proceedings, allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and

(b) all such amendments as may be necessary for the purpose of determining the real questions in controversy between the parties *shall* be made

In dealing with the analogous provision as to amendment of issues namely, O 14 R 5, their Lordships of the Privy Council observed that the first portion of that rule left the matter of amendment of issues entirely to the discretion of the Court, while the second portion made it imperative on the Court to make all such amendments as may be necessary for the purpose of determining the real matter in controversy between the parties[1] This duty has, however, been interpreted to be only a *rule of conduct*, which is subject to the inherent power of the Court to prevent injustice and abuse of process of the Court[2] In a case under the corresponding English Rule (O 28 R 1), Lord Esher said

> "*A rule has been enunciated by the Court which is rather a rule of conduct than a rule of* rigid law such as can never be departed from, because I take it that the Court might depart from it, if there were very exceptional circumstances in any particular case leading the Court to think that it would not be right to apply it It is nevertheless a rule of conduct which must generally be followed"[3]

The object of the rule is that Courts should get at and try the *merits* of the cases that come before them, and should consequently allow all amendments that may be necessary for the purpose of determining the real question in controversy between the parties, provided it can be done without causing *injustice* to the other side In *Cropper* v *Smith*,[4] Bowen, L J, observed as follows

> "It is a well established principle that the object of Courts is to decide the rights of the parties and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights . I know of no kind of error or mistake which if not fraudulent or intended to overreach, the Court ought not to correct if it can be done without injustice to the other party Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected *if it can be done without injustice* as anything else in the case is a matter of right"

The provisions of this rule also apply to the trial of cases before the Sikh Gurdwaras Tribunal under the *Sikh Gurdwaras Act (VIII of 1925)*,[5] to cases before a Subordinate Judge deciding a dispute under the Madras District Municipal Election Rules,[6] and to all suits, appeals and proceedings before the Deputy Commissioner and to all appeals from decisions therein, under the Chota Nagpur Tenancy Act[7]

This rule is not exhaustive of the powers of the Court as regards amendment

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Order 6 Rule 17 — Note 1

1. (12) 16 Ind Cas 250 (252) 35 Mad 607 39 Ind App 218 (P C)
2. (14) AIR 1914 Sind 40 (41) 8 Sind L R 28
3. (1886) 16 Q B D 556 (558) Steward v North Metropolitan Tramways Co (Cited in AIR 1914 Sind 40)
4. (84) 26 Ch D 700 (710 711)
5. (28) AIR 1928 Lah 825 (827) 9 Lah 649
6. (26) AIR 1926 Mad 1048 (1043)
7. See S 265 (3) Bengal Act VI of 1908

and hence, though the rule only refers to *pleadings* the Court has also power to allow the amendment of *applications* [8]

Section 5 of the Provincial Insolvency Act renders the provisions of this rule applicable to proceedings under the Act[9] and a petition in insolvency can be amended under this rule [10]

2. The Court may allow either party to alter or amend — Discretion of Court. — As has been noticed in the above Note, the amendment of pleadings is in the discretion of the Court Under Section 53 of the old Code, the discretion was somewhat limited as to the time and the extent of the amendment allowable But this rule confers a very wide discretion on the Courts in the matter of amendment of pleadings [1] The discretion must, however, be exercised on *judicial principles* and not in an arbitrary, vague or fanciful manner,[2] or so as to cause *injustice* to the opposite side The main considerations to be borne in mind in exercising the discretion are that the rules of procedure have no other aim than to facilitate the task of administering justice,[3] that multiplicity of suits should be avoided[4] and that the interests of substantial justice should be advanced [5] Thus, a Court should allow the amendment of a pleading where there has been a clerical error, or a *bona fide* wrong description of property or where there has been a mistake of law or fact,[6] provided there is no

8 ('38) AIR 1938 Pat 209 (210) (A Court has jurisdiction to allow an amendment of an application for leave to sue in *forma pauperis*, by including an item of property which was originally omitted from the application or annexure thereto)

9. (35) AIR 1935 Mad 202 (203) (Where the words with intent to defeat and delay his creditors were omitted but the act of insolvency was clearly set out *held* that there being a formal defect arising from the omission of certain words the amendment to include those words should be allowed (1897) 1 Q B D 394, Weldon v Neal Rel on)

10. (38) AIR 1938 Mad 53 (55)
(35) AIR 1935 Mad 202 (203)

Note 2

[illegible]

2. See Note 6 to Preamble
(11) 11 Ind Cas 481 (491) (Cal)
(84) 7 All 79 (83) (FB)

3 (28) AIR 1928 Oudh 305 (306)
(33) AIR 1933 Cal 271 (273 274)
(36) AIR 1936 Pat 140 (149)

4. (16) AIR 1916 Mad 316 (316)
(81) 5 Bom 181 (183) (Additional court fee collected on the excess claim covered by amendment of plaint)
(81) 5 Bom 609 (613 614) (Party should not be put to the expense of a new suit if it can be avoided)
(72) 9 Bom H C R 1 (6) (FB)
(98) 25 Cal 371 (390) (As far as possible all matters in dispute between the same parties should be decided in the same suit)
(66) 11 Moo Ind App 468 (486) (PC) (Money bond executed by *A*—Suit against *A* and *B* for combining to get *A*'s estate illegally transferred —Plaint was amended to recover money against *A* alone)

[illegible]

be regarded)
(30) AIR 1930 Bom 249 (250)
(37) AIR 1937 Oudh 481 (487) 13 Luck 584 (The main consideration to be borne in mind while allowing amendment of pleadings are the advancement of the interest of substantial justice and the avoidance of the multiplicity of litigation)

6 (23) AIR 1923 Nag 182 [illegible] 19 Nag L R [illegible] (Vakalatnama [illegible])
(25) AIR 1925 All 538 [illegible] (Wrong provision of law quoted in the plaint)

O. 6 R. 17
Notes 2-3

injustice to the other side which cannot be compensated by the award of costs[7] It has been held that the Court can only *allow* the amendment of a plaint but not amend a plaint itself or direct its amendment[8] Nor can a Court compel a plaintiff to change the character of his suit[9]

3. Amendment of plaint introducing new case. — Under Section 53 of the old Code, the rule as to amendments was more rigid and restricted than it is under the present Code It was specifically provided by the proviso to that Section that no amendment could be allowed which converted a suit of *one character* into *a suit of another and inconsistent character*[1] Thus, in the following classes of cases it was held that the amendment prayed for altered the character of the suit and was consequently disallowed —

Suit against the defendant on the basis of his being a trespasser amendment into a suit for rent based on a subsisting tenancy[2] Suit for rent on the basis of tenancy amendment into a suit for damages for use and occupation[3] Suit based on one ground of claim a

(32) AIR 1932 Bom 367
munim signing plaint—P
later)
(31) AIR 1931 Cal 770 (7
filing suit in firm name-

property in the plaint)
(28) AIR 1928 Nag 203 (205) (Bona fide mistake whether of law or fact — Following AIR 1924 Rang 249)
(25) AIR 1925 Oudh 718 (719) (*Omission of word due to inadvertence*)
(16) 32 Ind Cas 512 (512) (U P B R) (A clerical error as to the number of the plot in an eject ment suit)
(11) 11 Ind Cas 827 (828) (Rang) (A *clerical*

too rigidly enforced — Amendment of plaint should be allowed even at late stage)
7. See Note 5 below
(33) AIR 1933 Lah 245 (245) 33 Pun L R 694 (695)

favour the judgment is pronounced should be called upon to amend his pleadings)]
9. (30) AIR 1930 Cal 42 (46) 57 Cal 349
(39) AIR 1939 Lah 172 (173) (Where the plaintiff bases his claim for possession on his title and defendant alleges adverse possession, it is

in question and so he is bound to sue for cancellation of the decree)

Note 3

1. (72) 19 Suth W R 12 (14) Ind App Sup Vol 131 (PC) (New case will not be allowed to be set up)
(87) 9 All 188 (191) (Plaint not to be returned

(93 1900) 1893 1900 Low Bur Rul 518
2 (89) 13 Bom 664 (668)
3 (99) 27 Cal 239 (242)
(95) 22 Cal 752 (756)
[**But see** (09) *2 Ind Cas 920 (921)* 12 Oudh Cas 140
(09) 3 Ind Cas 346 (349) (*Cal*)]
4 ('70) 2 N W P H C R 407 (408) (Claim based on gift by will claim based on inheritance)
(83) 5 All 456 (459)
(87) 12 Bom 431 (434)
(95) 22 Cal 562 (565) (Suit on basis of plaintiff being in permissive possession—Amendment on

to establish right of ownership amendment into claim for an easement [5] Suit based on one title amendment into claim based on another title [6] Suit alleging one kind of fraud amendment into a claim based on another kind of fraud [7] Suit for rent amendment into suit for possession[8] or for a declaration of title [9] Suit based on letting and hiring amendment into suit based on the relationship of principal and agent [10] Suit based on the invalidity of a transaction amendment into one based on the validity thereof [11] Suit for share of property on the basis of non division amendment into claim for partition [12] Suit for possession amendment into claim for resumption [13] Suit for ejectment on the ground of tenant holding over amendment into claim for partition [14] Suit on the basis of a contract amendment of claim on the basis of tort [15] Suit based on a plea of transfer of property amendment into a plea of contract to transfer property [16] See also the undermentioned cases [17]

As has been seen in Note 2 above, the powers of amendment under the present Code are much wider than they were under the old Code The proviso in the old Section that *no amendment could be allowed which changed the character of the suit* has been omitted[18] and a new provision has been introduced by O 6 R 17 which implies that even an amendment introducing a new ground of claim or an allegation of fact inconsistent with the original pleading may be allowed in proper cases

Illustrations

1 *A* sues *B* for the recovery of the sum of money due on settlement of accounts of a dissolved partnership He subsequently applies to amend his plaint by substituting a claim *for accounts* of a dissolved partnership Here the amendment clearly effects a change in the character of the suit but the Court is not powerless as it was under the old Code to allow the amendment [19]

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that the property was found to be public property)

5 *See the following cases*
(1864) 2 Bom H C R A C 176 (178) (Claim to establish right of ownership over land—Claim to easement over same not to be decreed unless claimed alternatively)
(07) 34 Cal 51 (53) (FB) (Do — There is no harm in claiming the relief in the alternative]
(78) 2 All 669 (670 671)

6 (72) 18 Suth W R 274 (274) (Claim as owner of whole property by purchase from *A* claim as heir or as joint purchaser with him)
(72) 19 Suth W R 12 (14) Ind App Sup Vol 131 (PC)
(70) 12 Suth W R 487 (488) (Claim as heir of *N* claim as heir of *J*)

7 (87) 11 Bom 620 (638) 14 Ind App 111 (PC) [*See* (16) AIR 1916 Cal 120 (123) (Two distinct theories of fraud set up in the plaint and at trial)]

8 (95) 19 Bom 303 (307)

9 (95) 19 Bom 303 (307)

10 (80) 5 Cal 60? (605)

11 (07) 34 Cal 372 (3 9) (Suit for setting aside mortgage deed into one for redemption)
(83) 7 Bom 155 (161) (Original claim based on [illegible] lment based [illegible]

12 [illegible]

14 [illegible]

15 [illegible] ion in the relief does not alter the character of a suit)
(68) 9 Suth W R 206 (209)

16 (01) 24 Mad 377 (385) 28 Ind App 46 (PC)

17 (78) 1 All 591 (599) (Suit for pre emption—Plaintiff not alleging in plaint he was ready and willing to pay the price found to be true by the Court—On date of final disposal seeking to so amend his plaint—Court not bound to allow the amendment)
(09) 4 Ind Cas 837 (839) 34 Bom 515 (Suit for dissolution of partnership—Suit for specific item)
(01) 25 Bom 337 (349 350) 27 Ind App 216 (PC) [illegible]
zarpeshgi claim for declaratory decree)
(88) 11 Mad 106 (114 115)
(1900 02) 1 Low Bur Rul 193 (195) (Application for letters of administration cannot be converted into one under the Guardians and Wards Act)
[*See* (10) 8 Ind Cas 558 (563) (Lah) (Suit by reversioners for possession on the allegation that the alleged widow was not the widow of the proprietor—Amendment into a suit for declaration that the alienation by the alleged widow was without necessity)]

18 (23) AIR 1923 Nag 241 (242)
(10) 6 Ind Cas 1015 (1016) 13 Oudh Cas 152

19 (23) AIR 1923 Nag 241 (242)

O. 6 R. 17 Note 3

2 A sues B for the specific performance of a contract alleged to have been entered into by B with A Subsequently he applies for the amendment of the plaint so as to convert it into a suit for damages for breach of the said contract The Court has power to allow the amendment if it does not cause injustice to the other side [20]

3 A files a suit against B for possession of lands on the basis of a compromise entered into by the parties and filed by them in a previous suit The compromise was neither registered nor embodied in the decree A subsequently applies for amendment of the plaint by converting it into a suit for the specific performance of the contract embodied in the compromise The amendment could be allowed [21]

4 A and B entered into an agreement for sale of goods by A to B the goods to be taken delivery of by B on a certain date B failed to take such delivery and A re-sold the goods more than two months after the date of the breach of the contract by B and then filed a suit for damages against B on the basis of such re sale Finding that owing to the delay in making the re-sale he may not get damages on the basis of re-sale he applied for an amendment of the plaint by claiming damages on the basis of breach of contract itself It was held that such amendment should be allowed [22]

But though under the present Code there is no such rigid rule as was enacted in the old Code against the allowing of the amendment converting a suit of one character into a suit of another and inconsistent character [23] and the whole matter is entirely in the discretion of the Court still as a general rule the Court will not in the exercise of such discretion allow an amendment converting a suit of one character into a suit of another character [24]

There is one limitation however on the wide powers of amendment that can be exercised by the Court under this Code and that is that the Court cannot by way of amendment substitute one distinct cause of action for another, or change the subject matter of the suit In *Ma Shwe Mya* v *Maung Po Hnaung* [26] their Lordships of the Privy Council observed as follows

All rules of Court are nothing but provisions intended to secure the proper administration of justice and it is therefore essential that they should be made to serve and be subordinate to that

20 (28) AIR 1928 P C 203 (218 219) 52 Bom 597 55 Ind App 360 (PC) (See the precaution the Privy Council desires to be taken before allowing amendment)

21 (17) AIR 1917 Mad 624 (625)

22 (25) AIR 1925 Sind 222 (223)
(24) AIR 1924 Bom 330 (331)
(17) 11 Ind Cas 827 (828) (Rang) (A converse case)

23 See the illustrations given above
(27) AIR 1927 Lah 103 (104) 8 Lah 257 (Suit for recovery of purchase money on the basis of vendor s lien — Amendment into a suit for damages for breach of contract allowable)
(26) AIR 1926 Mad 909 (910) (Suit based on exclusive ownership—Plaint allowed to be amended into one for partition by cosharers)
(23) AIR 1923 Nag 151 (152) 19 Nag L R 69 (Claim for a share was allowed to be changed into claim for maintenance)
[*See also* (23) AIR 1923 Nag 241 (242) (No express restriction on the discretion of the Court provided it is judicially exercised)]

24 (27) AIR 1927 P C 18 (20) 54 Ind App 55 6 Pat 323 (PC)
(33) AIR 1933 Pat 443 (444) (Amendment could not be allowed being made at a late stage and as it substantially changed the character of the suit)
(34) AIR 1934 Oudh 118 (118)
(37) AIR 1937 Rang 413 (416)
[*See* (38) AIR 1938 Lah 712 (714) (What amounts to alteration of nature of suit discussed — Nature of suit is not altered by mere change in wording of plaint or introduction of fresh details)]
See also the following cases
(13) 18 Ind Cas 807 (809) (Lab) (Suit in individual capacity—Change into suit on behalf of wakf disallowed on the ground of inconsistency in claims)
(14) AIR 1914 Mad 460 (461) 15 Ind Cas 299 (301) 37 Mad 529 (Suit in ejectment cannot be converted into one for partition)

25 (22) AIR 1922 P C 249 (250 251) 48 Ind App 214 4 Upp Bur Rul 30 48 Cal 832 (PC)
(19) AIR 1919 Cal 904 (906 907) 45 Cal 305
(11) 9 Ind Cas 774 (775) (Low Bur) (Radical amendments not to be made in second appeal)
(37) AIR 1937 Oudh 438 (442) 13 Luck 219 (Suit for partition—On Court holding that there was partnership between plaintiff and defendants plaintiff praying that the suit be treated as one for dissolution of partnership—Plaintiff s prayer held should not be allowed)
(35) AIR 1935 Rang 496 (497) (Where a Burmese husband claims a declaration based on the assertion that the land was kanwin property but fails he will not be allowed to substitute his previous claim by a claim based on his interest in that property as bought by his wife during marriage for the two claims are entirely different—AIR 1922 P C 249 Applied)

26 (22) AIR 1922 P C 249 (250 251) 48 Ind App 214 4 Upp Bur Rul 30 48 Cal 832 (PC)

purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but nevertheless no power has yet been given to enable one distinct cause of action to be *substituted for another, nor to change by means of amendment the subject matter of the suit*

The reason of the above rule is that the substitution of a totally new case in place of the original one cannot be said in any sense to be an *amendment* of the *original claim*. Nor can it be said that a totally new case is necessary for the purpose of determining the real questions in controversy between the parties, that is, the controversy disclosed in the suit as originally framed.

It follows from the principles set forth above that under the present Code:

(1) An amendment will generally be allowed where the nature of the suit is not altered, provided it does not cause prejudice or surprise to the opposite party.[27] Such amendments were allowed under the old Code also.[28]

(2) An amendment may be allowed even if it introduces a new ground of claim or an allegation of fact inconsistent with the original pleading, where the Court thinks it just and necessary.[29]

27. (12) 16 Ind Cas 785 (786) (Cal) (Only test under the new Code is whether the amendment can be allowed without injustice.)

—Amendment stating that balance had been struck does not alter nature of suit.)
('26) AIR 1926 Lah 472 (472) (Plaint slightly defective—Amendment should be allowed.)

remedying formal defect arising from omission of certain words *held* should be allowed.)
('36) AIR 1936 Mad 151 (152) (Plaint reading certain document in particular way—Amendment by reading the document in another way must be allowed as it is not introducing new

('35) AIR 1935 Oudh 501 (503) (Amendment adding new ground of exemption from limitation can be allowed.)
28. ('09) 3 Ind Cas 159 (160) : 34 Bom 250

share

version into a suit for a simple money decree.)
('87) 1887 All W N 28 (28, 29) (Claim for pre

another substituted for it.)
('01) 5 Bom L R 329 (330) (Suit for bare declaration into one for possession.)
('95) 1895 Bom P J 551 (551) (Suit by the purchaser of a hundi alleging it to be negotiable was allowed to be amended into one on a non-negotiable instrument.)
('79) 4 Bom 222 (226) (Suit to establish plaintiff's exclusive right to the partnership property—Amendment into one for dissolution of partnership and account.)
('07) 6 Cal L Jour 612 (618, 619)
('83) 9 Cal 695 (698)
('05) 28 Mad 500 (502, 503)
('82) 5 Bom 496 (499) (Suit for possession—Share of joint property—Amendment into claim for partition.)
('93) 1893 Pun Re No 106, p 423
('84) 8 Bom 168 (173) (Suit for ejectment—Conversion into suit for redemption.)
('83) 7 Bom 146 (149) (Do.)
[*See* ('07) 5 Cal L Jour 527 (537) (Suit for ejectment and mesne profits—Amendment into a suit for redemption was not allowed in this case.)]
[*See also* ('82) 6 Bom 495 (497) (Suit for possession by mortgagee—Amendment into suit for foreclosure.)]
29. ('11) 11 Ind Cas 827 (828) (Low Bur) (English Courts do not refuse an amendment simply because it introduces a new case.)

refuse the application to amend[2] A sued B a Tramway Company for damages caused by their negligence in keeping their tramway in bad repair B simply denied negligence and did not plead that the liability to keep the tramway in repair did not belong to them but to the local authority At a subsequent stage of the case B applied for amendment of the written statement to raise the said plea At the time of the application A s remedy against the local authority was time barred It was held that the proposed amendment displaced the plaintiff s suit and should not be allowed[3]

Where in a suit for libel the defendant applied at the time of trial to amend the written statement so as to include a plea of privilege the application was disallowed on the ground that it would be unfair at that stage to allow the amendment[4] An amendment of the written statement should as a general rule be refused when the plaintiff has called all his evidence on the issues of fact raised by the written statement and has closed his case[5] unless the plaintiff is given an opportunity to call further evidence to rebut the new case set up[6] A defendant who has deliberately and under no mistake or misapprehension admitted a material fact in his written statement cannot be allowed at a later stage to change his front and make out a new case by denying that fact[7] But where in an ejectment suit the defendant pleaded exclusive possession and denied the plaintiff s title as landlord and also set up a claim to be in possession under a *mourasi* lease granted by the plaintiff s predecessor in title it was held that the effect of the alternative plea was merely to put the plaintiff to the proof of a title which would justify his prayer for ejectment and could therefore be allowed to be raised[8] Again where on the facts appearing in the plaintiff s evidence a new defence of *law* arises there is no reason why it should not be taken by way of amendment even after the plaintiff has closed his case on the facts Thus a plea that the suit is barred by virtue of Section 23 of the Contract Act was allowed to be raised in so far as it arose out of the plaintiff s evidence[9]

The improbability or the unconvincing nature of the new defence sought to be raised is not in itself a ground for refusing to allow an amendment of a written statement by the inclusion of such defence[10]

See also the undermentioned decision[11]

5 Amendment taking away right accrued to a party by lapse of time — The object of the rule being to get at and try the merits of the case and to do substantial justice between the parties no amendment will be allowed which will work *injustice* to one of the parties The rule of conduct of the Court is that however negligent or careless the first omission may have been and however late the proposed amendment the amendment should be allowed if *it can be made without injustice to the other side*[1] One of the classes of cases in which an amendment will work injustice

(35) AIR 1935 Pat 463 (465) (The Court will not allow an amendment that would involve a com

6 (14) AIR 1914 Mad 59 (61)
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Note 5

O. 6 R. 17
Note 3

purpose that all proceedings [illegible] should always be liberally exercised [illegible] the power has not been given [illegible] *of a kind to be [illegible] change by means of amendment the subject matter of the [illegible]*

The reason of the above rule is that the substitution of a totally new case in place of the original one cannot be said in any sense to be an *amendment* of the original claim. Nor can it be said that a totally new case is necessary for the purpose of determining the real questions in controversy between the parties, that is, the controversy disclosed in the suit as originally framed.

It follows from the principles set forth above that under the present Code:

(1) An amendment will generally be allowed where the nature of the suit is not altered, provided it does not cause prejudice or surprise to the opposite party.[27] Such amendments were allowed under the old Code also.[28]

(2) An amendment may be allowed even if it introduces a new ground of claim or an allegation of fact inconsistent with the original pleading, where the Court thinks it just and necessary.[29]

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27 (12) 16 Ind Cas [illegible] ([illegible]) (Cal) (Only test under the new Code is whether the amendment can be allowed without injustice.)
(33) AIR 1933 All 374 ([illegible]) : 55 All 25[illegible]
(33) AIR 1933 Nag 62 ([illegible]) : 29 Nag L R 115
(30) AIR 1930 Lah 221 (222) (Suit by a partner for a specific sum as if balance had been struck —Amendment stating that balance had been struck does not alter nature of suit.)
(26) AIR 1926 Lah 472 (472) (Plaint slightly defective —Amendment should be allowed.)
(33) AIR 1933 Lah 215 (215)
(20) AIR 1920 Lah [illegible] ([illegible])
(33) AIR 1933 Rang 24 (24)
(25) AIR 1925 Mad 724 (7[illegible])
(31) AIR 1931 Nag 20 ([illegible]) : 26 Nag L R 3[illegible]
(25) AIR 1925 Nag 62 ([illegible])
(27) AIR 1927 Oudh 505 (50[illegible])
(37) AIR 1937 P C 42 (45, 46) : 16 Pat 140 (PC)
(37) AIR 1937 Cal 485 (487)
(35) AIR 1935 Lah 91 (91) (Appellate Court can allow amendment converting declaratory suit into one for possession as it is only a question of form.)
(35) AIR 1935 Mad 202 (203) (Amendment for remedying formal defect arising from omission of certain words *held* should be allowed.)
(36) AIR 1936 Mad 151 (152) (Plaint reading certain document in particular way—Amendment by reading the document in another way must be allowed as it is not introducing new and inconsistent claim.)
(38) AIR 1938 Mad 388 (389) (In the matter of rectifying defects in pleadings which do not affect any substantial rights, it is not consonant with justice to deny a remedy which otherwise would be lost by reason of carelessness or delay. Any carelessness or delay can always be punished,
[illegible]
(35) AIR 1935 Oudh 501 (503) (Amendment adding new ground of exemption from limitation can be allowed.)
28. (09) 3 Ind Cas 159 (160) : 34 Bom 250 (Amendment by referring to a document not included in the list of documents annexed.)
(07) 1907 All W N 203 (203) (Claim to a share as heir of A—Claim to whole as his own.)
(02) 24 All 456 (457) (Suit on mortgage —Conversion into a suit for a simple money decree.)
(87) 1887 All W N 28 (28, 29) (Claim for pre
[illegible]
another substituted for it.)
(03) 5 Bom L R 829 (830) (Suit for bare declaration into one for possession.)
(9) 1895 Bom P J 551 (551) (Suit by the purchaser of a hundi alleging it to be negotiable was allowed to be amended into one on a non negotiable instrument.)
(79) 4 Bom 222 (226) (Suit to establish plaintiff's exclusive right to the partnership property —Amendment into one for dissolution of partnership and account.)
(07) 6 Cal L Jour 612 (618, 619)
(83) 9 Cal 695 (698)
(05) 28 Mad 500 (502, 503)
(82) 5 Bom 496 (499) (Suit for possession—Share of joint property—Amendment into claim for partition.)
(93) 1893 Pun Re No 106, p 423
(84) 8 Bom 168 (173) (Suit for ejectment—Conversion into suit for redemption.)
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29 (11) 11 Ind Cas 827 (828) (Low Bur) (English Courts do not refuse an amendment simply because it introduces a new case.)

O. 6 R. 17
Notes 4-5

refuse the application to amend[2] A sued B, a Tramway Company for damages caused by their negligence in keeping their tramway in bad repair B simply denied negligence and did not plead that the liability to keep the tramway in repair did not belong to them but to the local authority At a subsequent stage of the case B applied for amendment of the written statement to raise the said plea At the time of the application, A's remedy against the local authority was time barred It was held that the proposed amendment displaced the plaintiff s suit and should not be allowed[3]

Where in a suit for libel, the defendant applied at the time of trial to amend the written statement so as to include a plea of privilege the application was disallowed on the ground that it would be unfair at that stage to allow the amendment[4] An amendment of the written statement should, as a general rule, be refused when the plaintiff has called all his evidence on the issues of fact raised by the written statement and has closed his case,[5] unless the plaintiff is given an opportunity to call further evidence to rebut the new case set up[6] A defendant, who has deliberately and under no mistake or misapprehension admitted a material fact in his written statement, cannot be allowed at a later stage to change his front and make out a new case by denying that fact[7] But where in an ejectment suit the defendant pleaded exclusive possession and denied the plaintiff s title as landlord, and also set up a claim to be in possession under a *mourasi* lease granted by the plaintiff s predecessor in title, it was held that the effect of the alternative plea was merely to put the plaintiff to the proof of a title which would justify his prayer for ejectment and could, therefore, be allowed to be raised[8] Again, where on the facts appearing in the plaintiff s evidence a new defence of *law* arises there is no reason why it should not be taken by way of amendment, even after the plaintiff has closed his case on the facts Thus, a plea that the suit is barred by virtue of Section 23 of the Contract Act was allowed to be raised in so far as it arose out of the plaintiff s evidence[9]

The improbability or the unconvincing nature of the new defence sought to be raised is not in itself a ground for refusing to allow an amendment of a written statement by the inclusion of such defence[10]

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(35) AIR 1935 Pat 463 (465) (The Court will not allow an amendment that would involve a com

Encumbered Estates Act—Additional claims can not be allowed)

6 [illegible]
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Note 5

1 (1883) 32 W R (Eng) 262 (263) Clarapede v Commercial Union Association (Per Brett M R)

(10) 8 Ind Cas 788 (790) (Cal) (Putting in a document of acknowledgment to save limitation when there is a well founded claim)

O. 6 R. 17
Note 5

to the opposite party is where it takes away from a party a right accrued to him by lapse of time.[2] As a rule, therefore, a plaintiff will not be allowed to amend his plaint by introducing a new cause of action which since the date of the plaint has become barred by the statute of limitation.[3] In other words, no amendment should be allowed as will take away a valid defence under the law of limitation.[4] Thus where a plaintiff, though entitled to various alternative reliefs sued only for one of the reliefs within the period of limitation, it was held that he should not be allowed to amend the plaint in such a way as to enforce his other reliefs which had become time barred at the date of the amendment.[5]

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include a new plea where even had the plea been raised earlier defendant could not have dispproved it.)
('37) AIR 1937 Cal 485 (487)
(See also ('95) 22 Cal 632 (712-713).)
2 ('35) AIR 1935 Mad 202 (203)
('38) AIR 1938 Mad 663 (664)
('35) AIR 1935 Pat 86 (88) (Such a case might arise when a person who was a necessary party to a suit was not impleaded and a step is taken to implead him after the suit is barred against him.)
3 ('14) AIR 1914 All 302 (303)
('09) 4 Ind Cas 632 (632) (Lah)
(1887) 19 Q B D 394 (395, 396), Weldon v. Neal
('20) AIR 1920 Cal 189 (189)
('19) AIR 1919 [illegible] (298, 299)
('31) AIR 1931 Mad [illegible] (Amendment which involves the trial of a suit [illegible] on the face of it barred cannot be allowed.)
('31) AIR 1931 Mad 1 (2) (Suit for possession as reversioner to last male owner—Amendment that properties were stridhanam of the wife of the last male owner and that plaintiff was heir.)
('28) AIR 1928 Mad 828 (829)
('25) AIR 1925 Mad 917 (918) (Application to [illegible] when suit [illegible]
[illegible] parties would be [illegible]
[illegible] L R 69 [illegible] period of limitation.)
('38) AIR 1938 Nag 388 (389), I L R (1939) Nag 194
4 ('26) AIR 1926 Mad 827 (828) (Original claim was for recovery of money on a loan dated 28th January 1916—Amendment into a claim as on [illegible]

('31) AIR 1931 Bom 590 (591) (Suit against joint family—Claim in the alternative against defendants as partners.)
('27) AIR 1927 Cal 733 (736) (Whether the plaint of two persons can be amended on the application of one of them is a matter of doubt.)
('22) AIR 1922 Cal 275 (277) (Suit for declaration of title—Amendment for recovery of possession not allowed.)
[illegible]
Rul 17[illegible]
[illegible] ent in [illegible]
[illegible] ment allowed.)
5 ('14) AIR 1914 All 80 (83), 36 All 370

O. 6 R. 17
Notes 6-8

be allowed [8]

7. Amendment to be refused when the application is not in good faith.— It is one of the necessary conditions for the exercise of the Court's discretion in allowing an amendment, that the applicant has acted in good faith [1] While, therefore, as a general rule, leave to amend ought not to be refused if the applicant has acted *bona fide*,[2] it will be refused where he has been acting *mala fide* [3] Courts will infer want of *bona fides* from *great delay* in applying for leave to amend [4] An amendment which seeks to reagitate the same questions and lead further evidence, is an abuse of the process of the Court and hence should not be allowed [5]

8. Amendment by adding or substituting a new plea of fraud — Where fraud of one kind has been pleaded, an amendment introducing a new and distinct kind of fraud in substitution of the fraud pleaded, will not be allowed especially after all the evidence has been given [1] "It is a well known rule that a charge of fraud must be substantially proved as laid, and that when one kind of fraud is charged, another kind of fraud cannot upon the failure of proof, be substituted for it" [2] The reason is that such a substitution will as a rule *entirely change the character of the suit as originally* laid On the same principle where no fraud has at all been alleged in the original plaint, a new plea of fraud will not, except where strong grounds exist, be allowed to be raised by way of amendment [3] In *Bently v Black*,[4] Lord Esher, M R, said

> "It has long been the universal practice, except in most exceptional circumstances not to allow amendments for the purpose of adding a plea of fraud where fraud is not pleaded in the first instance

Where the fraud is disclosed only in the pleading of the defendant or on his cross examination, such a circumstance may justify an amendment by adding a new plea of fraud [5] Thus, where the plaintiff sued on a mortgage executed by the defendant, and the defendant pleaded that he was a minor on the date of the mortgage and that the mortgage was therefore, void, the plaint was allowed to be amended by raising the plea that the defendant was guilty of fraudulent misrepresentation that he had attained majority at the time of the execution of the mortgage [6] But the Court will in every case require to be satisfied about the truth, and substantiality, of the proposed amendment and why the allegations were not originally made, before it grants the amendment [7] Where, in a 'passing off action, the omission to refer to fraud in the

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8. (31) AIR 1931 Pat 426 (427) 10 Pat 630

Note 7

[illegible]

be allowed only when a party has an honest case to raise)
(30) AIR 1930 Nag 295 (296) 27 Nag L R 226
2 (1878) 10 Ch D 393 (397) Tildesley v Harper (Cited in 1 Ind Cas 652)
(11) 11 Ind Cas 481 (491 495) (Cal)
(21) AIR 1921 Lah 367 (368)
(29) AIR 1929 Rang 33 (34)
3 (10) 8 Ind Cas 600 (601) (Low Bur)
(30) AIR 1930 Pat 321 (321) (Suit for possession whether can be converted into one for redemption)
(35) AIR 1935 Mad 50 (51)
(36) AIR 1936 Mad 545 (547)
[*See also* (37) AIR 1937 Pat 572 (575) 16 Pat 527 (Plaint based on forged document — Amendment in second appeal will not be allowed)]

[illegible]

Note 8

1 (87) 14 Ind App 111 (121) 11 Bom 690 (PC)
2 (87) 14 Ind App 111 (125) 11 Bom 620 (PC)
3 (28) AIR 1928 Mad 759 (760)
4 (1893) 9 T L R 580
5 (1889) 14 P D 56 (59) Riding v Hawkins
6 (98) 25 Cal 371 (388 390)
7. (24) AIR 1924 Mad 883 (885)

plaint was due to an oversight and there were circumstances to show that the plaintiff intended from the very outset to allege fraud, it was held that in the interests of justice the amendment should be allowed.[8] Where the plaintiff sued for the recovery of a certain sum of money on the basis of his title by inheritance and the defendant pleaded a sale of such right to himself the plaint was allowed to be amended, by raising the plea that the sale was invalid owing to the fraud of the defendant.[9]

See also the undermentioned decisions.[10]

9. Amendment by adding new reliefs or claims. — An alteration merely in the relief claimed in the suit does not, as a general rule, change the character of the suit, and an amendment seeking such alteration will be allowed if it does not cause injustice to the other side.[1] The same principle will apply to the addition of new reliefs in the plaint. Where a claim to which the plaintiff is entitled has been left out by a *bona fide* mistake, or by inadvertence, or on a misapprehension of facts, an amendment will be allowed by adding the claim so left out.[2] Where, however, the omission is a deliberate one, leave to amend will be refused.[3] Where, by virtue of circumstances arising subsequent to the institution of the suit, the plaintiff becomes entitled to a larger or other relief than the one claimed, amendment may be allowed so as to add such other relief.[4] All reliefs *ancillary* to the main relief asked in the plaint may be allowed to

8 ... AIR 1928 Mad 759 (760)
9 ... m 509 (514, 515)
10 (35) AIR 1935 Mad 868 (870) (Suit by minor after becoming major against ex-guardian for accounts — Plaint may be amended by making it one for recovery of specific sum of money lost to the minor ... through fraud of the guardian.)
(35) AIR 1935 Mad 50 (51) (A suit on a promissory note cannot be converted into a suit based on fraud or deceit, especially at a late stage.)

Note 9

1. (93) 20 Cal 805 (808)
(95) 22 Cal 692 (710)
(33) AIR 1933 Rang 247 (249)
(34) AIR 1934 Mad 267 (268) (Additional relief asked for by way of amendment, out of abundant caution due to conflict of decisions, amendment should be allowed.)
(34) AIR 1934 Rang 266 (267) (Amendment within limitation.)
(97-01) 2 Upp Bur Rul 231
(34) AIR 1934 Mad 600 (600) (Suit by minor for ...

for declaration that decree was not binding on ...

... be allowed.)
(35) AIR 1935 Mad 160 (161) (Promissory note executed by person on his own behalf and as ...

... sonally allowed.)

... tion — Subsequent prayer for possession.)
(25) AIR 1925 Oudh 555 (556) (Do.)
(29) AIR 1929 Lah 112 (112) (Do.)
(23) AIR 1923 Mad 553 (557) (Omission to add further relief of redemption — Amendment allowed in second appeal.)
[*See also* (35) AIR 1935 Pat 365 (366) (Suit on ...

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(12) 17 Ind Cas 646 (647) (Cal)
(19) AIR 1919 Cal 904 (907) 45 Cal 805
4. (29) AIR 1929 Cal 519 (520) 58 Cal 622
(25) AIR 1925 Cal 944 (944)
(07) 6 Cal L Jour 74 (80, 81)

O. 6 R. 17
Notes 6-8

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> "It has long been the universal practice, except in most exceptional circumstances not to allow amendments for the purpose of adding a plea of fraud where fraud is not pleaded in the first instance

Where the fraud is disclosed only in the pleading of the defendant or on his cross examination such a circumstance may justify an amendment by adding a new plea of fraud [5] Thus, where the plaintiff sued on a mortgage executed by the defendant, and the defendant pleaded that he was a minor on the date of the mortgage and that the mortgage was therefore, void, the plaint was allowed to be amended by raising the plea that the defendant was guilty of fraudulent misrepresentation that he had attained majority at the time of the execution of the mortgage [6] But the Court will, in every case, require to be satisfied about the truth and substantiality, of the proposed amendment and why the allegations were not originally made, before it grants the amendment [7] Where in a "passing off" action, the omission to refer to fraud in the

8. ('31) AIR 1931 Pat 426 (427) 10 Pat 630

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11 Ind Cas 481 (491 495) (Cal)
1921 Lah 367 (368)
(84)
v Bur)
for possession

('36) AIR 1936 Mad 545 (547)
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4 ('24) AIR 1924 Mad 883 (885)
('18) AIR 1918 Sind 6 (8) 13 Sind L R 1 (An [illegible]

Note 8

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3 ('28) AIR 1928 Mad 759 (760)
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1 (93) 20 Cal 805 (808)
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(33) AIR 1933 Rang 247 (249)
(34) AIR 1934 Mad 267 (268) (Additional relief asked for by way of amendment out of abundant caution due to conflict of decisions amendment should be allowed)
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(97 01) 2 Upp Bur Rul 231
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(34) AIR 1934 Rang 266 (267) (Amendment of prayer and not of cause of action — Relief one which plaintiff is entitled to claim — Defendant not deprived of any defence—Amendment should

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O. 6 R 17
Notes 6-8

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8 Amendment by adding or substituting a new plea of fraud — Where fraud of one kind has been pleaded an amendment introducing a new and distinct kind of fraud in substitution of the fraud pleaded will not be allowed especially after all the evidence has been given [1] It is a well known rule that a charge of fraud must be substantially proved as laid and that when one kind of fraud is charged another kind of fraud cannot upon the failure of proof be substituted for it [2] The reason is that such a substitution will as a rule entirely change the character of the suit as originally laid On the same principle where no fraud has at all been alleged in the original plaint a new plea of fraud will not except where strong grounds exist be allowed to be raised by way of amendment [3] In *Bently v Black* [4] Lord Esher M R said

> It has long been the universal practice except in most exceptional circumstances not to allow amendments for the purpose of adding a plea of fraud where *fraud is not pleaded in the* first instance

Where the fraud is disclosed only in the pleading of the defendant or on his cross examination such a circumstance may justify an amendment by adding a new plea of fraud [5] Thus where the plaintiff sued on a mortgage executed by the defendant and the defendant pleaded that he was a minor on the date of the mortgage and *that* the *mortgage* was *therefore* void the plaint was allowed to be amended by raising the plea that the defendant was guilty of fraudulent misrepresentation that he had attained majority at the time of the execution of the mortgage [6] But the Court will in every case require to be satisfied about the truth and substantiality of the proposed amendment and why the allegations were not originally made before it grants the amendment [7] Where in a passing off action the omission to refer to fraud in the

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Note 7

1 [illegible]

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(30) AIR 1930 Nag 295 (296) 27 Nag L R 296
2 [illegible] v Harper

3 (10) 8 Ind Cas 600 (601) (Low Bur)
(30) AIR 1930 Pat 321 (321) (Suit for possession whether can be converted into one for redemption)
(35) AIR 1935 Mad 50 (51)
(36) AIR 1936 Mad 545 (547)
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4 (24) AIR 1924 Mad 883 (885)
(18) AIR 1918 Sind 6 (8) 13 Sind L R 1 (*An application for amendment in order to get ad*vantage over the other side in the course of

5 [illegible]

Note 8

1 (87) 14 Ind App 111 (121) 11 Bom 620 (PC)
2 (87) 14 Ind App 111 (125) 11 Bom 620 (PC)
3 (28) AIR 1928 Mad 759 (760)
4 (1893) 9 T L R 580
5 (1889) 14 P D 56 (59) Riding v Hawkins
6 (98) 25 Cal 371 (388 390)
7 (24) AIR 1924 Mad 883 (885)

Where, however, the proposed amendment is likely to cause injustice to the other side, it will not be allowed.[9] Thus, where the application for leave to amend was made at a very late stage of the proceedings and the grant of the leave would have necessitated practically a trial of the whole case over again, it was held that leave should be refused.[10] Where the relief claimed by way of amendment was totally different from, and inconsistent with, the relief originally claimed it was held by the High Court of Lahore that leave to amend should be refused.[11] In *Ardeshir H Mama v. Flora Sassoon*,[12] where a suit for specific performance, or, in the alternative, for damages, was sought to be amended so as to convert it into a suit for damages only, their Lordships of the Privy Council observed as follows:

> That the Court should have the power of granting such an amendment in a proper case is salutary and indeed necessary ... But it is one to be most carefully and jealously exercised in all the circumstances of each individual case and with due regard to its effects upon the position both of the plaintiff and the defendant ... Indeed so serious, in many cases, is the exercise [illegible]

10. Amendment by adding a new ground of relief. — The same principles as are applicable to cases of amendments by adding *new reliefs*, apply to amendments by adding new *grounds of relief*. Thus, a new ground in support of the relief claimed cannot be said to alter the character of the suit and will as a general rule be allowed.[1]

(12) 13 Ind Cas 203 (204) (Mad)
(12) 16 Ind Cas 986 (987) (Mad) (Suit for partnership account — Addition of prayer for dissolution.)
(33) AIR 1933 Lah 45 (215) (Do.)
('13) 21 Ind Cas 778 (779) (Mad)
(15) AIR 1915 Mad 452 (453): 38 Mad 677 ... prayer ... declara... nager— Consideration valid in part — Suit can be amended into one for redemption.)
(18) AIR 1918 Mad 1142 (1145) (Plaintiff can be allowed to amend his plaint which prayed for redemption of the whole mortgage by praying for recovery in the alternative of his share and for partition and possession of such share on payment of the proportionate amount of the mortgage.)
(27) AIR 1927 Mad 212 (213)
(29) AIR 1929 Mad 273 (274) (Suit for rent and possession—Addition of prayer for declaration of title.)
(68) 10 Suth W R 362 (363) (Suit for enhancement of rent for specific share of land can be ...

... specific performance of contract in alternative could be claimed.)
(10) 8 Ind Cas 477 (479): 1 Upp Bur Rul 30 (Suit for divorce between Burmese spouses was instituted without praying for partition — Amendment by adding a prayer for partition.)
(17) AIR 1917 Low Bur 72 (72)
(22) AIR 1922 Sind 46 (46) (Suit for specific performance or in the alternative for damages—Amendment by giving up claim for specific performance.)
[But see (14) AIR 1914 Low Bur 225 (225) (Suit by vendee for possession—Vendor's father interested in the property sold—Vendee cannot ...

9. [*See* (12) 14 Ind Cas 537 (539) (All).]
10. (92) 15 Mad 255 (258)
(98) 21 Mad 288 (291)
11. (29) AIR 1929 Lah 449 (450)
12. (28) AIR 1928 P C 208 (219): 52 Bom 597: 55 Ind App 360 (P C)

Note 10

1. (05) 8 Oudh Cas 266 (270) (Suit for declaration of title on ground of survivorship—Amendment by pleading that even if partition had taken place the plaintiff had a preferential title.)
(31) AIR 1931 Bom 590 (591, 592) (Suit against certain persons as members of a joint Hindu family—Amendment by pleading in the alternative that the defendants were in any event liable as partners of a firm.)
(10) 8 Ind Cas 79 (81) (Cal) (Alternative ground in support of claim for injunction.)
(25) AIR 1925 Oudh 523 (524) (Original claim on custom — Amended claim independent of custom.)
(32) AIR 1932 Mad 603 (604)
(09) 10 Bom L R 346 (349)

O. 6 R. 17
Notes 10-11

In the undermentioned case,[2] the plaintiff was allowed to amend his plaint by adding another ground even where he had adduced false evidence in support of his first ground, where the falsity of the claim did not extend to the whole of the title that was set up, but was confined to particular link in the chain As regards the amendment of pleadings of parties who deliberately put forward false claims, see the undermentioned cases [3]

11. "As may be necessary for the purpose of determining the real questions in controversy." — The main object of allowing amendments is *to get at the rights* of the parties,[1] and to avoid *multiplicity of suits,* where the dispute can be settled in the suit already instituted without unfairness or injustice to the other side [2] "However the necessity to amend may have arisen, leave to amend should always be given and at any stage in the proceedings in order to allow the real question at issue between the parties to be raised on the pleadings, unless the party applying for leave has acted in bad faith or the amendment will cause some injury to the opposite party for which he cannot be fully compensated by costs or otherwise "[3] Thus, where the *properties in the plaint are wrongly described,*[4] *or some properties are omitted from the*

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2. ('33) AIR 1933 Cal 271 (274)

3. ('33) AIR 1933 Cal 271 (274)

Note 11

1. ('19) AIR 1919 Cal 304 (307) 45 Cal 305
('35) AIR 1935 Pat 463 (465)

2. ('21) AIR 1921 Nag 161 (162)
('25) AIR 1925 Nag 195 (196) (Amendments should be made to shorten litigation)
('13) *19 Ind Cas 250 (250) (All)*
('20) AIR 1920 Lah 220 (222)
('25) AIR 1925 Mad 585 (596) (Amendments which will enable the final settlement of the disputes between the parties should be allowed)
('26) AIR 1926 Pat 427 (428) 5 Pat 746 (Question of fact to be raised by amendment, already facts and evidence adduced—Amendment should be allowed)
('72) 18 Suth W R 424 (430) (Action on promissory notes — Part of the consideration illegal—Amendment allowed in appeal so as to recover so much of the consideration as was not illegal)
('23) AIR 1923 Rang 160 (161)
('35) AIR 1935 All 651 (652) (Suit *objecting to* constructions made by defendants on certain plot — Plaintiff not knowing in what capacity defendants made construction — Plaintiff applying for amendment of plaint on *defendant's* reply—*Held* it should be allowed)
('38) AIR 1938 Mad 709 (709) (Suit by mortgagee to enforce his half share in mortgage—Sub mortgagees made defendants but subsequently transposed as co-plaintiffs — Application by them for amendment of plaint by including other half share *held* should be allowed)
('37) AIR 1937 Nag 84 (84) I L R (1937) Nag 151 (Declaratory suit — Suit for declaration of Maharki watan — Subsequent amendment for reliefs of possession and injunction — Separate suit for possession in time if amendment would have been refused—Possession being consequential relief on title, amendment *held not contrary* to law)

3. ('25) AIR 1925 Mad 950 (958).
('38) AIR 1938 Rang 461 (463) 1938 Rang L R 521
See also the following cases
('14) AIR 1914 Mad 17 (17)
('32) AIR 1932 Bom 175 (176)
('70) 14 Suth W R 181 (182)
('26) AIR 1926 Nag 265 (266)
('25) AIR 1925 Oudh 555 (556).
('22) AIR 1922 Oudh 266 (267)
('25) AIR 1925 Sind 26 (28)
('28) AIR 1928 Mad 2 (5) (Mortgage suit—Amendment though necessitating decision as to ownership of property was allowed)
('35) AIR 1935 Mad 158 (160) (Amendment adding a new ground of exemption from limitation)
('26) AIR 1926 Mad 754 (755) (Amendment not affecting defendant's liability to pay)
('15) AIR 1915 Mad 984 (986)

4. ('26) AIR 1926 Nag 313 (314)
('35) AIR 1935 Oudh 92 (93) 10 Luck 496
('32) AIR 1932 Pat 355 (356) 11 Pat 624 (Particulars of survey plots)
('11) *10 Ind Cas 476 (477) 33 All 616*
('95) 17 All 238 (291)
('74) 21 Suth W R 187 (187) (One of the boundaries of one of the plots claimed if omitted can be supplied by amendment)
('70) 14 Suth W R 474 (474) (Quantity of land in defendant's possession not specified—Defect can be remedied by amendment)
[*See* ('35) AIR 1935 Rang 522 (523) (Property incorrectly described in plaint, preliminary decree and final decree — Amendment can be allowed in final decree under inherent power)]
[*See also* ('36) AIR 1936 P C 332 (334) . 16 Pat 1 63 Ind App 441 (P C) (Suit for partition of estate left by deceased — Partition of entire estate claimed and no occasion for differentiating between ancestral property and self acquired properties of deceased — Finding that former *not partible but only the latter — Plaintiff* should be given an opportunity of proving what items were self acquired properties of deceased)]

plaint by inadvertence[5] or where there is a mistake in the statement of the cause of action,[6] or a *bona fide* mistake in making the necessary averments in the plaint,[7] or in drawing up the pleadings,[8] or the suit is brought under a wrong Act[9] an amendment will be allowed to rectify the omission or mistake See also the cases cited below[10]

But the 'questions in controversy between the parties which have to be brought out clearly and decided are, save in exceptional cases the questions in controversy between the parties *when the parties joined issue* that is when the defendant puts in his written statement they do not include new questions which the defendant neither wished nor intended then to dispute but which, at a later stage in the proceedings either because he has changed his mind or because something has happened after he filed his written statement, he thinks it profitable to dispute[11] An amendment which will be *useless* if made as for instance an amendment setting up a claim or defence which is bad in law,[12] or an amendment which, if allowed *would still leave the claim or defence as amended unsupportable*[13] cannot be said to be necessary for the purpose of determining the real question in controversy in the suit Again a merely *technical plea* cannot be said to be necessary for the purpose of determining the real questions in controversy between the parties and therefore it was held that it should not be allowed to be set up by way of amendment[14]

12. Amendment by introducing new cause of action. — It has been seen in Note 3 *ante* that there is a limitation on the wide powers of the Court to amend

5 (14) AIR 1914 Lah 263 (264 265) 1914 Pun Re No 69

(34) AIR 1934 Cal 640 (642) (Omission in an application for leave to sue in *forma pauperis* due to mal erte ce)

(16) AIR 1916 Pat 317 (319) 1 Pat L Jour 393 (Partition suit — Items omitted by inadvertence might be brought in by amendment)

6 (69) 11 Suth W R 223 (223)

(30) AIR 1930 All 474 (475)

7 (10) 6 Ind Cas 876 (877) (Mad) (Defective averments should be allowed to be amended)

(25) AIR 1925 Nag 9 (10)

(71) 7 Beng L R 333 (334)

(72) 9 Bom H C R 1 (6)

(35) AIR 1935 Pat 86 (87) (No averment in plaint that notice under S 80 has been served even though such notice has been served as a fact — Amendment of plaint to include such averment must be allowed)

[*See* (35) AIR 1935 Mad 158 (159 160) (Amendment adding a new ground of exemption from limitation)]

8 (21) 62 Ind Cas 652 (653) (Mad) (Clerical error made in the plaint)

(32) AIR 1932 Lah 28 (29) (Want of verification in pleading may be amended)

(13) 18 Ind Cas 444 (445) 40 Cal 541 (Technical defect in the mode of relief asked)

(10) 7 Ind Cas 251 (252) (Cal) (Plaint—Not pro

Amendment by plaintiff signing later—Allowed)

(26) AIR 1926 Nag 385 (386) (Omission to raise certain pleas by mistake or thinking they were

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tituted wrongly in name of firm by mistake—Provisions of Partnership Act should not be too rigidly enforced—Amendment of plaint should be allowed even at late stage)

[*See also* (33) AIR 1933 Mad 410 (411) (Amendment of plaint for stating relief originally intended accurately and clearly can be allowed)]

9 (73) 19 Suth W R 61 (62)

10 (37) AIR 1937 Nag 173 (174) ILR (1937) Nag 514 (Plaintiff wrongly described as mandir in plaint—Plaint *held* could be amended by striking out the word mandir and substituting word deity for it)

(37) AIR 1937 Oudh 290 (291) 13 Luck 157 (Where a suit was brought by one of two co-mortgagees to recover his share only but it was found that the mistake was due to wrong advice and that the amendment of plaint would not have changed the cause of action *held* that the plaintiff should be given permission to amend the plaint for the ends of justice)

11 (25) AIR 1925 Mad 950 (958)

12 (23) AIR 1923 Mad 245 (246) (Negligence fo nd Amendm nt to a a m a la s of negli

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14 (11) 10 Ind Cas 532 (534) (Cal)

(34) AIR 1934 All 11 (12) (Amendment to include mere technical plea of limitation — Not allowed)

O. 6 R. 17
Note 12

pleadings, namely, that the Court cannot, by way of amendment, substitute *one distinct cause of action for another*.[1] Where the plaintiff sued for specific performance of a contract alleged to have been entered into by the defendant with him in 1912 and on his failure to establish the alleged contract sought to amend the plaint by setting up another and independent contract of 1903, it was held by their Lordships of the Privy Council that such amendment could not be allowed. Their Lordships said:

> "When once that contract has been negatived, to permit the plaintiff to set up and establish another and an independent contract altogether would, in their Lordships' opinion, be to go outside the provisions established by the Code of Civil Procedure to which reference has been made. It would be a regrettable thing if when in fact the whole of a controversy between two parties was properly open, rigid rules prevent its determination, but in this case their Lordships think that the rules do have that operation and that it was not open to the Court to permit a new case to be made."[2]

In the following instances amendments were refused as introducing a new and distinct cause of action:—

(1) Claim on the basis of *Dattaka* adoption — amendment into claim based on *apathitha* adoption.[3]

(2) Claim based on negligence — amendment into claim based on nuisance.[4]

(3) Suit based on fraud and instigation of false claims on the part of the defendant — amendment into claim based upon an implied contract of indemnity.[5]

Note 12

1 ('38) AIR 1938 Mad 53 (55) (An amendment which enables the creditor to allege new acts of insolvency which have become unimpeachable and have ceased to be acts of insolvency under S. 9, Provincial Insolvency Act, and which he neither relied nor intended to rely when presenting his petition in insolvency cannot be allowed.)
('36) AIR 1936 Pat 535 (536) (An amendment which involves a substantial alteration of the cause of action, namely, to change a suit for declaration into one for possession, should not be permitted more especially when the suit is brought long after the expiry of the period of limitation.)
('38) AIR 1938 Rang 125 (126) (Where a person brings a suit for recovery of possession of land but it is found that in fact his claim is for redemption of an unprovable usufructuary mortgage, such person cannot be allowed to amend the pleadings by basing his suit on his title, the causes of action for the two suits being different.)
See also the following cases:
('27) AIR 1927 Mad 859 (860)
('16) AIR 1916 Mad 698 (698)
('16) AIR 1916 Mad 1212 (1213) (Plaint not to be amended so as to set up a totally different title and cause of action.)
('19) AIR 1919 Oudh 247 (248) (Starting a new trial on a cause of action deliberately abandoned — Amendment will not be allowed in second appeal.)
('18) AIR 1918 Mad 691 (681) 40 Mad 365 (FB)
('26) AIR 1926 Rang 49 (50) 3 Rang 483 (Claim of one kind cannot be converted into claim of another kind.)
('20) AIR 1920 Low Bur 92 (93, 94)
('19) AIR 1919 Upp Bur 29 (29) 3 Upp Bur Rul 171

2 Ind Jur (NS) 118 (Plaint not to be amended [illegible] plaintiff to add [illegible]

found to be forgery—Suit cannot be amended to one on account stated in the previous year.)
('94) 21 Cal 997 (1005) 21 Ind App 163 (PC)
('91) 15 Bom 93 (98) (Leave to sue under Clause 12, Letters Patent will not be given in respect of a different cause of action after the institution of the suit.)
[illegible]

Amendment into suit for redemption of different mortgage.)]
[**But see** ('16) AIR 1916 Mad 1072 (1073) (Suit for specific performance can be decreed on a contract different from the one set up when time is not essence of contract and there has [illegible] Bur [illegible]
(**See however** ('25) AIR 1925 Rang 178 (182) 2 [illegible]

4. [illegible]
5 ('13) 21 Ind Cas 935 (936) (Mad)

O. 6 R. 17 Note 12

(4) Claim for declaration of ownership—amendment into claim for specific performance of a contract.[6]

(5) Claim to establish title to an *archaka* office and for mesne profits of certain lands attached to the office—amendment into an alternate claim for reasonable wages for having rendered *archaka* service in suit temple.[7]

(6) Suit on the basis of a contract—amendment raising plea that there was no contract at all.[8]

(7) Suit for redemption—amendment so as to convert it into one for enforcing a right as owner.[9]

(8) Plaintiff suing alleging right to sue on behalf of a certain committee—on failing to establish such right, amendment by adding as parties persons who had such right.[10]

Where in answer to an application for amendment it is alleged that such amendment would change the cause of action the Court must look to the *substantial nature* of the claim and not to the *formal* manner in which it is inserted.[11] A mere change in the *date* of the cause of action[12] or the correction of a clerical error[13] or amendments to disclose further details of a fact which support or amplify a cause of action already sued on[14] or the correction of a misdescription of property,[15] cannot be said to introduce such a *distinct* cause of action as will entail a rejection of the application for amendment. Thus where the plaintiff sued to set aside a sale on the ground that the defendants had taken advantage of his youth, he having just attained majority, and afterwards applied to amend the plaint by adding that on the date of the sale he was a minor, it was held that the amendment was merely for the purpose of amplifying and developing the original cause of action and should be allowed.[16] Similarly a plaint can be amended by putting in the necessary ground of exemption from limitation for the suit such as an acknowledgment of liability.[17] Where in respect of an *original liability* to pay a certain sum of money, a document, such as a promissory note or a mortgage, is taken and the plaintiff in a suit on such document finds that the document is inadmissible in evidence owing to some technical defect, an amendment of the plaint by claiming relief as on the basis of the original liability does not, as a general rule, amount to a substitution of a distinct cause of action and should

6 ('31) AIR 1931 Lah 595 (597).
7 ('28) AIR 1928 Mad 828 (829).
8 ('27) AIR 1927 Mad 973 (973).
9 ('29) AIR 1929 Rang 179 (181) 7 Rang 140.
('16) AIR 1916 Low Bur 71 (72) 8 Low Bur Rul 418.
('21) AIR 1921 Lah 59 (55).
10 ('26) AIR 1926 Mad 577 (577).
11 ('26) AIR 1926 Sind 264 (267) 21 Sind L R 330.
('38) AIR 1938 Pat 400 (401) (Amendment altering mere form of suit should be allowed.)
12 ('26) AIR 1926 Mad 128 (129) (Change in the date as to when cause of action arose.)
('33) AIR 1933 Sind 131 (133).
[illegible]

14 ('25) AIR 1925 Nag 9 (11).
('81) 5 Bom 609 (613, 614).
('20) AIR 1920 Low Bur 92 (93, 94) (Amendment [illegible]
[illegible]
15 ('37) AIR 1937 Lah 895 (896) (Amendment of application for adjudication as insolvent.)
16 ('25) AIR 1925 Mad 188 (188).
17 ('09) 3 Ind Cas 159 (160) 34 Bom 250.
('18) AIR 1918 Mad 1200 (1200).
('18) AIR 1918 Lah 220 (220) 1918 Pun Re No 102.
('27) AIR 1927 Mad 504 (505).
('28) AIR 1928 Sind 17 (20) 22 Sind L R 272.
[illegible]

O. 6 R. 17
Note 12

therefore, be allowed [18] Again, where subsequent to the institution of the suit by the plaintiff, events happen which give the plaintiff a new cause of action for the relief claimed or the right to a new or additional relief he will, as a general rule, be allowed to amend the plaint by moulding it in an appropriate manner [19] Thus where the plaintiff sues to redeem a particular mortgage, and the defendant denies that mortgage but sets up another mortgage the plaintiff may be allowed to amend the plaint by

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a party to amend its pleadings by permitting him to substitute one ground of exemption from limitation for another)
(35) AIR 1935 Mad 158 (159)

18 (22) AIR 1922 Lah 394 (394) (Insufficiently stamped hundi)
('20) AIR 1920 Mad 910 (911) (Do)
(27) AIR 1927 Mad 878 (878) (Do)
(24) AIR 1924 Mad 520 (521) (Do)
('31) AIR 1931 Oudh 54 (56) (Do)
(26) AIR 1926 Mad 1124 (1124 1125) (Mortgage for amount due on settled accounts — Suit on mortgage—Binding character of mortgage denied —Amendment into claim on basis of running account)
(30) AIR 1930 Mad 168 (170 172)
(35) 39 Cal W N 1235 (1241)
(35) AIR 1935 All 353 (357) 57 All 459 (Suit on promissory note — Plaintiff finding his suit as such may fail applying for amendment by falling back on original consideration— Amendment *held* should be allowed)
(36) AIR 1936 Rang 508 (509) 14 Rang 383 (Promissory note — Suit for recovery of debt thereunder time-barred — Application to amend plaint to allow creditor to sue for original debt —Amendment should be allowed)
(38) A I R 1938 Rang 461 (467) 1938 Rang L R 521 (Mortgage suit — Claim based on pro note and transfer by deposit of title deeds — Pro note inadmissible because of some defect in it — Amendment to base claim on original transaction —Other party if not deprived of defence amendment can be allowed)
(38) AIR 1938 Pat 205 (207) 17 Pat 268 (Plaintiff in suit on hand note is entitled to recover his claim on the original loan when hand note is not admissible provided plaint is amended)
(36) AIR 1936 Mad 785 (787) (F B) (Suit on promissory note barred by limitation — Plaint amended so as to base claim on original debt)
(35) AIR 1935 Rang 282 (284)
(36) AIR 1936 Mad 632 (633) (Amendment of plaint allowing plaintiff to base his cause of action on fresh promise to pay time barred debt —Fresh promise being original cause of action amendment allowed)
(37) AIR 1937 Pat 656 (656)

See also the following cases

(33) AIR 1933 Nag 57 (62) 29 Nag L R 131 (Facts for the original cause of action fully stated —Formal amendment not necessary)
(30) AIR 1930 Bom 474 (476)
(25) AIR 1925 Rang 282 (282) 3 Rang 183 (F B)
(30) AIR 1930 Lah 559 (560)
(20) AIR 1920 Mad 336 (336) (Suit on a pro note—Amendment into suit based on pro note as well as original consideration—Allowed)
(39) AIR 1939 Mad 34 (35) (Suit on promissory note — Note insufficiently stamped — Amendment of plaint by falling back on a previous promissory note allowed)
(35) AIR 1935 Mad 888 (890) (Suit on hundi— Hundi found inadmissible in second appeal — Amendment of plaint allowed)

As to cases where the loan and the note are simultaneous see the following cases

(32) AIR 1932 Mad 693 (694)
[*See* (14) AIR 1914 Mad 657 (659) 38 Mad 660 (Suit on pro note which is inadmissible—Payment of money at the time of execution of note does not give rise to independent obligation— Relief cannot be granted upon such obligation)]
[*See also* (30) AIR 1930 Bom 66 (68)
(33) AIR 1933 Bom 476 (477 478) 57 Bom 609 (Suit on promissory note — Cause of action on original loan giving rise to pro note can be set up by amendment at trial or appeal)]
[But see (25) AIR 1925 Mad 351 (352) (Suit on pro note insufficiently stamped—Consideration of note being antecedent debt—Relief based on antecedent debt cannot be granted)
(32) AIR 1932 Bom 394 (395)]

19 ('26) AIR 1926 Mad 6 (10)
(15) AIR 1915 Sind 25 (27) 9 Sind L R 61
(25) AIR 1925 Pat 168 (178)
(31) AIR 1931 Nag 10 (12) 26 Nag L R 348
(25) AIR 1925 Mad 1021 (1023)
(21) AIR 1921 Lah 220 (221) (Suit for injunction may be changed into one for possession)
(12) 16 Ind Cas 734 (735) (Mad) (Suit for declaration — Securing of possession by defendant after suit—Adding of prayer for possession—Court can order amendment)
(89) 12 Mad 136 (136)
(31) AIR 1931 Mad 505 (509)
(24) AIR 1924 Mad 309 (310)

In the following cases relief based upon such new cause of action was granted although amendment was not asked for

(23) AIR 1923 All 560 (562)
(17) AIR 1917 Mad 198 (200) (Appellate Court can take cognizance of subsequent events)
(18) AIR 1918 Oudh 105 (106) (Plea based on subsequent events can be raised)
(19) AIR 1919 Lah 269 (263) 1919 Pun Re No. 127. (Decree can be given without amendment)
(18) AIR 1918 Mad 143 (149) (Relief on cause of action arising subsequent to suit can be granted)
(35) AIR 1935 Oudh 22 (23) 10 Luck 270 (But in such cases opposite party must be given an opportunity to amend his pleading)

claiming relief on the basis of that mortgage,[20] except where the plaintiff is guilty of *mala fides*[21] For other instances, see the undermentioned cases[22] But where the cause of action is foreign to the original cause of action on which the suit was brought, the amendment cannot be allowed Thus, where *A*, the endorsee of a promissory note, sued *B* on the note, and it was found that the note was void as infringing the Paper Currency Act, and the plaintiff thereupon obtained an ***assignment of the original obligation*** and applied to add this cause of action, it was held that it could not be allowed inasmuch as the cause of action based on the ***assignment of the original obligation*** was quite distinct from the cause of action based on the assignment of the promissory note itself[23] On the question if Courts can give relief on a cause of action accruing after the institution of the suit, see Note 4 to O 7 R 7 ***infra*** and cases cited in Point 19 above

13. "At any stage of the proceedings." — Under the old Code a plaint could only be returned for amendment in certain cases specified, *at or before the settlement of issues*[1] The Court could also *at any time before judgment* amend the plaint[2] The

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[*See also* (22) AIR 1922 Oudh 206 (207) (Suit for declaration of title — During pendency of suit

to be dismissed)

(71) 7 Beng L R App 65 (65) (Substitution of parties due to subsequent events)]

[**But see** (27) AIR 1927 Cal 56 (57) (Distinct cause of action — Not allowed)

('10) 5 Ind Cas 699 (701) 6 Nag L R 17]

20. (80) 4 Bom 581 (588) (Suit for redemption— Defendant admitting mortgage but proving that it was of another date and for a different amount — Relief granted to plaintiffs upon facts proved by defendant)

(93) 17 Bom 365 (368) (Do)

(03) 27 Bom 271 (276, 278) (Do)

(10) 7 Ind Cas 115 (117) 32 All 651 (Suit on a later mortgage — Later mortgage containing covenant not to redeem it before redeeming the earlier one—Amendment into suit on both mortgages allowed)

(03) 5 Bom L R 643 (645) (Suit for redemption — Defendant denying suit mortgage but prior mortgage which was admitted by him was then alive — *Amendment of plaint for redemption of* earlier mortgage)

(07) 30 Mad 388 (390) (Suit for redemption— Plaintiff failing to prove mortgage set up by him — Plaintiff may be allowed to redeem on basis of different mortgage under which defendant claims to hold)

(17) AIR 1917 Mad 495 (498) (Suit for redemption — Defendant denying suit mortgage but claiming to hold under other different mortgages —Plaintiff can be allowed to amend his plaint so as to claim redemption of one of the mortgages set up by defendant)

(29) AIR 1929 Oudh 483 (485) 5 Luck 424 (Suit for redemption — Defendant denying suit mortgage but claiming to hold under two earlier mortgages—Amendment of plaint so as to claim redemption of earlier mortgages allowed)

[*See also* (30) AIR 1930 Sind 98 (98) (Suit for

[**But see** (38) AIR 1938 Oudh 16 (16) 13 Luck 669]

21 (18) AIR 1918 Mad 121 (122) (Plaintiff fabricating a document)

[*See also* (37) AIR 1937 Pat 572 (575) 16 Pat 527 (A party coming to Court with a forged document should not be allowed to amend his plaint in second appeal)]

22

dants — Amendment does not substitute distinct cause of action)

23 (31) AIR 1931 Mad 533 (533)

Note 13

1 (85) 7 All 79 (81) (FB)

(85) 7 All 860 (862)

(66) 5 Suth W R 234 (234) (Plaint cannot be amended after settlement of issues)

(80) 2 All 671 (675) (Plaint amendment as per the order made at the first hearing — It cannot afterwards be returned for amendment)

(68) 10 Suth W R 111 (112) (Plaint cannot be amended in Appellate Court)

(80) 2 All 669 (671) (Appellate Court cannot

ment at the final hearing)

(78) 10 Bom H C R 17 (18) (Not alleging any cause of action against one of the defendants)

(85) 9 Bom 358 (361) (Plaint disclosing no cause of action)

(97 96) 2 Upp Bur Rul 251 (Cause of action

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O. 6 R. 17
Note 13

present rule now makes it clear that the amendment can be made *at any stage* of the proceedings[3] It may, thus be allowed before or at or after the trial or before the final decree in the case[4] or in appeal[5] or in second appeal[6] or in revision[7] or even in an appeal before the Privy Council[8] A Court of Appeal may also remand the case directing the lower Court to amend the plaint and proceed with the trial[9] Mere delay, therefore, in applying for an amendment will not be a ground for refusing an [illegible][10] But where the application is made at such a late

[illegible] by trial

Court after judgment)

[illegible]

given an opportunity to adduce evidence on the new case adopted by the petitioner)
(37) AIR 1937 Pat 5?6 (5?7) (Suit instituted in name of firm by mistake — Amendment to be [illegible]

[illegible] appeal)
(19) AIR 1919 Oudh 154 (158) (Amendment of plaint may be allowed in appeal under excep[illegible]

(25) AIR 1925 Cal 431 (435) (When defendant [illegible]

(Amendment not changing character of suit and not unfair can be made in appeal before High Court)
(36) AIR 1936 All 239 (257) 58 All 505 (But the opposite party should not be prejudiced or taken by surprise)
(35) AIR 1935 Lah 91 (91) (*Appellate Court can* allow amendment converting declaratory suit into one for possession)
(35) AIR 1935 Mad 888 (890)
(38) AIR 1938 Pat 400 (401)
[*See also* (35) AIR 1935 Lah 378 (379)]

6 See Section 108 *ante*

[illegible] ed)
(36) AIR 1936 Mad 545 (547) (Necessary amendment can be permitted even in second appeal— Principles to be observed stated)
[*See* (35) AIR 1935 Pat 504 (506) 15 Pat 46 [illegible] the stage of the [illegible] 2 Pat

7 [illegible]

8 [illegible] All 4?9 (PC)
(67) 11 Moo Ind App 468 (486) (P C)

[illegible] nd by High Court for a [illegible] urt —Amendment by lower Appellate Court is bad)]

10 (25) AIR 1925 Oudh 291 (292) 27 Oudh Cas 231 (Loss to the defendant due to delay in [illegible]

stage that under the circumstances, it will cause injustice or injury to the opposite party if the leave to amend is granted the application will be refused [11] Thus the Court will as a rule be disinclined to grant leave to amend —

(1) Where it introduces a totally new case [12] or necessitates a fresh trial or the letting in of fresh evidence [13]

(2) Where the amendment will lead to needless complications [14]

(3) Where the plaintiff is negligent or has taken his stand deliberately on a certain basis [15]

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plaint by withdrawing claim against property out id jurisdiction allowed)
(39) AIR 1939 Mad 388 (389) (In the matter of rectifying defects in pleadings which do not affect any substantial rights it is not consonant with justice to deny a remedy which otherwise would be lost by reason of carelessness or delay)
(35) AIR 1935 Pat 403 (405) (The significance of delay lies not in the quantity of time that has elapsed but in what has transpired during that time)

11. (25) AIR 1925 P C 169 (170) 47 All 459 (P C)
(33) AIR 1933 Bom 101 (104 105) (Leave asked for in second appeal refused)
(33) AIR 1933 Pat 443 (444) (Nature of case altered by amendment)
(21) 61 Ind Cas 328 (329) (Lah)
(12) 13 Ind Cas 128 (130) (Cal)
(86) 1886 Pun Re No 68 p 144
(21) AIR 1921 Lah 156 (156)
(18) AIR 1918 Lab 138 (138)
(14) AIR 1914 All 302 (303) (Amendment to introduce a new cause of action when it was ... t in ... efore ... nend his suit for possession into one for a right of way)
(18) AIR 1918 Pat 230 (233) (More than a year after issues when the case was ready for hearing raising a completely new point)
(87) 11 Bom 620 (638) 14 Ind App 111 (P C) (Amendment applied for when the evidence had been taken)
(73) 10 Bom H C R 187 (187)
(23) AIR 1923 Cal 223 (226) (Amendment defeating plea of defendant cannot be allowed)
(28) AIR 1928 Mad 828 (829)
[*See* (33) AIR 1933 Cal 668 (673) 60 Cal 801]

12 (27) 99 Ind Cas 979 (980) (Lah)
(34) AIR 1934 Oudh 118 (118)
(28) AIR 1928 Lah 933 (934)
(29) AIR 1929 Lah 710 (711) (After a period of two and half years)
(21) AIR 1921 Lah 53 (55) (Plaintiff having prayed for redemption was not allowed to amend his plaint for possession of property on the foot ... ed in revision)
(18) AIR 1918 Nag 148 (149) (Suit for declaration that sale is invalid — Amendment by claiming possession of property)
(38) AIR 1938 P C 123 (129) 32 Sind L R 448 I L R (1938) Mad 646 (P C)
(38) AIR 1938 Nag 388 (390) I L R (1939) Nag 191

13. (92) 15 Mad 255 (257 259)
(33) AIR 1933 Lah 676 (677) 14 Lah 640
(21) AIR 1921 Cal 125 (126)
(15) AIR 1915 Lah 177 (177)
(28) AIR 1928 Lah 599 (600) 9 Lah 291 (When no cause of action at all was alleged and suit was dismissed amendment not allowed to introduce the same)
(31) AIR 1931 Lah 260 (262) (Suit to recover price of goods supplied refused to be amended into a suit to recover damages for breach of contract)
(98) 21 Mad 288 (291) (Further evidence necessary)
(11) 12 Ind Cas 200 (202) (Upp Bur) (Fresh issues and fresh evidence)
(19) AIR 1919 Cal 534 (535 536) 46 Cal 168
(28) AIR 1928 Bom 516 (518) 52 Bom 640
[*See* (30) AIR 1930 Rang 140 (142) 7 Rang 800]

14 (28) AIR 1928 Lah 375 (376) 9 Lah 588 (Amendment changing plaintiff s name from temple to idol)
(25) AIR 1925 Mad 441 (442) (To convert a suit for maintenance of certain members alone of a tavazhi into a suit on behalf of the whole tavazhi)

15 (27) AIR 1927 Bom 521 (525) 51 Bom 749 ... stage)
(33) AIR 1933 Cal 271 (274) (In this case however considering the facts and circumstances the amendment was allowed on the ground that it would be more in furtherance of justice to do so)
... an agreement to sell)
(28) AIR 1928 Lah 32 (33) (Suit in ejectment cannot be amended in second appeal as on basis of permissive possession)

O. 6 R. 17
Note 13

(4) Where, notwithstanding objection by the opposite party, the plaintiff insists on proceeding with the suit as framed[16]

(5) Where the plaintiff has had several opportunities to apply for amendment but has slept over his rights for a very long time[17]

See also the undermentioned cases[18]

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(30) AIR 1930 Pat 321 (321) (Suit for possession

remedies open to him)
(28) AIR 1928 Oudh 135 (136 137)
(36) AIR 1936 Mad 545 (547) (For allowing amendment in second appeal it should be seen whether the conduct of the party seeking the amendment has been *bona fide* and he has come to Court with clean hands and whether by the exercise of due diligence the relief for amendment could have been sought earlier)
(37) AIR 1937 Sind 92 (93) 31 Sind L R 406 (Application to amend description in plaint—Plaint instituted by living person in name of and verified on behalf of a dead person—Living person s name cannot be substituted under O 1 R 10 in place of dead person—Plaintiff guilty of gross neglect—He cannot be allowed to amend under O 6 R 17)

16 (91) 15 Mad 255 (257)
(26) AIR 1926 Mad 988 (989) (Suit for injunction—Plaintiffs out of possession—Objection to frame of suit by defendants—Plaint yet not sought to be amended—Failure of plaintiff in trial Court—Application for amendment filed in appeal)
(82) 8 Cal 277 (278)
(97) 24 Cal 584 (588)

(10) 6 Ind Cas 549 (543) (All)
(24) AIR 1924 Pat 310 (311) 2 Pat 919 (Where the mistake is *bona fide* amendment will be allowed)

f date in

le delay)

(37) AIR 1937 Mad 484 (487)

18 (14) AIR 1914 All 484 (485) (Plaintiff in suit for ejectment asking plaint to be amended so as

appeal)
(71) 21 Suth W R 208 (209) (FB) (Where there is reason to think that omission to claim alter

defendant to raise objections in bar not taken in original statement)
(67) 3 Mad H C R 372 (373) (Defect on the face of the plaint which would have rendered it inadmissible is not a matter for amendment at the final hearing of the suit)
(36) AIR 1936 Pat 185 (189) (Suit barred under

possession)

Amendment of plaint sought—Amendment re

plaint sought in appeal on ground of mistake in

14. Opportunity to be given to the opposite party to amend his pleading. — Where a pleading is allowed to be amended, an opportunity should be afforded to the opposite side to meet the new case by filing any additional statement or letting in such further evidence as may be necessary [1] Where, however, a party raises a contention not covered by his pleading, the Court cannot direct the opposite party to file a statement in answer to such contention, without first directing the former to amend his pleading and deciding that the amendment is necessary [2]

15. "On such terms as may be just." — These words give the Judge an unfettered discretion as to the terms to be imposed in granting an amendment of the pleadings [1] As a general rule an amendment will only be allowed on the terms that the cost of the application for leave to amend, and of the costs occasioned by, and in consequence of, the amendment shall be paid by the party amending in any event [2]

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typing — No sufficient explanation offered why mistake was not discovered earlier — Appellate Court will not exercise its discretion in allowing amendment)

(38) AIR 1938 Pat 558 (559) (Suit under O 21, R 103 C P C for declaration and possession — Amendment of plaint by deleting claim for possession to avoid payment of additional court fee — Application for leave to re amend plaint in second appeal by including claim for possession — Leave refused)

(38) 1938 Oudh W N 1138 (1140) (Where a party has obtained an adjudication of his claim from the trial Court or has argued his case in respect

of court fee)

(36) 40 Cal W N 1233 (1236) (Suit challenging patni sale brought in wrong form — Objection in written statement — Amendment of plaint should not be allowed in Appellate Court when objection is taken when limitation for bringing suit has expired)

(38) AIR 1938 P C 123 (129) 32 Sind L R 418 I L R (1938) Mad 616 (P C) (*Held* that the relief of so wide and exceptional a nature should not have been entertained by way of amendment at the end of the trial)

(37) AIR 1937 Pat 572 (575) 16 Pat 527 (A party will not be allowed to amend the plaint in second appeal when he comes to the Court

(

Allowing amendment in second appeal is improper)

claim at the stage of second appeal from what he had either in trial or in Appellate Court)

Note 14

1 (12) 16 Ind Cas 785 (786) (Cal) (Because the case was pending for a long time is no exception

Ap for trial independently of Rules 23 and 25 of Order 41)

(75) 23 Suth W R 172 (173)

(14) AIR 1914 Mad 59 (61)

(34) AIR 1934 Bom 407 (410)

(35) AIR 1935 Oudh 22 (23) 10 Luck 270 (New events arising during progress of suit giving rise to new cause of action)

(34) AIR 1934 All 273 (276) 56 All 428

[*See* (17) AIR 1917 Lah 301 (302) 1917 Pun Re No 83]

2 (16) AIR 1916 Mad 903 (907)

Note 15

1 (1892) 2 Q B 317 (318 319) Woolley v Broad [*See also* (34) AIR 1934 Cal 102 (103 104) (Amendment of plaint before trial has begun should be allowed — Defendant can be compensated in costs — That another suit in which

evidence or pleading rendered nugatory by the amendment)

(95) 22 Cal 692 (711 713) (In appeal and in ordering a remand a party amending has been ordered to deposit all costs upto date within a specified time)

Belated amendment can be allowed only on condition of payment of costs)

(34) AIR 1934 All 273 (276) 56 All 428

O 6 R 17
Notes 15-18

The terms should be such as will prevent the opposite party from being prejudiced by the amendment [3]

An order directing a plaintiff to pay in cash the costs of amendment of the plaint after he has been found to be a *pauper* is not proper [4] Where a party accepts under an order costs which but for the order would not at that time be payable he cannot afterwards object that the order ought not to have been made [5] Where an amendment of a pleading is allowed on condition of the party paying to the opposite party a certain sum as costs and such sum is paid and accepted by the opposite party the latter cannot afterwards object to the order allowing amendment [6]

16 How amendments should be made — Under the old Code the plaint could be *returned* for amendment in certain cases specified [1] Under the present Code it would seem that the pleading should not be *returned* for amendment but is to be kept on the Court s file with direction to the parties to amend if necessary [2] Where however the Court has no pecuniary *jurisdiction* to entertain the suit the Court should under the provisions of O 7 R 10 of the Code return the plaint to the plaintiff who may amend it by deleting certain reliefs claimed and re present the same to the Court [3]

It is not however essential that the amendment should be made on the *face of the plaint* itself it may be made even on a separate sheet of paper though it is usually done on the plaint itself [4]

16a Court not having jurisdiction over suit, if can allow amendment of plaint — A Court which has no jurisdiction to entertain a suit is not competent to allow an amendment of the plaint which if granted would bring the suit within its jurisdiction [1] But it can return the plaint for presentation to the proper Court and the plaintiff can amend the plaint and re present it to the same Court [2]

17 Who can apply for amendment — Where a suit is instituted by two plaintiffs it is doubtful whether one of them alone can apply for amendment of the plaint [1]

18 Extent of amendment — A pleading can be amended only to the extent allowed by the Court Thus where a plaint was ordered to be amended by *addition of parties* and the plaintiff also altered the *relief claimed* it was held that the plaint

3 (1887) 36 Ch D 770 (774) Curtz v Spence
4 (22) AIR 1922 Bom 385 (385) 47 Bom 104
5 (27) AIR 1927 Mad 1009 (1009)
(33) AIR 1933 Mad 410 (411)
(34) AIR 1934 Cal 554 (555 556) 61 Cal 433 (Per Lort Williams J Ghose J contra)
6 (34) AIR 1934 Nag 163 (163) 30 Nag L R 347 (Unless he accepts the costs expressly re serving at that time his right to challenge that order)

Appeal is va d though ne a ep co s nen tendered on due date)]

Note 16

1 (11) 10 Ind Cas 922 (923) (Low Bur)
(97) 1 Cal W N 574 (576) (Land as described in the plaint cannot be identified)
[*See also* (03) 27 Mad 80 (84 85) (Suit held for multifariousness)]
2 (21) AIR 1921 Sind 166 (168) 17 Sind L R 2 3
[**See however** (13) 19 Ind Cas 672 (672) (Mad) (Pleading may however be returned to a party if he applies for it)]
3 (28) AIR 1928 Mad 559 (559 560)
4 (93) 1893 All W N 225 (225)

Note 16a

1 (35) AIR 1935 All 842 (843)
(38) AIR 1938 All 17 (18) ILR (1938) All 40
2 (38) AIR 1938 All 17 (18) ILR (1938) All 40

Note 17

1 (27) AIR 1927 Cal 733 (73)

must be taken as originally framed, even though the unauthorised amendment as to relief was not objected to either by the Court or by the other party [1]

A Court cannot allow an amendment which has the effect of ousting its own jurisdiction over the suit [2]

19. Effect of amendment and limitation. — Where, in a suit against several defendants, the Court cannot take cognisance of the claim as against some of the defendants, and in consequence thereof the plaintiff amends his plaint by restricting his claim only as against the other defendants, the effect of the amendment is as if the suit had never been commenced in respect of the former [1]

Where an amendment is allowed under this rule such amendment relates back to the date of the suit as originally filed where no party is added [2] But where the plaint in a suit for possession of certain plots of land is subsequently amended by the inclusion of certain other plots, it is not a case of amendment properly so called, but a case of an addition of entirely new lands and as regards such lands the suit will date only from the day when the claim was made in respect thereof[3] and not from the date when the application was granted Similarly, the amendment of a plaint by the addition of a necessary party cannot relate back to the date of the filing of the suit [4] See Note 41 to O 1 R 10 *ante* See also the undermentioned decision [5]

A plaint can be allowed to be amended under this rule although at the time of the amendment the suit (if instituted then) would have been barred by limitation [6] See also Note 5 *supra* It has been held by the Nagpur Judicial Commissioner's Court[7] that where an amendment of the plaint is made on the direction of the Court on the ground that the suit as framed was not maintainable all orders passed by the Court against the defendants previously (*e g* order for attachment before judgment) are vacated automatically

20. Appeal. — Under the old Code orders *returning plaints* for amendment were appealable under clause 6 of Section 588 [1] But no appeal lay from an order

Note 18

1 ('10) 7 Ind Cas 505 (525) (Lah)
2 ('28) AIR 1928 Mad 400 (400)

Note 19

1 ('19) AIR 1919 Low Bur 42 (43) 9 Low Bur Rul 275
2 ('34) AIR 1934 Lah 412 (412) (Provided no fresh claim is added)
('32) AIR 1932 Bom 367 (368 370)
('33) AIR 1933 Mad 153 (156)
('26) AIR 1926 Mad 487 (488)
('12) 17 Ind Cas 193 (196) 37 Bom 340 (Where introducing fresh claim relates back to date of suit)

should not be allowed in such cases)]
5 ('36) AIR 1936 Mad 991 (992) (Where a suit is filed by an unregistered firm and on subsequent registration an application is made to amend the plaint and to treat the suit as instituted on date of application the amendment will not be granted and as the suit as originally instituted was incompetent any subsequent amendment cannot relate back to the date of institution)
6 ('95) 17 All 288 (291) (Court can return plaint for amendment even after the period of limitation for the suit)
('14) AIR 1914 Nag 77 (78) 10 Nag L R 32 (General rule is that amendment claiming fresh relief will not be allowed after limitation period —But this rule will not apply where amendment is in interest of defendant)
('11) 10 Ind Cas 731 (733) 7 Nag L R 33
7 ('34) AIR 1934 Nag 169 (170)

Note 20

1 ('03) 1903 Pun L R No 78 p 207 (208)

O. 6 R. 17
Notes 20-21

passed by the Court itself under clause (c) of Section 53 directing an amendment[2] Under the present Code, no appeal lies from an order granting or refusing an amendment under this rule[3] Nor will an Appellate Court in an appeal from the decree in the suit interfere with the discretion of the lower Court in granting or refusing amendments[4] Where the defendants do not take objection to the amendment, they will be deemed to have waived it and cannot raise it again at the stage of appeal[5]

An order refusing leave to amend a plaint is in the nature of an interlocutory order and is not appealable under the Letters Patent as a judgment[6] Nor is an order amending the title of a plaint by omitting the word 'summary' and transferring the case to the short cause list a judgment within Clause 15 of the Letters Patent[7]

Where on a plaint being amended in accordance with the order of the Court, the Court finds that the suit is beyond its pecuniary jurisdiction and returns the plaint for presentation to the proper Court the order directing amendment can be challenged in the appeal from the order returning the plaint[8]

21 **Revision** — See Notes to Section 115, *ante* generally See also the undermentioned cases[1]

O. 6 R. 18

R. 18. [*Cf* S 53.] If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited then within fourteen days from the date of the order, he shall not be permitted to amend after the expiration of such limited time as aforesaid or of such fourteen days, as the case may be, unless the time is extended by the Court.

Failure to amend after order

[R S C, O. 28 R 7; *Cf* 1877, S 53]

2 (81) 8 All 854 (855)
(81) 1881 All W N 83 (83)
(01) 1901 All W N 140 (140)
3 (11) 11 Ind Cas 231 (232) 1911 Pun Re No 96 [**See however** (18) AIR 1918 Cal 189 (189) (*In this case it is assumed that an appeal will lie from an order granting an amendment*)]
4 (16) AIR 1916 Cal 605 (606)
(33) AIR 1933 Lah 667 (668)
(14) AIR 1914 Cal 842 (843)
(11) 4 Ind Cas 856 (857) 1909 Pun Re No 101
(34) AIR 1934 Lah 974 (975) (Discretion of lower Court not to be interfered with unless it was exercised arbitrarily and contrary to well established principles)
(38) AIR 1938 Lah 270 (272)
(39) AIR 1939 Nag 288 (289) I L R (1939) Nag 194 (*Interference allowed where lower Court acted on a wrong view of law*)
5 (17) AIR 1917 Cal 614 (615)
6 (17) AIR 1917 Mad 350 (350)
7 (25) AIR 1925 Bom 153 (160)
8 (36) AIR 1936 Mad 936 (937) (The fact that the plaintiff did not apply in revision from the order directing amendment did not estop or preclude him from questioning the correctness of that order)

Note 21

1 (33) AIR 1933 Rang 49 (50) 11 Rang 36
(35) AIR 1935 All 353 (356) 57 All 459 (Order refusing amendment is 'case decided' within the meaning of Section 115)
(35) AIR 1935 All 651 (652) (The refusal to allow an amendment of the plaint is a case decided within the meaning of S 115)
(36) AIR 1936 All 686 (689) I L R (1937) All 17 (F B) (No revision lies from an order refusing to allow an amendment of a pleading—*Cases where the amendment comes under some other order of the Court e g the addition or substitution of parties or the striking off of a pleading may amount to a case decided but an order passed purely under O 6 R 17 does not*)
(36) AIR 1936 Pat 491 (493) (High Court treated appeal as revision and set aside order allowing amendment)
(35) AIR 1935 Cal 102 (107) (Ordinarily discre*tion exercised by lower Court will not be reviewed unless irreparable injury and failure of justice will be caused but no hard and fast rule can be laid down*)

1. Failure to amend after order. — Under Sections 53 and 54 of the Code of 1877, the Court could reject a plaint if the party failed to comply with the order for amendment [1] There is no such provision under this Code and the only consequence of the failure to amend within time would be, that he cannot amend his pleading afterwards, unless the time is extended by the Court [2] This rule does not prohibit a fresh suit being brought on the same cause of action when the amendment has not been made in time [3] Where the order of amendment is made, not under this Order, but under some other provision of law, the provision that the amendment must be made within 14 days, where no time is fixed, does not apply [4] **O. 6 R. 18 Note 1**

The Court has a discretion to extend the time even after the expiry of the period originally fixed[5] and no appeal will lie against an order admitting an amended plaint after the time fixed [6]

ORDER VII.

PLAINT

Particulars to be contained in plaint.

R. 1. [S. 50.] The plaint shall contain the following particulars :— **O. 7 R. 1**

(a) the name of the Court in which the suit is brought ;

(b) the name, description and place of residence[4] of the plaintiff ;

(c) the name, description and place of residence of the defendant, so far as they can be ascertained ;

(d) where the plaintiff or the defendant is a minor or a person of unsound mind,[5] a statement to that effect ;

(e) the facts constituting the cause of action[6] and when it arose ;[7]

(f) the facts showing that the Court has jurisdiction ;[8]

(g) the relief which the plaintiff claims;[9]

Order 6 Rule 18 — Note 1

1. ('04) 1904 Pun Re No 57, p 168

2. ('21) 60 Ind Cas 376 (377) (Lah) (The plaint cannot be dismissed)
('13) 19 Ind Cas 472 (473) (Punjab Chief Court) (Do)
('36) AIR 1936 Pesh 155 (157) (Failure to amend

plaintiff to join a person as co plaintiff—Latter refusing to join as co plaintiff—Suit not to be dismissed but Court must add him as defendant)]

3 ('27) AIR 1927 Lah 83 (83)

4. ('14) AIR 1914 Cal 637 (638) (High Court's direction of amendment apart from Order 6)

5. ('92) 16 Bom 263 (266)
[*See* ('01) 4 Oudh Cas 108 (115) (Case under S 54 of the Code of 1882)]

6. ('09) 4 Ind Cas 492 (492) (All)

O. 6 R 17
Notes 20–21

passed by the Court itself under clause (c) of Section 53 directing an amendment [2] Under the present Code no appeal lies from an order granting or refusing an amendment under this rule [3] Nor will an Appellate Court in an appeal from the decree in the suit interfere with the discretion of the lower Court in granting or refusing amendments [4] *Where the defendants do not take objection to the amendment* they will be deemed to have waived it and cannot raise it again at the stage of appeal [5]

An order refusing leave to amend a plaint is in the nature of an interlocutory order and is not appealable under the Letters Patent as a judgment [6] Nor is an order amending the title of a plaint by omitting the word summary and transferring the case to the short cause list a judgment within Clause 15 of the Letters Patent [7]

Where on a plaint being amended in accordance with the order of the Court the Court finds that the suit is beyond its pecuniary jurisdiction and returns the plaint for presentation to the proper Court the order directing amendment can be challenged in the appeal from the order returning the plaint [8]

21 Revision — See Notes to Section 115 *ante* generally See also the *undermentioned cases* [1]

O 6 R 18

R. 18. [*Cf* S 53] If a party who has obtained an order for leave to amend does *not amend accordingly* within the time limited for that purpose by the order, or if no time is thereby limited then within *fourteen days from the date of the order, he shall not be permitted* to amend after the expiration of such limited time as aforesaid or of such fourteen days, as the case may be, unless the time is *extended by the Court*

Failure to amend after order

[R S C, O 28 R 7, *Cf* 1877, S 53]

2 (81) 3 All 851 (655)
(80 188) All W N 83 (83)
(01) 1901 All W N 140 (140)
3 (11) 11 Ind Cas 231 (23) 1911 Pun Re No 90
(**See however** (19 AIR 1 18 Cal 188 (189) (In this c se it as un el that an appeal w ll lie
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Note 21

36
(Order
with a
ual to
case
decided w thin the meaning of S 115)
(36) AIR 1936 All 686 (689) I L R (1937) All

(
tion exerc sed by lower Court will not be review ed unless irreparable injury and failure of justice will be caused but no hard and fast rule can be laid down)

1. Failure to amend after order. — Under Sections 53 and 54 of the Code of 1877, the Court could reject a plaint if the party failed to comply with the order for amendment [1] There is no such provision under this Code and the only consequence of the failure to amend within time would be, that he cannot amend his pleading afterwards, unless the time is extended by the Court [2] This rule does not prohibit a fresh suit being brought on the same cause of action when the amendment has not been made in time [3] Where the order of amendment is made, not under this Order, but under some other provision of law, the provision that the amendment must be made within 14 days, where no time is fixed, does not apply [4] O. 6 R. 18 Note 1

The Court has a discretion to extend the time even after the expiry of the period originally fixed[5] and no appeal will lie against an order admitting an amended plaint after the time fixed [6]

ORDER VII.

PLAINT

Particulars to be contained in plaint.

R. 1. [S. 50.] The plaint shall contain the following particulars :— O. 7 R. 1

(a) the name of the Court in which the suit is brought ;

(b) the name, description and place of residence[4] of the plaintiff ;

(c) the name, description and place of residence of the defendant, so far as they can be ascertained ;

(d) where the plaintiff or the defendant is a minor or a person of unsound mind,[5] a statement to that effect ;

(e) the facts constituting the cause of action[6] and when it arose ;[7]

(f) the facts showing that the Court has jurisdiction ;[8]

(g) the relief which the plaintiff claims ;[9]

Order 6 Rule 18 — Note 1

1. ('04) 1904 Pun Re No 57, p 168

2. ('21) 60 Ind Cas 376 (377) (Lah) (The plaint cannot be dismissed)
('13) 19 Ind Cas 472 (473) (Punjab Chief Court) (Do)
('36) AIR 1936 Pesh 155 (157) (*Failure to amend* to amend and pay costs as ordered—No jurisdiction to dismiss suit)
('11) 10 Ind Cas 503 (505) (Cal) (Failure to amend as ordered—No objection at the earliest opportunity — Objection deemed waived — Amendment application treated as part of plaint)
('28) 111 Ind Cas 787 (789)(Lah) (Court cannot compel plaintiff to amend—If suit cannot pro plaintiff to join a person as co plaintiff—*Latter* refusing to join as co plaintiff—Suit not to be dismissed but Court must add him as defendant)]

3 ('27) AIR 1927 Lah 83 (83)

4 ('14) AIR 1914 Cal 637 (639) (High Court s direction of amendment apart from Order 6)

5 ('92) 16 Bom 263 (266)
[*See* ('01) 4 Oudh Cas 108 (115) (*Case under S 54 of the Code of 1882*)]

6. ('09) 4 Ind Cas 492 (492) (All)

O. 7 R. 1 Notes 1–2

(h) where the plaintiff has allowed a set-off or relinquished a portion of his claim,[10] the amount so allowed or relinquished; and

(i) a statement of the value[11] of the subject-matter of the suit for the purposes of jurisdiction and of court-fees, so far as the case admits

[1877, S. 50; 1859, S. 26. See S 26 and O. 6 R. 2.]

Synopsis

1. Legislative changes. —

1 The word shall has been substituted for "must in the opening sentence See Note 3

2 In clause (e) of this rule, the word "facts' has been substituted for the words "a plain and concise statement of the circumstances,' occurring in the old Section See Note 6

3 Clauses (d), (f) and (i) are new

2. Plaint in general. — As has been seen in Note 3 to Section 26 *ante*, a plaint has been held to mean 'a private memorial tendered to a Court in which the person sets forth his cause of action the exhibition of an action in writing" It corresponds to the '*statement of claim* in England and its object is to state the grounds upon which the plaintiff seeks the assistance of the Court to grant him relief[1]

Order 6 lays down generally what pleadings (*i e*, plaint or written statement) should contain, and this Order lays down in *particular* the requirements of a *plaint* Every plaint, therefore, should comply with the rules contained in Orders 6 and 7, so far as they are applicable Thus

(1) It should contain the name of the Court in which the suit is brought (O 7 R 1a)

(2) It should contain the *(a)* name, *(b)* description, and *(c)* place of residence of—
(i) the plaintiff (O 7 R 1b),
(ii) the defendant so far as can be ascertained (O 7 R 1c)

(3) Where the plaintiff or defendant is a minor or a person of unsound mind it should contain a statement to that effect (O 7 R 1d)

Order 7 Rule 1 — Note 2

1. See cases cited in Note 3 to Section 26

(4) Where the plaintiff sues in a *representative* capacity, it should show not only that he has an existing interest in the subject matter, but that he has taken necessary steps to enable him to institute a suit, concerning it (O 7 R 4) **O. 7 R. 1 Note 2**

(5) It should state in a *concise* form the *material facts* on which the plaintiff relies for his claim (O 6 R 2)

(i) It should set out the facts constituting the cause of action (O 7 R 1e) When necessary it should be divided into paragraphs numbered consecutively — all dates, numbers and sums to be expressed in figures (O 6 R 2)

(ii) The forms given in Appendix A to the Code, or similar forms, should be used as far as possible (O 6 R 3)

(iii) If the plaintiff pleads misrepresentation, fraud, breach of trust, wilful default, undue influence, etc, and in all cases where particulars may be necessary, beyond those as are exemplified in the forms aforesaid, it should contain the particulars (with dates and items if necessary) (O 6 R 4)

(iv) If a party relies on illegality or insufficiency in law of any contract, that party should plead such illegality or insufficiency in law in his pleading, it is not sufficient simply to deny the contract (O 6 R 8)

(v) Whenever the contents of a document are material, it is sufficient to state *the effect thereof as briefly as possible without setting out the whole or* any part thereof, unless the precise words are material (O 6 R 9)

(vi) Whenever it is material to allege malice, fraudulent intention, knowledge or any condition of mind of any person it is sufficient to allege it as a fact without setting out the circumstances from which it is inferred (O 6 R 10)

(6) If the suit is for the recovery of money, it should state the *precise* amount claimed and when the plaintiff has allowed a set off or relinquished a portion of his claim, the amount so relinquished or so allowed should be stated (O 7 R 1h), but in suits for accounts or for mesne profits, it should state the *approximate* amount sued for (O 7 R 2)

(7) If the subject matter of the suit is immovable property, it should contain a description sufficient to identify it, *i e*, boundaries or survey numbers thereof should be specified (O 7 R 3)

(8) Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded on separate and distinct grounds, he should state them as far as possible separately and distinctly (O 7 R 8)

(9) It should state the interest of the defendant in the subject matter and his liability to answer the plaintiff s demands (O 7 R 5)

(10) It should state when and where the cause of action arose

(i) It should state (if necessary) the facts showing that the Court has jurisdiction (O 7 R 1f)

(ii) If it is presented after the expiration of the period of limitation prescribed, it should show the grounds of exemption from the law of limitation (O 7 R 6)

(11) It should contain a statement of the value of the subject matter of the suit for the purposes of jurisdiction and of court fees, so far as the case admits (O 7 R 1i)

O. 7 R. 1
Notes 2-4

(12) It should state specifically the relief which the plaintiff claims either simply or in the alternative it is not necessary to ask for general or other relief which may always be given as the Court may think just (O 7 R 7)

(13) It should be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case (O 6 R 15)

A suit is instituted by the presentation of a plaint to the Court or to such officer as it may appoint in this behalf (O 4 R 1) but cannot be said to be *duly* instituted until it is admitted and *registered* as a suit (see Note 2 to Section 26) The Court may return a plaint for presentation to the proper Court at any stage (O 7 R 10) or reject it on any of the grounds mentioned in O 7 R 11 (see O 7 R 11, *infra*)

The provisions of this Order are made applicable to plaints presented under the provisions of the Bengal Tenancy Act [2] the Madras Estates Land Act [3] the Agra Tenancy Act [4] the Oudh Rent Act [5] the Orissa Tenancy Act[6] and the Provincial Small Cause Courts Act [7]

3 Scope of the Rule — The provisions of this rule are *imperative* [1] The substitution of the word shall in the place of must in the opening sentence has not effected any change in the law See also Note 2 above

4 Name, description and place of residence — The object of the Legislature is to secure correct particulars regarding the parties so far as they can be ascertained so that there may be no uncertainty with regard to the identity of the parties The full description of the party and the character in which he sues or is sued should be given in the plaint [1] The word description includes the age father s name[2] and other particulars that may be necessary to identify the person Thus the titles by which the defendant is generally known should also be given [3] As to the effect of misdescription of parties see Note 37 to Order 1 Rule 10 *supra*

The place of residence of the plaintiff should be accurately given [4] and that of the defendant should be given as accurately as can be ascertained it is not sufficient to make vague statements as to the defendant s place of residence such as carrying on business in Calcutta [5] or formerly in Calcutta now residing in Kashmir [6] If the plaintiff after enquiry is unable to ascertain these particulars fully he should include a paragraph in the plaint to that effect [7] It is not sufficient to give these particulars

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Note 3

1 (25) AIR 1925 Nag 183 (184)
(15) AIR 1915 Cal 681 (682) 42 Cal 65
(96) 18 All 403 (406) (The word must in the old Section held to be most imperative)
(1900) 5 Cal W N lxiii (lxiii)

Note 4

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in invariably state that he is suing as receiver of the estate of some person to be mentioned particularly by name who is insolvent)
2 (27 ... (The High Court

refused to amend plaint even after Court s direction to amend)
(1900) 5 Cal W N lxiii (lxiii) (Christian party — Initials before actual name not sufficient—Full

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6 (79) 4 Cal L Rep 366 (371)
7. (1900) 5 Cal W N lxiii (lxiii)

in the cau e title of the plaint, as the cause title is not covered by the verification of the particulars in the plaint [8] In a suit by or against a corporation, the plaintiff or defendant, as the case may be, is the corporation itself and the name, description, and place of business of such corporation only need be given It is not necessary to give the particulars of the person who purports to sign the pleading [9]

It is a fundamental principle that a suit can be instituted only by the person *having the cause of action or by some one on his* behalf [10]

5 Party, a minor or person of unsound mind. — See Order 32 *infra*

6. Facts constituting the cause of action. — The words "plain and concise statement of the circumstances' occurring in the old Section have been substituted by the word "facts' in view of the specific provisions of Order 6 Rule 2

As to what are material facts see O 6 R 2, *supra* As to the meaning of the words *cause of action*, see Note 14 to Section 20, *supra*

Every suit presupposes the existence of a cause of action against the defendant for, if there is no cause of action at all, the plaint will have to be rejected under Rule 11, *infra*.

Where there is no such right in law as that claimed, there can be no cause of action in respect thereof, and a suit cannot be based thereon See Note 41 to Section 9 and the undermentioned cases [1]

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8 (31) AIR 1931 Cal 459 (461) 58 Cal 418
9 (33) AIR 1933 Sind 102 (102) 26 Sind L R 431
10. (36) AIR 1936 Pat 198 (200) 14 Pat 633 (Estate held by Court of Wards is not legal entity—Suit by manager of Court of Wards not competent when he does not act as representing proprietor of estate)

Note 6

1 (05) 8 Oudh Cas 350 (360) (No suit for injunction against erecting a building will lie for interference with plaintiff s right to light and air unless there is a substantial interference with light and air)
(05) 8 Oudh Cas 84 (85) (Defendant having never set up proprietary or under proprietary title plaintiff has no cause of action for declaratory decree in Civil Court)
(08) 18 Mad L Jour 186 (187) (Any person other than the payee or the holder of a negotiable instrument has no right to sue)
('98) 1898 Pun Re No 57, p 189 (The rule that when a nearer reversioner has colluded with the alienee the next reversioner can sue would not enable the reversioner having the remotest chance of success to sue)
(05) 32 Cal 96 (105) 31 Ind App 183 (P C) (In the absence of a completed contract no suit lies [illegible] the [illegible] ourt does not give new cause of action)
(69) 11 Suth W R 331 (332) (Unsuccessful intervention in a suit for rent against raiyats can afford plaintiff no cause of action for a declaration of title against third parties)
(69) 12 Suth W R 4 (25 26) (When map was prepared in plaintiff s presence no suit to rectify the error subsequently lies)
(69) 12 Suth W R 204 (205, 206) (Government cannot sue to recover land on behalf of a zamindar)
(98) 20 All 198 (200) (Trespasser has no cause of action to sue for crops sown by him)
(02) 24 All 288 (291) (Decree for costs assigned to A and A realising the cost — Decree reversed in appeal by judgment debtor — Latter has no cause of action to sue for costs)
(05) 27 All 14 (15) (Suit for cancellation of a will does not lie during the lifetime of the testator)
(89) 1889 Pun Re No 162, p 568 (A suit for damages arising out of a civil action launched maliciously does not lie)
(88) 1888 Pun Re No 178 p 469 (Pattidars who are not the next reversioners have no cause of action to contest adoption by widow)
[illegible] against defendant)
(87) 9 All 439 (440) (The vendor who has covenanted with the vendees that he has a good title cannot sue to set aside a mortgage decree which a third party has obtained on the same property)
[illegible] the estate)

O. 7 R. 1
Notes 7-8

7. When cause of action arose. — It is necessary for the plaintiff to state *specifically* when the cause of action for the suit arose[1] This is necessary for the purpose of enabling the Court or the defendant to ascertain from the plaint whether there is a cause of action and whether it is not barred by the law of limitation[2] But the statement need not be made in a *separate* paragraph if it is clear from the other *facts alleged in the plaint*[3]

A plaintiff is not, however, absolutely bound by the *statement* regarding the date of the accrual of the cause of action it may be determined or inferred from the facts stated[4]

8 "Facts showing that the Court has jurisdiction" — All the *facts* showing that the Court has jurisdiction should be set out in the plaint and if any special jurisdiction vested in the Court by law is invoked *all the facts which call for the exercise of that jurisdiction should be set out*[1] When jurisdiction of a Court to try the suit is disputed the Court must decide the same preliminary to the adjudication of the suit itself[2] As to the *statement of facts showing the pecuniary* jurisdiction of a Court see Note 11 below See also Note 4 to Section 6 *ante* and the undermentioned cases[3]

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(77) 26 Suth W R 82 (85) 3 Ind App 241 (P C)

money paid under legal *compulsion to defen*dant by plaintiff which was not due does not lie

(70) 14 Suth W R 420 (421 422) (A suit in anticipation of a threatened invasion of right will not lie)

(71) 16 Suth W R 18 (19) (*Reversioner has no* cause of action if he does not allege waste or improper alienation by widow)

(35) AIR 1935 Pesh 132 (133) (In a suit on a promissory note payable at a specified place the plaint ought to contain a statement that the note had been presented for payment as that forms part of the cause of action — If there is no allegation of presentment in the plaint the plaintiff cannot be given an opportunity of proving presentment)

[*See also* (74) 6 N W P H C R 104 (110) (*Defen*dant could not have maintained a suit to close *market on his neighbour s land*)

Note 7

1 (32) AIR 1932 Cal 259 (261 262) 59 Cal 448
(30) AIR 1930 Mad 742 (744)
(69) 11 Suth W R 238 (239) (Suit for possession — Date of dispossession to be accurately given)
(01) 4 Bom L R 58 (59 60) 26 Bom 360 (3?2) (Ejectment suit — Precise nature of notice to quit and the date on which it was given should be stated)

be stated)

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in the plaint)

4 (79) 4 Cal 529 (531)
[*See also* (35) AIR 1935 All 759 (760) (*Mistake or inaccuracy in stating the date of the cause* of action for the suit is not sufficient to justify *dismissal of the suit*)]

Note 8

1 (25) AIR 1925 Nag 163 (164)
(38) AIR 1938 Mad 497 (499) (The burden of

Court on an investigation of the case comes to the conclusion that it has jurisdiction that there was no jurisdiction in the Court merely because of the absence of an assertion in the plaint)]

2 (18) AIR 1918 Mad 998 (1000 1006) 40 Mad 1 (F B)

9. "Relief which the plaintiff claims." — See Order 7 Rule 7, *infra*

10. "Where the plaintiff has allowed a set-off or relinquished a portion of his claim." — The amount set off or relinquished should be specified with precision, or at least should be stated in such a manner that the amount may be inferred from the other allegations in the plaint [1]

11. Valuation of suit. — The plaintiff should distinctly state in the plaint, the valuation of the suit for the purposes of court fees and of jurisdiction As the two valuations may not be the same in several cases they have to be stated specifically [1] Where the plaintiff claims reliefs arising out of the *same* cause of action, he can state the *aggregate* value of his reliefs, but if he claims reliefs in respect of two or more distinct causes of action, he should state the valuation of each cause of action separately, as the court fee is separately payable in respect of each [3] Where the plaintiff claims relief in the *alternative*, he should also state his valuations in respect of the two reliefs and the court fee is payable on the value of the larger relief [3]

The valuation of a suit for the purposes of jurisdiction is necessary in order to ascertain whether the suit is within the *pecuniary jurisdiction* of the Court [4] A plaintiff should, however, state the true value at which the subject matter of the suit *ought* to be valued, it should not be arbitrary or fanciful [5] See also Note 4 to Section 6 and Notes 7 to 10 to Section 15, *ante*

The question of court fees should be determined with reference to the plaint as it is and not as it ought to have been [6] Whether a case falls within any particular provision of the Court Fees Act must be determined from the *substance* and not merely from the *language* or form of the plaint [7]

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terion is an examination of the plaint and not an examination of the issues which have been framed after the written statement has been filed)
(34) AIR 1934 Lah 803 (803) (Allegations in plaint and not pleas determine jurisdiction)
(31) AIR 1931 All 664 (664) (Whether Civil Court or Revenue Court has jurisdiction depends upon the allegation in plaint)
(32) AIR 1932 All 460 (460) (Do)
(32) AIR 1932 All 473 (474) (Do)

Note 10

1 (1900) 1900 All W N 214 (214)
[*See* (10) 8 Ind Cas 943 (943) (Mad) (Relinquishment of a particular sum on the basis of right to get a particular sum — If plaintiff is found entitled to get less he should not be tied down to the amount relinquished)]

Note 11

1 [*See* (37) AIR 1937 Bom 826 (833) I L R (1937) Bom 402 (Suit for declaration and possession — S 8 of Suits Valuation Act has no application to such suit—In such suit value for

(32) AIR 1932 All 413 (414)
(33) AIR 1933 Rang 40 (40)
(32) AIR 1932 Pat 9 (10) 11 Pat 161 (Court

(34) AIR 1934 Lah 563 (573) 15 Lah 531 (FB)
(33) AIR 1933 Mad 430 (431)
(33) AIR 1933 Mad 431 (432)
(31) AIR 1931 All 369 (371 372) 53 All 552
(35) AIR 1935 Cal 273 (274 275)
(36) AIR 1936 Pat 171 (172) 15 Pat 386 (Court cannot demand court fee from a plaintiff on the ground that the question of possession will arise in the suit)

O. 7 R. 1 Note 11 The mere fact that a suit has been under-valued or over-valued cannot affect the decree, unless the wrong valuation has prejudicially affected the merits of the case[8]

O. 7 R. 2

R. 2. [S. 50.] Where the plaintiff seeks the recovery of money, the plaint shall state the precise amount claimed:

In money suits

But where the plaintiff sues for mesne profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant, the plaint shall state approximately the amount sued for.

[1877, S. 50; 1859, S. 26. See O. 20.]

Local Amendments

LAHORE

In the second paragraph, *after* the word "defendant" *insert* "or for moveables in the possession of the defendant, or for debts of which the value he cannot, after the exercise of reasonable diligence, estimate and *after* the word "amount" where it last occurs *insert* or value"

N.-W. F. P.

Same as that of Lahore above

Synopsis

1. Scope of the Rule.	3. Accounts
2. Mesne profits.	4. Suit for damages.

1. Scope of the Rule.—In a suit for the recovery of money, the plaint should, as a rule, state the amount claimed precisely[1] But in a suit for *mesne profits or for an amount* which will be found due to the plaintiff on taking *unsettled accounts* between him and the defendant, in which the plaintiff is not, at the time of the institution of the suit in a position to give the amount precisely, he should state it *approximately*. The amount is given tentatively, as the correct amount is ascertained only in the course of the suit (O. 20 Rr. 12, 16 and 17)

2. Mesne profits. — The expression "mesne profits" has been defined in Section 2 (12)

A plaintiff may claim in a suit *past mesne profits, i. e.*, mesne profits accruing up to the date of institution of the suit, and *future mesne profits* from the date of institution up to the delivery of possession. The valuation in the plaint should, under this rule, be only with reference to the amount of the *past mesne profits* claimed[1]

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8. ('33) AIR 1933 All 249 (252) 55 All 315 (FB).

Order 7 Rule 2 — Note 1

1. ('70) 14 Suth W R 373 (374) (Suit for contribution—Plaint must state the exact amount due from each of the defendants—Else the plaint is to be rejected.)

Note 2

1. ('27) AIR 1927 Cal 182 (184) 53 Cal 992

('30) AIR 1930 Mad 30 (36, 37). 53 Mad 838 (Plaintiff can be given future mesne profits as well though he had asked only for past mesne profits.)

('14) AIR 1914 Cal 858 (860) (Where plaintiff is in a position to value mesne profits accrued due [illegible]

accrued due in a Munsif's Court must be deemed to have limited his claim to the maximum pecuniary jurisdiction of that Court.)]

O. 7 R. 2
Notes 2–4

The *future mesne profits* need not be valued, since it is impossible to give even an approximate statement of the amount [2] But the valuation of the *past mesne profits* given will be the valuation of the amount *sued for* under this rule [3] and is the valuation for the purposes of jurisdiction (see Section 6 and Section 96 Note 18, *supra*)

As to the ascertainment of mesne profits see O 20 R 12 *infra* See also Section 11 of the Court fees Act

3 **Accounts** — A suit for money which will be found due on taking accounts is instituted when the defendant is under a legal obligation to render accounts which the plaintiff is not in a position to ascertain [1] In such cases this rule requires that the plaintiff should state *approximately* the amount which will be found due to him on taking unsettled accounts between him and the defendant [2] The approximation required under sub rule (2) may be a rough and ready approximation such as the plaintiff is able to give [3] The valuation given by the plaintiff is purely tentative and is the valuation for the purposes of jurisdiction (see Section 6 *supra*)

As to the ascertainment of the amount due in a suit for accounts see O 20, Rules 16 and 17 *infra* and Section 11 of the Court Fees Act

4 **Suit for damages** — It has been held that in a suit for damages based on fraud the plaintiff may give an *approximate* valuation in the plaint and offer to pay additional court fees in case a larger amount is found due *before the decree is* passed, as Section 11 of the Court Fees Act will not apply to such a case [1]

O. 7 R. 3

R. 3. [New] Where the subject-matter of the suit is immoveable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement of survey, the plaint shall specify such boundaries or numbers

Where the subject matter of the suit is immoveable property

Local Amendment

CALCUTTA

Add at the end the words and where the area is mentioned such description shall further state the area according to the notation used in the record of settlement or survey, with or without at the option of the party the same area in terms of the local measures

2 (26) AIR 1926 Pat 218 (229) 5 Pat 361 (FB) (Per Jwala Prasad J)
(25) AIR 19 5 Cal 1076 (1080 1081) 53 Cal 14 (FB) (Mesne profits *pendente lite* are not to be considered in determining the value of the suit for purpose of jurisdiction—(Per Walmsley J) mesne profits as a condition precedent to the investigation of such profits)
(91) 15 Bom 416 (418)
(23) AIR 1923 Rang 110 (112 113) 4 Upp Bur Rul 140

Note 3

1 (12) 14 Ind Cas 786 (787) 8 Nag L R 36
2 (88) 12 Bom 675 (677)
3 (14) 22 Ind Cas 71 (73) (Bom)
(85) 9 Bom 22 (24)
(35) AIR 1935 Lah 689 (689)

Note 4

1 (07) 17 Mad L Jour 625 (626)
(*See also* (1900) 16 T L R 433 London and Northern Bank Ltd v George Newnes Ltd

O. 7 R. 1 Note 11

The mere fact that a suit has been under-valued or over valued cannot affect the decree, unless the wrong valuation has prejudicially affected the merits of the case [8]

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R. 2. [S. 50.] Where the plaintiff seeks the recovery of money, the plaint shall state the precise amount claimed:

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But where the plaintiff sues for mesne profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant, the plaint shall state approximately the amount sued for.

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Synopsis

1. Scope of the Rule.
2. Mesne profits.
3. Accounts.
4. Suit for damages.

1. Scope of the Rule.—In a suit for the recovery of money, the plaint should, as a rule, state the amount claimed precisely [1] But in a suit for *mesne profits* or for an amount which will be found due to the plaintiff on taking *unsettled accounts* between him and the defendant, in which the plaintiff is not, at the time of the institution of the suit, in a position to give the amount precisely, he should state it *approximately.* The amount is given tentatively, as the correct amount is ascertained only in the course of the suit (O 20 Rr 12, 16 and 17)

2. Mesne profits. — The expression "mesne profits" has been defined in Section 2 (12)

A plaintiff may claim in a suit *past mesne profits, i e*, mesne profits accruing up to the date of institution of the suit, and *future mesne profits* from the date of institution up to the delivery of possession The valuation in the plaint should, under this rule, be only with reference to the amount of the *past mesne profits* claimed [1]

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1. ('70) 14 Suth W R 373 (374) (Suit for contribution—Plaint must state the exact amount due from each of the defendants—Else the plaint is to be rejected)

Note 2

1. ('27) AIR 1927 Cal 182 (184) 53 Cal 992
('30) AIR 1930 Mad 30 (36, 37) . 53 Mad 838 (Plaintiff can be given future mesne profits as well though he had asked only for past mesne profits)
('14) AIR 1914 Cal 658 (860) (Where plaintiff is in a position to value mesne profits accrued due . . . accrued due in a Munsif s Court must be deemed to have limited his claim to the maximum pecuniary jurisdiction of that Court)]

O. 7 R. 2 Notes 2-4

The *future mesne profits* need not be valued, since it is impossible to give even an approximate statement of the amount.[2] But the valuation of the *past mesne profits* given will be the valuation of the "amount *sued for*" under this rule,[3] and is the valuation for the purposes of jurisdiction (see Section 6 and Section 96 Note 18, *supra*)

As to the ascertainment of mesne profits, see O 20, R 12 *infra* See also Section 11 of the Court-fees Act

3. Accounts. — A suit for money which will be found due on taking accounts, is instituted when the defendant is under a legal obligation to render accounts which the plaintiff is not in a position to ascertain[1] In such cases this rule requires that the plaintiff should state *approximately* the amount which will be found due to him on taking unsettled accounts between him and the defendant[2] The approximation required under sub rule (2) may be a rough and ready approximation such as the plaintiff is able to give[3] The valuation given by the plaintiff is purely tentative, and is the valuation for the purposes of jurisdiction (see Section 6, *supra*)

As to the ascertainment of the amount due in a suit for accounts, see O 20, Rules 16 and 17, *infra*, and Section 11 of the Court-Fees Act

4. Suit for damages. — It has been held that in a suit for damages based on fraud the plaintiff may give an *approximate* valuation in the plaint and offer to pay additional court-fees in case a larger amount is found due *before the decree is passed*, as Section 11 of the Court Fees Act will not apply to such a case[1]

O. 7 R. 3

R. 3. [New.] Where the subject-matter of the suit is immoveable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement of survey, the plaint shall specify such boundaries or numbers.

Where the subject-matter of the suit is immoveable property.

Local Amendment

CALCUTTA

Add at the end the words "and where the area is mentioned, such description shall further state the area according to the notation used in the record of settlement or survey, with or without, at the option of the party, the same area in terms of the local measures"

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2 ('26) AIR 1926 Pat 218 (229) 5 Pat 361 (FB)

plaintiff to pay additional court fee on future mesne profits as a condition precedent to the investigation of such profits)

Note 3

1. ('12) 14 Ind Cas 786 (787) 8 Nag L R 36
2. ('88) 12 Bom 675 (677)
3. ('14) 22 Ind Cas 71 (73) (Bom)
('85) 9 Bom 22 (24)
('35) AIR 1935 Lah 689 (689)

Note 4

1. ('07) 17 Mad L Jour 625 (626)
[*See also* (1900) 16 T L R 433, London and Northern Bank Ltd v George Newnes Ltd.

O. 7 R 3
Notes 1-3

Synopsis

1 "Immoveable property"
2 "Description sufficient to identify it"
3 Conflict between the description by boundaries and by area

1 "Immoveable property" — This rule does not apply unless immovable property is the *subject matter* of the suit[1] See also Section 16 *supra*

2 "Description sufficient to identify it" — A plaint should contain a description of the immovable property sufficient to *identify* it[1] as otherwise the decree if passed will be incapable of execution (See O 20 R 9 *infra*) But a suit *cannot be dismissed or a plaint rejected on the ground that the description is* insufficient[2] the Court may call upon the plaintiff to furnish the necessary particulars[3] or allow the plaintiff to amend his plaint by giving such particulars[4]

In the case of *chur* lands which are constantly going under water and re forming it is very difficult to premise with any degree of certainty whether the claim would be for a re formation in *situ* or for contiguous accretion until full investigation based upon a survey and comparison of maps is made Hence in such a case the plaint should not be construed too strictly[5]

3 Conflict between the description by boundaries and by area — If in the plaint or in any deed there is an inconsistency between the description by the boundaries and by the area that which is more certain and stable and least likely to have been mistaken and which sufficiently identifies the land should prevail[1] The true construction is that which will as far as possible bring the several factors into harmony with one another and express most nearly the intention of the parties[2] But if a land is conveyed with *definite* boundaries and the *measurements* indicate a smaller area than that covered by the boundaries the rule of interpretation is that the area covered by the *boundaries* should prevail[3]

O. 7 R. 4

When plaintiff sues as representative

R. 4. [S 50, para 4] Where the plaintiff sues in a representative character[2] the plaint shall show not only that he has an actual existing interest

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Order 7 Rule 3 — Note 1

1 (32) AIR 1932 Lah 328 (330) (Administration suit is not one for possession of immovable property—O 7 R 3 has no application)

Note 2

1 (1900) 5 Cal W N 121 (123)
(72) 18 Suth W R 461 (462)
(78) 2 Cal L Rep 134 (137) (In suit for injunction boundaries should be correctly described)
(76) 2 Cal 1 (19) (Where estate bears a name boundaries need not be given)

2 (97) 1 Cal W N 574 (576)
(97) 1 Cal W N clxxxix (clxxxix)
(70) 14 Suth W R 474 (474)
[*See also* (13) 18 Ind Cas 745 (746) (Cal) (Mis description is not fatal)]
[**See however** (74) 22 Suth W R 426 (426)]
[**But see** (05) 1 Cal L Jour 27n (28n)]

3 (09) 2 Ind Cas 347 (348) 5 Low Bur Rul 1
(15) AIR 1915 Cal 597 (598 599)

4 (74) 21 Suth W R 187 (187)

5 (33) AIR 1933 Cal 199 (202)

Note 3

1 (09) 4 Ind Cas 713 (719) 37 Cal 293 (If boundary is more definite the boundary prevails)
(31) AIR 1931 Lah 349 (351) (Area specific—Area prevails)
[*See* (97) 1 Cal W N clxxxix (clxxxix) (Measurements specific — Land sufficiently identified though boundary incorrect)]

2 (09) 2 Ind Cas 123 (125) (Cal) (Though boundaries more generally govern)

3 (24) AIR 1924 Mad 493 (493)

in the subject-matter, but that he has taken the steps, if any, necessary to enable him to institute a suit[3] concerning it.

[See S. 92, O. 1 R. 8, O. 30, O. 31.]

Synopsis

1. Scope of the Rule. — This rule lays down that if the plaintiff files the suit in a *representative* capacity, the plaint should show —

(1) that the plaintiff has an actual existing interest in the subject-matter, and

(2) that he has taken the steps that may be necessary to enable him to file a representative suit.

Thus, in a suit under Section 92 of the Code, the plaintiff should state that he has an interest in the trust and that he has obtained the consent in writing of the Advocate General Similarly, in cases where the law requires probate or letters of administration to be obtained in respect of the estate of a deceased person, the plaint should state that the plaintiff has obtained a probate, or that he is the executor under the will, or, if the person died intestate, that he has obtained letters of administration in respect of the estate of the deceased.

The provisions of this rule should be strictly complied with[1] Otherwise the plaint may have to be rejected on presentation[2] If a decree is passed, it will not bind the estate or the persons represented by the plaintiff in the suit

2. "Where the plaintiff sues in a representative character." — This rule deals with representative suits, *i e*, suits instituted by a person in his *representative*, as distinguished from his *individual*, character The following are some instances of *representative* suits —

(i) Suit by one or more persons on behalf of a community or persons having the same interest (O 1 R 8)

(ii) Suit by executor or administrator representing the estate of a deceased person

(iii) Suit under Section 92 of the Code by two or more persons having an interest in the trust

(iv) Suit by the manager of a joint Hindu family or by the karnavan of a Malabar *taruad*

(v) Suit by a shebait on behalf of the idol[1]

(31) AIR 1931 Cal 596 (598) 58 Cal 686 (Extrinsic evidence may be let in to show real intention of the parties)

(26) AIR 1926 Pat 257 (257, 258)

(23) 1923 Oudh 114 (116, 117) . 27 Oudh Cas 64

Order 7 Rule 4 — Note 1

1 ('25) AIR 1925 Nag 183 (184)

2. (14) AIR 1914 Bom 286 (287) 38 Bom 618

Note 2

1 (30) AIR 1930 Pat 97 (97) (Though ordinarily shebait represents an idol in certain

O. 7 R. 4
Notes 5-9

If the suit is to recover a *debt due* to the deceased, it is necessary that a probate, or letters of administration or a succession certificate should be produced, as otherwise no decree can be passed (see Section 214 of the Succession Act)

6. Mahomedans. — In the case of Mahomedans, it is not necessary to obtain a probate or letters of administration[1] See Sections 212 and 213 of the Succession Act But it is, however, necessary, if the suit is for the recovery of *a debt due to the deceased*, to produce a probate or letters of administration or succession certificate (see Section 214 of the Succession Act)[2] as above

7. Indian Christians. — "Indian Christian" has been defined to mean a native of India, who is or in good faith claims to be of unmixed Asiatic descent and who professes any form of the Christian religion[1] Till the passing of the Native Christian Administration of Estates Act, 1901,[2] the Indian Christians were governed by the Succession Act (1865) and, therefore if the deceased *died intestate*, letters of administration were necessary and in case the deceased left a will, a probate of the will was necessary to establish any right to his property[3] But the Native Christian Administration of Estates Act provided that Section 190 of the Succession Act shall not apply to the property of an Indian Christian who died intestate, and though a probate was still necessary in the case of a will, no letters of administration were necessary in the case of intestacy The law is the same since the *passing of the Succession Act*, 1925, wherein Section 212 provides that no letters of administration are necessary to establish any right to any part of the property of the deceased A probate however, is necessary in the case of a will A succession certificate is necessary in a suit to recover a debt due to deceased as above (Section 214)

8. Europeans, Parsees, Jews and Armenians. — These persons are governed by the provisions of Section 212 (1) and Section 213 (1) of the Succession Act, and, therefore it is necessary to obtain a probate or letters of administration as the case may be to establish any right in a Court of law[1]

9 Succession certificate. — In a suit for *recovery of a debt* due to a deceased person the person claiming on *succession* to the effects of the deceased should produce a probate or letters of administration, or a succession certificate having the debt specified therein as otherwise no *decree* can be passed under Section 214 of the Succession Act But if the debt is a *joint family debt and the plaintiff claims by survivorship*, no succession certificate is necessary[1] As to the other cases where

Note 6

1. ('10) 8 Ind Cas 655 (656 657) 37 Cal 839
2 ('84) 8 Bom 241 (255)

Note 7

1 Section 2 (d) of the Succession Act, 1925 (XXXIX of 1925)
2. Act VII of 1901
3. Sections 190 and 187 of the Succession Act, 1865 (X of 1865)

Note 8

1. ('94) 18 Bom 337 (342) (Letters of administration should be obtained in respect of the whole estate)
('27) AIR 1927 Bom 474 (476 477) 51 Bom 771 (But Section 212 is not applicable to a suit for sale by a mortgagee against the heirs of mortgagor)

Note 9

1. ('95) 17 All 578 (580)
('95) 19 Bom 338 (339)
('99) 1 Bom L R 197 (199)
('96) 23 Cal 912 (913) (Continuation of suit by the sons)
('96) 9 O P L R 65 (68)
('91) 14 Mad 377 (379)
('94) 17 Mad 108 (117) (Succession certificate not recover debt due to last holder of estate)

succession certificate is not necessary, see the undermentioned cases [2] As to what is a "suit for debt" for the purposes of Section 214 of the Succession Act, see Notes 10 and 11 below

10. Suit for rent. — The word "debt" in Section 214 (1) of the Succession Act does not include rent, revenue or profits in respect of land used for agricultural purposes [see Section 214 (2)] and, therefore, no succession certificate is necessary to recover rent for agricultural land [1] The amount of the decree for rent deposited by defendant in Court is still rent and can be withdrawn without a succession certificate by the legal representatives of deceased decree-holder [2]

11. Suit for debt. — Under Section 214 of the Succession Act the Court cannot pass a decree against a debtor of the deceased in favour of a person claiming on *succession* to be entitled to the effects of the deceased, except on production of a succession certificate, etc As to what is a suit for debt, see Note 10 above and the undermentioned cases [1]

12. Suit by or against a company. — See Order 29 Rules 1 and 2, *infra*.

13. Suit by or against a club. — See Order 1 Rule 8 Note 4, *supra*.

14. Cause title of the suit. — See Appendix A "Description of parties in particular cases" It is not, however, *necessary* under this rule that the capacity in which the plaintiff sues should be stated in the *cause title* of the plaint, although it is

[*See also* ('91) 1 Mad L Jour 679 (680) (Where there is nothing to show that debt belongs to joint family, succession certificate should be produced)]
[**But see** (07) 30 Mad 454 (458) (Impartible estate—Claim by survivorship—Suit to recover debt due to the last holder — Certificate is necessary)]
2. ('92) 16 Bom 240 (241) (To file an award no succession certificate necessary)
('96) 20 Bom 437 (439) (Curator suing under Act XIX of 1841 need not produce succession certificate)
(1858) 1858 El Bl & El 63, Jones v Thomson (Rent due after death of deceased—No succession certificate necessary)
('97) 20 Mad 162 (166, 167) 24 Ind App 73 (PC)

Note 10

1. ('99) 26 Cal 536 (538)
('07) 17 Mad L Jour 257 (257)
[**See however** ('91) 1 Mad L Jour 680 (682) (But in a suit on a bond though for rent, a succession certificate is necessary)]
2. ('13) 18 Ind Cas 495 (495) (Cal)

Note 11

1. (08) 30 All 315 (317) (Dower whether prompt or deferred is a debt)
('91) 1891 Pun Re No 88 page 429 (Do)
('94) 22 Cal 143 (150) (Suit on mortgage—Not a suit for debt — No succession certificate necessary)
('92) 19 Cal 336 (339, 340) (Do)
('94) 16 All 259 (268) (Dissenting from 19 Cal 336—Suit for sale on mortgage — Succession certificate necessary)
('93) 16 Mad 64 (66) (Suit for foreclosure — No succession certificate is necessary)
('01) 28 Bom 630 (633, 635) (Suit for sale on mortgage—No succession certificate is necessary)
('89) 12 Mad 255 (257) (Suit on mortgage brought by the adopted son of the mortgagee—Not a suit for debt—No certificate under Act 27 of 1860 is necessary for the purpose of maintaining the suit)
('01) 24 Mad 22 (24) (Suit on mortgage—Not a suit for debt—No succession certificate is necessary)
(88) 15 Cal 54 (57 58) (Purchaser of mortgaged property is not a "debtor")
(1900) 1900 All W N 94 (95) (Suit for foreclosure)
('06) 29 Mad 77 (79) (Suit on mortgage—But if personal remedy sought, succession certificate necessary)
('08) 12 Cal W N 145 (150) (Do)
('95) 18 Mad 457 (458) (Suit for damages for [illegible] under a will is a debt)
('99) 22 Mad 139 (141, 144) (Suit for accounts—Not a suit for debt)
('05) 32 Cal 418 (420, 421) (Do)
('76) 2 Cal 45 (54). (Suit for immovable property not a suit for debt)
('09) 3 Ind Cas 492 (493, 494) 36 Cal 492 (F B). (Debt existing in the life of a creditor but which became payable only after his death is still a debt)
('98) 2 Cal W N 591 (593) (Debt fallen due since the death of the creditor—No succession certificate is necessary)

O. 7 R. 4 Note 14

a convenient place to make such a statement. It is sufficient if the capacity in which the plaintiff sues appears in the body of the plaint[1] The strict rules of English pleadings are not applicable to India[2]

O. 7 R. 5

Defendant's interest and liability to be shown

R. 5. [S. 50, para. 5.] The plaint shall show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand.

[*Cf.* 1877, S. 50, cl. 5.]

1. Defendant's interest and liability. — This rule makes it necessary that the plaintiff should show the interest of the defendant in the subject-matter of the suit and his liability to meet the plaintiff's demand[1] If the defendant is sued in a *representative* capacity, it is incumbent on the plaintiff to state the capacity in which the plaintiff seeks to make him liable, as otherwise any decree passed will bind no more than the defendant s individual interest[2] As to the liability of the defendant in particular cases, see the cases cited below[3]

Note 14

1. ('28) AIR 1928 Nag 319 (321)
('16) AIR 1916 Cal 164 (166)
('17) 1917 Cal 441 (442)
('19) AIR 1919 Cal 245 (247) 46 Cal 877
('28) AIR 1928 Mad 445 (446)

2. ('28) AIR 1928 Mad 445 (447)

Order 7 Rule 5 — Note 1

1. ('24) AIR 1924 Nag 191 (193, 194)

2. ('32) AIR 1932 Mad 185 (186, 187)
('89) 12 Mad 434 (437)
[illegible]

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[illegible] Mad 425 ([illegible]) (Suit against female owner having only limited interest — [illegible]

3. ('90) 14 Bom 597 (603, 604) (The other members of the family are bound by a decree properly passed against the manager)

('08) 31 Mad 161 (162, 163) (Debts contracted by manager though amounting to a breach of civil duty binds minor members of family)
('03) 26 Mad 214 (221, 223) (Debt incurred for family trade — Minor coparcener bound by the debt)
('07) 9 Bom L R 1289 (1293) (Do)
[illegible]

liable to pay interest on mortgage)
('97) 19 All 26 (32) (F B) (Do)
('04) 28 Bom 383 (389) (Son liable to pay father's debts whether father is dead or alive)
('04) 27 Mad 71 (75) (Son not liable to pay sums [illegible] father where the misappro[illegible]

[illegible]

('04) 26 All 611 (614, 616) (Do)
('05) 28 Mad 377 (378) (Do)
('88) 11 Mad 373 (374) (*Do*)
('07) 17 Mad L Jour 293 (294, 295) (Yet father [illegible]

If there are more defendants than one, the plaint should disclose a cause of action against each defendant and should state the interest of each defendant in the subject matter and how each defendant is liable to meet the plaintiff's demand [4]

R. 6. [S. 50, para. 6.] Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed.

Grounds of exemption from limitation law.

[1859, S. 26.]

Synopsis

1. Scope of the Rule. | **2. "The plaint shall show."**

Other Topics (miscellaneous)

Exemption from limitation — Grounds of See Note 2.
Omission to show grounds of exemption — Effect See Note 1.

1. Scope of the Rule. — Where, but for some ground of exemption from the law of limitation, a suit would *prima facie* be barred by limitation, it is necessary for

('89) 12 Mad 90 (91) (Heirs not represented being minors—Suit binding since their father is a party and represents them though not formally appointed guardian)
('69) 12 Suth W R 41 (42, 44) (Adopted son liable for adoptive mother s debt only if he succeeds to her estate)
('81) 3 Mad 42 (46) (Liability of Hindu son limited to the extent of father's assets received)
('84) 8 Bom 220 (222, 223) (Son liable to pay father's debts even if assets are in the hands of third parties)
('89) 13 Bom 653 (654) (Though decree against sons might be passed their liability in execution is only to the extent of the assets inherited)
('68) 10 Suth W R 216 (217) (Property alienated by Mahomedan heir for paying debts not liable to creditor of deceased)
(1865) 2 Suth W R 258 (258) (Heirs of deceased liable to the extent of assets for debts due by deceased)
(1865) 2 Suth W R 296 (297) (Heir can dispose of property for discharging the debts of the deceased)
('69) 12 Suth W R 233 (233) (Heirs of a deceased person are responsible for the debts due by him to the extent of the assets in their possession)
('84) 8 Bom 309 (310) (Legal representative not in possession of assets liable if he can become possessed of the assets)
('97) 20 Mad 446 (447) (If heirs received sufficient assets from deceased they ...

('

assets from deceased)
('79) 4 Cal 342 (345 346) (Person in possession of estate represents estate till probate is obtained)
('05) 28 Mad 351 (352, 353) (Creditor in possession of assets liable as executor *de son tort*)
('85) 11 Cal 45 (51) (Decree against person in ...

binds the estate)
('91) 21 Cal 311 (318) (Mahomedan widow in possession of assets liable as representative)
('82) 8 Cal 370 (373, 374) (Do)
('85) 11 Cal 421 (429) (Mahomedan heir liable in respect of proportionate share of assets received)
('82) 4 All 361 (366) (Do)
('95) 19 Bom 273 (275) (Do)
('83) 9 Cal 406 (410) (Mortgagee of several properties from heir at law can proceed against purchaser of one of them only to the extent to which that property is liable)
('81) 8 Cal L Rep 447 (448) (Creditor of deceased Mahomedan cannot follow assets in hands of *bona fide* purchaser from heir at law)
('81) 7 Cal L Rep 460 (463) (Do)
('79) 4 Cal 402 (408) 5 Ind App 211 (P C) (Do)
('08) 30 All 352 (358, 359) (Estate of husband not liable for debts voluntarily incurred by wife to pay off husband's debts during husband s life time)
('95) 22 Cal 259 (262, 265, 266, 267) (Insolvent dying before filing schedule but after adjudication—Widow and not Official Assignee is the legal representative of the insolvent for purposes of a suit by a creditor)
('92) 16 Bom 233 (237) (Residue left by widow (Bombay school) not liable for personal debts of widow)
[*See* ('96) 20 Bom 339 (344, 345, 346)]

4. ('24) AIR 1924 Nag 191 (193, 191).

O. 7 R. 6
Notes 1–2

the plaintiff to show in the plaint such ground of exemption[1] If no such ground is shown in the plaint, it is liable to be rejected under Order 7 Rule 11 (d) *infra* The plaintiff will not be allowed to show the ground of exemption at the *trial* by putting in evidence any documents, such as acknowledgments of liability[2] But the Court may, save in exceptional circumstances, allow the plaint to be *amended* by making the necessary allegations[3] See also Note 7 to O 7 R 11, *infra*

2. "The plaint shall show." — It is sufficient that the ground of exemption is apparent on the face of the plaint It is not necessary that the plaint should specifically, and in so many words, claim the ground of exemption[1] Thus, where the fact of minority is apparent on the face of the record, it is not necessary that the ground of exemption under Section 8 of the Limitation Act should be specifically pleaded[2] Similarly where a plaint is presented on the re opening date after court holidays and the period of limitation has expired during the holidays, the fact that the ground of exemption under Section 4 of the Limitation Act was not specifically mentioned in the plaint will not entail the dismissal of the suit, inasmuch as the Court is bound to take judicial notice of the holidays[3] On the same principle it has been held that where a plaint presented to a wrong Court is returned for presentation to the proper Court the endorsements on the plaint will show the applicability of Section 14 of the Limitation Act and that therefore it is not necessary to specifically allege that ground of exemption[4] All that the rule requires is that the plaint should show a ground of exemption from limitation where the suit is instituted after the expiration of the period of limitation But once that is shown, the rule does not preclude the plaintiff from relying upon a *new ground* of exemption at the trial According to the High Court of Bombay however, the new ground taken should be *not inconsistent* with that taken originally,[5] while, according to the Allahabad[6] Calcutta[7] and Lahore[8] High Courts and the Judicial Commissioner s Court of Nagpur,[9] the new ground may *even be inconsistent* with the original one The High Court of

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Order 7 Rule 6 — Note 1

1 (32) AIR 1932 All 461 (464) 54 All 506 (Acknowledgment relied on — Plaintiff must

(74) 21 Suth W R 47 (48)
(19) AIR 1919 Mad 332 (333)
(24) AIR 1924 Nag 80 (80)

('24) AIR 1924 Lah 702 (706)

102
('10) 7 Ind Cas 797 (797) (Mad)
(09) 3 Ind Cas 159 (160) 34 Bom 250

Note 2

1

favour)]
2 (09) 2 Ind Cas 77 (78) (Cal)
3 ('20) AIR 1920 Nag 200 (202) 16 Nag L R 193

31 Cal 195)
[*See also* (09) 2 Ind Cas 77 (78) (Cal)]
8 (22) AIR 1922 Lah 230 (232) 2 Lah 13
9 ('21) AIR 1921 Nag 1 (1, 2) 17 Nag L R 200

Madras[10] has dissented from the view of the Calcutta and Lahore High Courts and has held that a new ground of exemption can be urged only after amendment of the plaint so as to include the new ground But where the plaintiff once amends his plaint by relying upon a new ground of exemption it has been held by their Lordships of the Privy Council that he will not thereafter, be allowed to rely upon the original allegation in the unamended plaint [11] O. 7 R. 6 Note 2

A plaintiff will not be allowed to rely upon a ground of exemption from limitation for the first time in appeal [12] The Appellate Court has the same powers of rejection of plaint as the trial Court under O 7 R 11 (d) [13] Similarly, a defendant will not be allowed to raise objections on the ground of failure to set out the grounds of exemption for the first time in appeal or revision [14]

This rule applies only to cases where the suit is barred *prima facie* [15] a plaintiff, therefore is not precluded from relying upon a ground of exemption from limitation, if, on the facts found the plaintiff s claim appears to be barred [16] The plaintiff has to show that his cause of action accrued within the period of limitation [17]

R. 7. [New.] Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement O. 7 R. 7

Relief to be specifically stated

[R S C, O 20 R 6]

Synopsis

1 Relief
2 General or other relief
3 Alternative relief
3a Suit under Section 77 of the Registration Act
4 Events happening after suit

1 Relief — This rule and O 2 R 2 sub rule 3 should be read together, and so reading them the following general propositions may be deduced —

(1) If the plaintiff being entitled to more than one relief in respect of the same cause of action omits to sue for any one of such reliefs he shall not afterwards sue for any relief so omitted

(2) Every plaint shall state *specifically* the relief which the plaintiff claims either simply or in the alternative

10 (33) AIR 1933 Mad 395 (396)
(36) AIR 1936 Mad 545 (546)
11 (26) AIR 1926 P C 85 (88) 48 All 457 53 Ind App 187 (I C)
12 (07) *17 Mad L Jour 281 (282)*
(21) AIR 1921 Nag 94 (95) 59 Ind Cas 709 (710) [*See also* (37) 20 Nag L Jour 42 (46) (If the plaintiff fails to make any averment of exemption from the law of limitation in the plaint he cannot be permitted in second appeal to amend his plaint)]
13 (24) AIR 1924 Nag 80 (80)
(23) AIR 1923 Nag 30 (31)
14 (17) AIR 1917 Mad 845 (845)
(09) 4 Ind Cas 923 (924) (Lah)
15 (14) *AIR 1914 Lah 408 (410) 1914 Pun Re* No 70
(19) AIR 1919 Lah 90 (91) 1 Lah 89
16 (19) AIR 1919 All 277 (278)
(22) AIR 1922 Oudh 135 (136 137) 25 Oudh Cas 69
17 (28) AIR 1928 Lah 763 (764)

O 7 R. 7
Note 1

(3) But a *general or other* relief need not however, be specifically asked for, but may be given by the Court as if it had been asked for

Where a question arises as to whether a plaintiff has asked for a particular relief in his plaint the *whole* of the plaint must be considered [1] and the *substance* and not merely the *form* of the plaint should be looked to [2] But this liberality of construction is subject to a limitation that the facts and documents which entitle the plaintiff to the relief claimed must be *stated or referred to* in his pleading In *Mahomed Zahoor Ali Khan* v *Mt Thakooranee Rutta Koer*,[3] their Lordships of the Privy Council observed as follows

> Though this Committee is always disposed to give a liberal construction to pleadings in the Indian Courts so as to allow every question fairly arising on the case made by the pleadings to be raised and discussed in the suit yet this liberality of construction must have some limit A plaintiff cannot be entitled to relief upon facts and documents not stated or referred to by him in his pleadings

In *Sri Mahant Govind Rao* v *Sita Ram Kesho*,[4] their Lordships of the Privy Council observed that the general rule that a plaintiff cannot be entitled to relief upon facts and documents not stated or referred to by him in his pleadings does not apply where the substantial matters which constitute the title of all the parties are touched in the *issues* and have been fully *put in evidence* in the case Relief can be granted in such cases on the basis of such matters [5]

It follows from what has been said above that no relief can be granted upon facts and documents not disclosed in the pleadings nor dealt with by the issues or the evidence in the case [6] Thus where the plaintiff asks for a particular relief on a specific

Order 7 Rule 7 — Note 1

1 (31) AIR 1931 Nag 198 (200) 27 Nag L R 299

2 (31) AIR 1931 Mad 91 (95)
(11) 11 Ind Cas 882 (884) (Cal) (Plaint in form for confirmation of possession but in substance for recovery of possession—Latter relief can be given)
(26) AIR 1926 Lah 417 (418) (Plaint badly drafted and hence the relief sought not clearly brought out—If evidence is let in on right

alleged giving without objection by defendant — Defendant cannot

3 (69) 11 Moo Ind App 468 (474) (P C)

4 (98) 21 All 53 (69) 25 Ind App 195 (P C)
[*See also* (87) 14 Cal 597 (597)
(26) AIR 1926 Cal 1003 (1005)

5 [*See* (36) AIR 1936 Pat 147 (149) (If a Court sees that the plaintiff is entitled to the relief which he claims although on other grounds than those put forward in his claim the Court would grant that relief if the defendant is not taken by surprise)
(37) AIR 1937 Mad 223 (226) (Suit on promis

decreed)]

6 (1863) 1 Mad H C R 471 (477)
(09) 2 Ind Cas 492 (493) (Cal) (Relief restricted to property in plaint)
(15) AIR 1915 Cal 939 (341) 43 Cal 103 (Plaintiff cannot claim relief on defendant s allegations abandoning his case)
(70) 2 N W P H C R 407 (408)
(25) AIR 1925 All 59 (59) (Suit on lease—Lease not proved—Court not to give decree on plaintiff s title)
(10) 8 Ind Cas 962 (965) (Low Bur) (Suit on one cause of action not to be decreed on another cause of action)
(15) AIR 1915 Mad 74 (75)
(10) 5 Ind Cas 764 (765 766) (Mad)
(36) AIR 1936 Pat 230 (231) (Suit by landlord for ejectment—Defendants recorded as raiyats—Plaintiff challenging entry suing for declaration of his rights to property and for ejecting defendants—Decree by Court should be confined to relief asked for—It should not grant declaration that defendants are tenants in respect of land in dispute)
(39) AIR 1939 Lah 206 (209) (SB) (Plaintiff not proving facts constituting his cause of action—

ground he cannot be granted the same relief on a different ground which is not at all disclosed in the plaint[7] A plaintiff suing for a declaration of title to a certain property under a sale deed executed in his favour cannot succeed on the ground of *adverse possession* if the facts in support of that ground are not disclosed in the plaint[8] But where a ground of relief *is disclosed* in the plaint, the fact that the plaintiff asked for the relief on a *different* ground will not disentitle him to relief on the ground disclosed in the pleading[9] **O. 7 R. 7 Note 1**

Where a plaintiff claims a larger relief than he is entitled to the suit should not be dismissed on that ground but the plaintiff should be given the relief he is entitled to[10] unless the ground on which the lesser relief can be granted is *inconsistent* with the case of the plaintiff as set out in his pleadings or would lead to a determination of

Suit should not be decreed on proof of different facts which defendant had no opportunity to controvert)

(34) AIR 1934 Rang 139 (144) (Body of plaint not mentioning the relief for mesne profits—Court fee not paid—Mesne profits not estimated —Only mention in prayer — Mesne profits cannot be granted)]
[*See also* (32) AIR 1932 All 353 (355)
(35) AIR 1935 Cal 234 (238) (Plaintiff s whole case rejected—*Held* that Court was not justified in granting rel ef on equitable grounds)]

7 (68) 10 Suth W R 189 (189) (Pre emption on basis of plaintiff being a coparcener with the vendor—Decree on the ground of vicinage not to be given)
(27) AIR 1927 Lah 36 (36) (Where plaintiff claimed easement by prescription no relief can be given on bas s of a natural right)
(20) AIR 1920 Pat 195 (196) (Do)
(69) 3 B ng L R App 142 (142) (Suit for pre-emption on ground of partnership — Plaintiff cannot get relief on the ground of vicinage)
(70) 2 N W P H C R 407 (408) (Title claimed under a will—Decree not to be given as on inheritance)
(35) AIR 1935 Pat 105 (109) (Suit for compensation against municipality on ground of unlawful removal of certain materials—Plaintiff on failure of that ground claiming compensation on ground that statute itself allowed compensation for removal of structures — Relief cannot be *granted*)

8 (08) 31 Mad 531 (531 532)
(33) AIR 1933 Lah 95 (97) 13 Lah 677 (Adverse possession should be pleaded)

9 (18) AIR 1918 Cal 802 (803)
(34) AIR 1934 All 990 (993)
(74) 21 Suth W R 121 (122)
(89) 8 Cal 9 6 (930 931) (Suit for rent on

(90) 14 Bom 213 (220 221)]

10 (18) AIR 1918 Mad 300 (307)
(06) 28 All 482 (487) 33 Ind App 81 (PC)
(80) 4 Bom 594 (598 599)
(16) AIR 1916 Cal 547 (548) (Claim for Rs 40—Only Rs 30 found due — Decree should be for Rs 30 and suit should not be dismissed)
(67) 7 Suth W R 92 (93)
(89) 11 Mad 91 (97)
(13) 19 Ind Cas 848 (848) (Mad) (Decree for admitted amount passed though plaintiff claimed larger figure)
(30) AIR 1930 All 225 (244) 52 All 619 (F B)
(13) 21 Ind Cas 721 (729) (Mad) (Plaintiff claiming whole of property — A share in it can be decreed)
(17) AIR 1917 Mad 884 (884 885) (Exaggeration of pla ntiff s claim is no ground for dismissal of the suit)
(17) AIR 1917 Nag 31 (32)
(19) AIR 1919 Lah 339 (341) 1919 Pun Re No 18 (Plaintiff claim ng whole of property under custom—Custom not proved—Decree for half of the property under Mahomedan law awarded)
(23) AIR 19 3 Sind 5 (8) 16 Sind L R 112 (FB)
(15) AIR 1915 All 116 (117 118) (Plaintiff sued for possession—Possession subject to conditions of service de reed)
(31) AIR 1931 Bom 473 (476)
(36) AIR 1936 Mad 252 (255)
(36) AIR 1936 Lah 673 (675) (Both parties over stating respective claims is not suffic ent to defeat plaint ff s claim)
(38) AIR 1938 Mad 270 (271) (Property dedi

community)
(37) AIR 1937 Pesh 81 (82)

O. 7 R. 7
Note 1

(3) But a *general or other* relief need not, however, be specifically asked for, but may be given by the Court as if it had been asked for

Where a question arises as to whether a plaintiff has asked for a particular relief in his plaint, the *whole* of the plaint must be considered,[1] and the *substance* and not merely the *form* of the plaint should be looked to[2] But this liberality of construction is subject to a limitation that the facts and documents which entitle the plaintiff to the relief claimed must be *stated or referred to* in his pleading In *Mahomed Zahoor Ali Khan* v. *Mt Thakooranee Rutta Koer*,[3] their Lordships of the Privy Council observed as follows

> "Though this Committee is always disposed to give a liberal construction to pleadings in the Indian Courts so as to allow every question fairly arising on the case made by the pleadings to be raised and discussed in the suit, yet this liberality of construction must have some limit A plaintiff cannot be entitled to relief upon facts and documents not stated or referred to by him in his pleadings"

In *Sri Mahant Govind Rao* v *Sita Ram Kesho*,[4] their Lordships of the Privy Council observed that the general rule that a plaintiff cannot be entitled to relief upon facts and documents not stated or referred to by him in his pleadings, does not apply where the substantial matters which constitute the title of all the parties are touched in the *issues* and have been fully *put in evidence* in the case Relief can be granted in such cases on the basis of such matters[5]

It follows from what has been said above that no relief can be granted upon facts and documents not disclosed in the pleadings, nor dealt with by the issues or the evidence in the case[6] Thus, where the plaintiff asks for a particular relief on a specific

Order 7 Rule 7 — Note 1

1. ('31) AIR 1931 Nag 198 (200) 27 Nag L R 299
2. ('31) AIR 1931 Mad 94 (95)
('11) 11 Ind Cas 882 (884) (Cal) (Plaint in form for confirmation of possession but in substance for recovery of possession—Latter relief can be given)
('26) AIR 1926 Lah 417 (418) (Plaint badly drafted and hence the relief sought not clearly brought out—If evidence is let in on right [illegible]
Proper relief should be granted)
3. ('68) 11 Moo Ind App 468 (474) (P C)
4. ('98) 21 All 53 (69) 25 Ind App 195 (P C)
(*See also* ('87) 14 Cal 592 (597)
('26) AIR 1926 Cal 1003 (1005)
5. [*See* ('36) AIR 1936 Pat 147 (149) (If a Court sees that the plaintiff is entitled to the relief which he claims, although on other grounds than those put forward in his claim, the Court would grant that relief if the defendant is not taken by surprise)
('37) AIR 1937 Mad 223 (226) (Suit on promissory note—Cash consideration alleged by plaintiff—Consideration in some other form proved —No surprise to defendant — Suit may be decreed)]
6. (1863) 1 Mad H C R 471 (477)
('09) 2 Ind Cas 492 (493) (Cal) (*Relief restricted to property in plaint*)
('15) AIR 1915 Cal 339 (341) 43 Cal 103 (Plaintiff cannot claim relief on defendant's *allegations* abandoning his case)
('70) 2 N W P H C R 407 (408)
('25) AIR 1925 All 59 (59) (Suit on lease—*Lease* not proved—Court not to give decree on plaintiff's title)
('10) 8 Ind Cas 962 (965) (Low Bur) (Suit on one cause of action not to be decreed on another *cause of action*)
[illegible]
of his rights to property and for ejecting defendants—Decree by Court should be confined to relief asked for—It should not grant declaration that defendants are tenants in respect of land in dispute)
('39) AIR 1939 Lah 206 (209) (SB) (Plaintiff not proving facts constituting his cause of action—

due to the plaintiff, even though the latter has not claimed it.[2] The Court may in a suit for exclusive possession pass a decree for *joint* possession.[3] Similarly, in a suit for sale of mortgaged property the Court may pass a personal decree against the mortgagor defendant provided the claim under the personal covenant is not barred by limitation.[4] Again, where the Court cannot decree partition because all the coparceners are not parties, it can grant the plaintiffs a declaration as to their title.[5]

But the power to grant such relief is controlled by the following considerations :—

(1) The relief granted should be based on facts stated or referred to in the plaint and should not be inconsistent with the case set up by the plaintiff[6] or with the relief claimed by him.[7] Thus, the Court cannot pass a decree for possession of property in a suit for *confirmation* of possession, inasmuch as the relief of possession is not consistent with the case set up by the plaintiff or with the relief claimed by him.[8] Similarly, in a suit for injunction on the basis of title, the Court cannot declare that the plaintiff is entitled to a right of easement jointly with the defendant.[9] For other illustrations, see the undermentioned cases.[10]

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2. ('21) AIR 1921 Lah 125 (126) : 2 Lah 256.

3. ('26) AIR 1926 Lah 567 (568).
('09) 2 Ind Cas 492 (493) (Cal).
('09) 3 Ind Cas 54 (54) : 5 Nag L R 105.
('30) AIR 1930 Mad 567 (569).
('14) AIR 1914 Mad 128 (130) : 38 Mad 1036. (Suit for ejectment — Decree for joint possession passed.)
('13) 21 Ind Cas 724 (729, 733) (Mad). (In suit for ejectment, a share of the property can be decreed to the plaintiff.)

4. ('25) AIR 1925 P C 280 (288) : 52 Ind App 418 : 5 Pat 135 (P C).
('02) 24 All 456 (45).
('82) 4 All 281 (283).
('06) 29 Mad 491 (495).
[But see ('29) AIR 1929 Oudh 303 (304).]

5. ('31) AIR 1931 Sind 74 (75).

6. (1806) 13 Ves 114 (120), Hiern v. Mill. (Referred to in A I R 1923 Pat 336.)
('72) 11 Moo Ind App 468 (473, 474) (P C).
(1878) 10 Ch D 502 (508), Gargill v. Bower.
('05) 27 All 325 (331) : 32 Ind App 123 (P C). (Appropriate relief was granted.)
('21) AIR 1921 Pat 14 (17) : 6 Pat L Jour 190.
('74) 22 Suth W R 248 (254).
('17) AIR 1917 Cal 367 (368). (Alternative prayer

('73) 21 Suth W R 8 (10).
('23) AIR 1923 Pat 386 (390).
('33) AIR 1933 Nag 115 (116) : 29 Nag L R 100. (Plaintiff claiming property as owner cannot succeed as trustee.)
('92) 15 Mad 489 (490). (Plaintiff's title found against — Joint right of easement in favour of plaintiff and defendant not to be decreed.)
('14) 23 Ind Cas 332 (335) (P C). (Relief on a wholly different basis not to be given.)
('70) 5 Beng L R 682 (690). (Inconsistent relief cannot be given under the general prayer.)
('92) 21 Cal 116 (120, 121). (Mere insertion of the general prayer clause in the plaint is not sufficient. There must be some other evidence.)
('67) 7 Suth W R 145 (146). (Jagirdar's right pleaded — A subordinate right of occupancy not to be granted.)

('29) AIR 1929 Lah 126 (127). (Relief to be granted should not go beyond the scope of the suit or the facts proved.)
('33) AIR 1933 Lah 267 (268).
('36) AIR 1936 Cal 465 (468).
('38) AIR 1938 Mad 865 (878).

7. ('97) 7 Mad L Jour 50 (51). (Suit by usufructuary mortgagee for possession — Decree for appointment of a curator and other reliefs — Other reliefs could only be read in connection with the main reliefs prayed.)

8. ('21) 63 Ind Cas 2 (3) (Pat).

9. ('92) 15 Mad 489 (490).

10. ('24) AIR 1924 Lah 713 (716) : 5 Lah 509. (Suit for specific performance — Damages also awarded under general relief.)
('04) 28 Bom 153 (161, 162, 163). (Suit for sale — Redemption in favour of prior mortgagee passed.)
('11) 14 Ind Cas 845 (848) (Cal). (Do.)
('10) 8 Ind Cas 64 (64) (Mad). (Suit for cancellation of sale deed — Decree for unpaid purchase money passed.)
('17) AIR 1917 Low Bur 3 (4). (Suit for share of

O. 7 R. 7 Note 2

(2) The relief granted should be based on the same cause of action as the relief claimed in the suit [11]

(3) The relief granted to the plaintiff should not be of an entirely *different description* from the relief claimed in the plaint The plaintiff "cannot desert the specific relief prayed and under the general prayer ask specific relief of another *description* unless the facts and circumstances charged by the bill will consistently with the rules of the Court, maintain that relief [12] Thus an injunction will not ordinarily be granted under the power to grant general relief [13] It must be expressly prayed, because the defendant might by his answer make a different case under the general prayer from what he would if an injunction were specifically prayed [14] The *test*, therefore, in such cases is to see whether the defendant will not be taken by surprise or be embarrassed by such relief being granted [15] There can be no surprise if the relief granted is *consistent* with that claimed and with the case raised in the pleadings[16] or if the parties knew the case which had to be tried [17] Thus a declaratory decree may be passed in a suit for possession of property [18] or a decree for joint possession can be passed in a suit for partition by metes and bounds where the property happens to be impartible,[19] provided there is no surprise under the circumstances of the case to the defendants Similarly *damages* may be awarded in addition to a decree for specific performance [20] or *an account* directed to be taken in a suit *for money* [21] But the Court cannot pass a decree for a general taking of accounts of a partnership in a suit to recover plaintiff s share alone in one item of the partnership assets [23] nor can it in a personal

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11 ('09) 3 Ind Cas 408 (414 415) (Cal) (Relief conformable to the case made in the plaint can be given)
('05) 27 All 174 (176)
('12) 13 Ind Cas 650 (651) (Lah) (When a plaintiff sues to redeem a certain mortgage that particular mortgage is his *cause of action* — To shift the attack to later mortgage is to change the suit into one based on different cause of action)
('17) AIR 1917 Cal 367 (368) (General prayer does not cover a relief based on different cause of action)
('39) AIR 1939 Lah 71 (71) I L R (1939) Lah 511 (Suit for compensation on express agreement No relief under S 70 Contract Act asked—Court cannot decree suit on principles of Section 70)

12 (1806) 13 Ves 114 *Hiern v Mill* (Referred to in A I R 1923 Pat 386 — Per Lord Erskine L C)
(1837) 9 Moo Ind App 353 (389 390) (P C) (Relief of a different description can be given if such a relief can be sustained by the allegations in the plaint)
('16) AIR 1916 Cal 829 (833 837) 43 Cal 743 (FB)
('24) AIR 1924 Lah 394 (395)
('37) AIR 1937 Oudh 484 (487) 13 Luck 594 (Plaintiff claiming decree for money found due from defendants on taking accounts — Decree declaring plaintiff s right to a share of the money with the defendants cannot be passed—Further decree cannot be passed against defendants against whom the plaintiff did not originally claim any relief)

13 7 Hare 89 (98 99 100) Castelli v Cooke
('81) 6 Cal 485 (489 490)
(*See also* ('29) AIR 1929 All 430 (431 432) (Injunction is only an alternative within the

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15 ('16) AIR 1916 Cal 829 (837 838) 43 Cal 743 (FB)
('09) 3 Ind Cas 408 (414 415) (Cal)
('28) AIR 1928 Bom 484 (486) 52 Bom 875
('26) AIR 1926 Lah 417 (418) (Case should not be allowed to be defeated owing to technicality)
('19) AIR 1919 Sind 98 (99) 13 Sind L R 150 (Prayer for demarcation and possession includes ejectment—Ejectment can be granted though relief not specifically asked for)
('23) AIR 1923 Pat 386 (390)
('36) AIR 1936 Cal 465 (468)

16 ('16) AIR 1916 Cal 829 (837 838) 43 Cal 743 (FB)
('36) AIR 1936 Cal 465 (468)

17 ('26) AIR 1926 Lah 417 (418)

18 ('23) AIR 1923 Lah 422 (423)
('24) AIR 1924 Lah 324 (325)
('29) AIR 1929 All 555 (555) (Suit for possession —Declaration that transfer by widow to defendant was void beyond widow s life time granted under general prayer)
('16) AIR 1916 Pat 94 (95) (Suit for possession— Declaratory decree that plaintiff is entitled to possession after expiry of term passed)

19 ('21) AIR 1921 All 106 (107) 43 All 318

20 ('24) AIR 1924 Lah 713 (716) 5 Lah 500

21 ('19) AIR 1919 Cal 296 (305)

22 ('19) AIR 1919 Mad 146 (148)

claim, pass a decree for sale of property in default of the payment of the sum decreed [23] Where a reversioner sues a Hindu widow for an *injunction* restraining her from committing waste and in such a suit prays for the *appointment of a receiver*, he is not entitled to a *declaration* of his reversionary right if he fails to establish his right to the reliefs claimed [24] It has been held by the Bombay High Court that in a suit for dissolution of marriage or in the alternative for a declaration that the marriage is a nullity, it is not open to the Court to pass a decree for judicial separation, such relief not being 'general or other relief' within the meaning of this rule [25]

A Court cannot, under the power to grant further relief, pass a decree in favour of a *pro forma* plaintiff if it is found that the real plaintiff is not entitled to the relief claimed [26]

An equitable relief under this rule may be granted even by the Appellate Court,[27] though it will be slow to interfere with the discretion exercised by the trial Court in granting appropriate relief under this rule [28]

3. Alternative relief. — "A person may rely upon one set of facts if he can succeed in proving them, and he may rely upon another set of facts if he can succeed in proving them "[1] Thus a plaintiff may claim specific performance of a contract or, in the alternative, cancellation of the contract and damages [2] Where *A* and *B* are tenants of the same landlord, in a suit for *khas* possession by *A* against *B* and the landlord, refund of *salami* or rent paid to the landlord can be granted if the right to *khas* possession is found against [3] *Similarly a plaintiff may in a suit on a negotiable* instrument claim in the alternative a decree on the original consideration [4] So also in a suit based on tenancy the plaintiff can claim damages for use and occupation in the alternative [5] Again a pre emptor may allege that the vendor has no title to part of the property and may alternatively offer to pre empt the whole if the Court finds that the vendor had title to sell the whole [6] An injunction it has been held is an alternative relief within the discretion of the Court and not an independent relief under Section 35 (a) of the Easements Act [7] But in all such cases plaintiff has to *set out the facts* relied on by him in his alternative claim distinctly and separately [8] He cannot be allowed to pick out such of the allegations as will support any alternative case put forward by him [9] If the facts are not stated in the plaint the plaintiff cannot claim

23 (25) AIR 1925 Oudh 550 (552)
24 (16) AIR 1916 P C 117 (119) 39 Mad 634 43 Ind App 207 (PC)
25 (38) AIR 1938 Bom 65 (67)
26 (03) 31 Cal 433 (440)
27 (25) AIR 1925 Cal 434 (435)
28 (26) AIR 1926 Lah 417 (418)
(67) 7 Suth W R 180 (181)

Note 3

1 (1887) 35 Ch D 492 (499) Owen v Morgan (Per Lindley L J)
(79) 9 Bom H C R 1 (6) (Plaintiff may from the beginning put forward an alternative case)
[*See* (1878) 7 Ch D 473 (489) Davy v Garret]
2 (24) AIR 1924 Bom 119 (127) 48 Bom 259 (Section 37 of the Specific Relief Act)
3 (25) AIR 1925 Cal 193 (194) (Suit for khas possession — Alternative claim for refund of *salami*)
4 (18) AIR 1918 P C 146 (146) 46 Cal 663 46 Ind App 33 (P C)
(24) AIR 1924 Mad 520 (521) (Claim for money due based on the original dealings may be combined with a claim for the same money as due under a pro note)
(12) 14 Ind Cas 399 (401) 8 Nag L R 7
(24) AIR 1924 Lah 144 (145) 4 Lah 198
(30) AIR 1930 Bom 66 (68) (As to when a decree on the original consideration cannot be passed see the observations made in this case)
[**See however** (33) AIR 1933 All 109 (109) (Where the loan is not independent of the promissory note no decree can be given even on the receipt given for money paid)]
5 (11) 11 Ind Cas 863 (864) (Low Bur)
(32) AIR 1932 Cal 41 (43)
(24) AIR 1924 Oudh 9 (93)
(26) AIR 1926 Mad 1071 (1072)
[*See also* (33) AIR 1933 Lah 15 (17) 13 Lah 561 (Suit on contract—Compensation can be granted)]
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O. 7 R. 7
Notes 3-4

the alternative relief without amending the plaint[10] In a suit by a son to set aside a transfer by his mother the plaintiff specifically alleged that his mother was of unsound mind and stated further that she was under the control of the donee The Privy Council was inclined to the view that the claim based on undue influence cannot be entertained as it was not specifically pleaded[11] So also in a suit on a hundi the Privy Council declined to pass a decree on the original consideration as such an alternative relief had not been prayed for[12]

But where in a suit all the facts giving rise to the alternative claim are *fully stated in the plaint* the fact that the plaintiff has not *formally* asked for the relief on the alternative claim is no bar to the granting of the relief on that basis[13]

The plaintiff might rely upon different allegations in the alternative claim even though they may be inconsistent with each other See Order 6 Rule 2 Note 5

A prayer for *alternative* relief cannot be converted into one for *additional* relief[14] A plaintiff praying for a relief and also for a lesser relief in the alternative, cannot be deemed to have waived his right to the relief originally claimed[15] Where the plaintiff asks for one of two alternative reliefs and is granted one he cannot, in appeal contend that he should be given the other relief[16]

3a Suit under Section 77 of the Registration Act — In a suit under Section 77 of the Registration Act 1908 no other claim such as a claim for possession and mesne profits can be coupled with the prayer to enforce registration of the document The reason is that the purpose of such a suit is strictly limited a special period of limitation is prescribed for it and the court fee leviable is separately provided for The allowing of another claim to be included in such a suit will completely alter its scope and character[1]

4 Events happening after suit — The ordinary rule is that the rights of parties must be determined as at the date of the action and not on the basis of rights which accrued to them after the institution of the suit[1] Thus where the plaintiff has no cause of action at all to institute the suit he will not ordinarily be allowed to take

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10 [illegible]

11 [illegible]

12 [illegible] 46 Ind App 33 (P C)

13 (32) AIR 1932 Nag 23 (26 27) 27 Nag L R 9[illegible]

(31) AIR 1931 Rang 139 (143) 9 Rang 56 (Suit on pro note insufficiently stamped—Plaintiff is [illegible] ration [illegible] (Mort [illegible] altera tion—Mortgagee can recover upon the original consideration)

(89) 4 All 245 (247 249)

14 (24) AIR 1924 All 271 (272)

15 (14) AIR 1914 Lah 201 (206) 1915 Pun Re No 4

16 (24) AIR 1924 Cal 445 (446)

Note 3a

1 [illegible]

(33) AIR 1933 Cal 196 (197) (Suit for registration of a usufructuary mortgage bond—Certain other alternative reliefs were also prayed for)

Note 4

1 (08) 7 Cal L Jour 269 (264) (Suit for recovery of possession—Plaintiff can succeed only on title as it stood on the date of the institution of the suit)

(30) AIR 1930 Nag 173 (176 177) 26 Nag L R 203 (Suit for possession on redemption—Plaintiff becoming entitled to possession only during suit—Not taken into account)

(24) AIR 1924 Pat 439 (439) 3 Pat 924 (Suit on basis of relinquishment by A—Relinquishment made only during suit)

(71) 15 Suth W R 106 (106)

advantage of a cause of action arising subsequent to the suit and claim relief on that basis [2] Nor, where a plaintiff has a cause of action on the date of the suit, will relief be *ordinarily refused to him on that basis by reason of subsequent events* [3]

But where it is shown that the original relief claimed has by reason of subsequent change of circumstances, become inappropriate, or that it is necessary to have the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties, the Courts may depart from the general rule and mould the relief on the basis of the altered circumstances [4] Thus, where

('28) AIR 1928 Mad 245 (246) (Suit decreed for

not maintainable)

plaintiff seeks to introduce a new case, he can do so only by an amendment of the plaint in which case the defendant must be given an opportunity of raising an appropriate defence)
('36) AIR 1936 Oudh 280 (289) 12 Luck 185

2. ('93) 21 Mad 288 (290) (Suit by landlord to eject trespassers pending lease—Subsequent expiry of lease—Plaintiff cannot get relief on that basis)
('93) 15 All 399 (403) (Death of person subsequent to suit giving title to plaintiff)
('10) 8 Ind Cas 576 (577) (Lah) (Suit by mortgagee for possession before expiry of period fixed for payment—Subsequent expiry of period will not entitle plaintiff to decree)
('26) AIR 1926 Mad 594 (597) (Suit for redemption premature—Period expired during pendency of litigation—Suit dismissed)
('36) AIR 1936 Mad 504 (506)
[*See also* ('36) AIR 1936 Oudh 250 (253) 12 Luck 101 (The title of plaintiff pre emptor must be subsisting not only at the date of sale deed but also at the date of the institution of the pre emption suit His acquiring title during pendency of the pre-emption suit is immaterial—A I R 1930 Oudh 274 and A I R 1931 Oudh 281, Relied on]

at date of institution of suit—Cause of action maturing afterwards — Suit not to be dismissed)]

('24) AIR 1924 Mad 309 (310)
('15) AIR 1915 Cal 103 (104, 105)
('23) AIR 1923 Oudh 242 (245)

4. ('07) 6 Cal L Jour 74 (78)
('28) AIR 1928 Pat 396 (397, 398) (Suit by landlord against trespasser while lease was running, for declaration and formal possession through tenant—Lease expiring—Decree for possession can be given)
('28) AIR 1928 Bom 427 (430) 52 Bom 883 (In

died pending suit, decree can be given on basis of M's death)
('17) AIR 1917 Cal 716 (719) 44 Cal 47
('29) AIR 1929 All 341 (343 344) (Suit is to be tried as on the date of cause of action—Subsequent events can be considered only in exceptional cases such as where the original relief has

('17) AIR 1917 Cal 822 (822) (Suit for khas possession against lessee on the ground of relinquishment—Relinquishment not proved but *pendente lite* lease expired—Decree for khas possession can be given)
('33) AIR 1933 Cal 534 (535) 60 Cal 685
('29) 1929 Mad W N 165 (165)
('24) AIR 1924 Nag 204 (207) (Relief refused on

('29) AIR 1929 Bom 337 (338)
('18) AIR 1918 Mad 272 (274) (Cause of action arising subsequent to the suit may be included by amendment)
('25) AIR 1925 Nag 251 (257)
('30) AIR 1930 All 856 (857) (After preliminary decree on a mortgage the morgagors were by Government Notification declared to be agriculturists whose property was not liable for sale—

O 7 R 7
Note 4

pending a suit for a declaration of title the defendant takes possession of the property in dispute the plaintiff may amend the plaint by adding a prayer for possession instead of bringing another suit[5] Similarly if pending a suit for partition by *A* against his brothers *B* and *C* *B* dies *A* can amend his plaint and claim a half share instead of one third[6] Again where in a suit for money the real cause of action arose only after the institution of the suit it was held in the cases noted below[7] that the Court should not reject the plaint and drive the plaintiff to file a fresh suit but should pass a decree on the basis of such subsequent cause of action It is not only in the power but sometimes the *duty* of the Court to take notice of subsequent events where if it is not so done the Court might decide matters no longer in controversy or deliver judgment which could not be carried into effect or grant a relief which is inappropriate and ineffectual[8]

But the discretionary power to depart from the general rule and to take notice of subsequent events will not be exercised where it would have the effect of taking away the jurisdiction of the Court or there is great delay in making the application, or if a fresh enquiry into other facts becomes necessary[9] It will not also be exercised where the subsequent cause of action is alleged to arise by virtue of something done *in the suit itself*[10] Thus in a suit for possession against a tenant on the ground of forfeiture by denial of title the plaintiff on failing to prove such denial before suit

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It was held that the final decree could not direct the sale of their property)

(19) AIR 191? Lah 26? (2?9) 1919 Pun Re No 127 (Minor Mahomedan girl sued before puberty to exercise her option of puberty—Puberty attained during the pendency of the suit—Option can be exercised)

(37) AIR 1937 Oudh 87 (97) 12 Luck 435 (Suit on contract—Contract found void—Court can grant relief under S 65 of the Contract Act)

(36) AIR 19?6 Oudh 260 (289) 12 Luck 185 (Do)

(35) AIR 1935 Oudh 22 (23) 10 Luck 270

(39) AIR 1938 Mad 293 (29) (Where the con t u d exi t ce of a erta n right is an e sen al requ s t for a ord n the relief asked for a d su h ght has been lo t before the re ef can be gr nt d the Court annot but take noti e of th t ed c rcu stances an l d line to g the r l i o wh ch p rts wo ld be entit ed before th el ng t r u star ce)

(37) AIR 1937 Mad 00 (0 ?0) (Compro n se of suit brought to knowledge of Court—Court is bound to ra se and try is ue regard ng it)

(*See also* (33) AIR 1933 All 217 (218) (Agra Pre-emption Act as am e ded in 1929 S 1?—The date of the decree is the crucial date and any rule or change i law that came into ex stence before that date would govern the suit)

(81) 6 Bom 139 (142 143) (Auct on purchaser s suit for redemption of a mortgage—Sale cer if cate not obtained on date of suit—Produc on

(??) AIR 1922 Oudh ?66 (267 268)

6 (93) 1? Mad 950 (353)

(15) AIR 1915 Sind 25 (?7) 8 Sind L R 61 (Claim as heirs of *A*—During the pendency of the suit a defendant da i hter of *A* die l—Claim as heirs of *A* s daughter could be allowed by way of amendment)

(26) AIR 1926 Mad 6 (12) (Suit by one co widow against another co widow and her alienee for possession after partit on of her one half share —Defendant co widow died pending appeal—Plaintiff can pray for pos ession of whole estate)

(21) AIR 1921 Bom 455 (456) 45 Bom 9?3 (Alienee from a minor coparcener sued for partition—Pending suit *minor* attained majority and executed a new conveyance—Plaintiff entitled to succeed)

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9 (26) AIR 19?6 Mad 6 (12)

10 (91) 15 Bom 407 (412 414)

(18) AIR 1918 Oudh 118 (119) (Plea in written sta em ent cannot furnish cause of action to plaintiff)

(22) AIR 192? Lah 437 (439) (Do)

(02) 29 Cal 203 (40?) (Tenancy terminated during suit—Notice to quit all g d in plaint

of

ade

O. 7 R. 7 Note 4

cannot take advantage of a denial in the written statement of the defendant[11] The Court will not also exercise such discretionary power if the subsequent cause of action is entirely different and distinct from the cause of action as originally alleged[12]

A decree which is good and valid at the date it was passed cannot by reason of a subsequent event become bad[13]

But where subsequent to the date of judgment of the first Court events happen which entitle the plaintiff to a change in the relief can the Appellate Court take notice of such events and mould the relief accordingly? In *Mt Anand Moyee Choudhoorayan* v *Sheeb Chunder Roy*[14] their Lordships of the Privy Council observed as follows

> The first and most important question is whether the decision of the Principal Suther Ameen was *when pronounced* a correct decision of the issues *then pending* before him between the then parties to the suit No subsequent event or devolution of interest can affect this question because to give effect to these should justice require it would be the office not of an appeal but of some supplemental proceeding

It was however held in the undermentioned cases[15] that there were exceptions to that general rule and that in such exceptional cases the Appellate Court may take notice of events happening after the date of the judgment of the first Court The introduction of the new rule O 41 R 33 on the lines of the English Rules of the Supreme Court enabling the Appellate Court not only to pass any order which ought to have been passed or made but to pass such *further or other decree or order* as the case may require makes it now perfectly clear that on appeal such a judgment may be given as ought to be given if the case came at that time before the Court of first instance[16]

O. 7 R. 8

R. 8. [New] Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they shall be stated as far as may be separately and distinctly

Relief founded on separate grounds

[R S C, O 20 R 7 See O 1 Rr 1 to 7 and O 2 Rr. 1 to 6]

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(03) 31 Cal 433 (440)
11 (19) AIR 1919 P C 1 (4) 42 Mad 589 46 Ind App 109 (P C)
(92) 15 Mad 123 (124)
(09) 2 Ind Cas 656 (657 658) 36 Cal 927
(05) 2 Cal L Jour 389 (395 396)
(01) 28 Cal 223 (227)
(01) 28 Cal 135 (138)
(31) 134 Ind Cas 1038 (1039) (Lah)
(86) 13 Cal 96 (98 99)
(96) 20 Bom 759 (764)
[*See also* (35) AIR 1935 Cal 255 (256) (Recital of payment in written statement cannot be relied on as saving limitation for suit under S 20 of the Limitation Act)]
[But see (84) 8 Bom 228 (230) (Setting up a

11

S 2 AIR 23 P C 9 9

I Mad 439 (F B) (Change of law subsequent to original Court s decree)
(28) AIR 1928 Cal 436 (437)
(1882) 9 Q B D 672 (676 678) Quilter v Mapleson (Referred to in AIR 1914 Mad 564)
(24) AIR 1924 Nag 204 (207)
(25) AIR 1925 All 361 (361) 47 All 324
(30) AIR 1930 Bom 554 (557) 54 Bom 902 (Even in second appeal the Court should take into consideration the events that have happened since filing of first appeal and grant relief accordingly)
(09) 1 Ind Cas 670 (675) (Cal)
(18) AIR 1918 Mad 1299 (1301) 40 Mad 818 (Change of law subsequent to original Court s decree)
(17) AIR 1917 Mad 193 (200)

O. 7 R. 8 Note 1

1. Relief founded on separate grounds. — The object of this rule is to prevent the trial being embarrassed by the want of clearness in the allegations in the plaint Plaintiff may, as has been seen in Rule 2 *ante* in a proper case, rely upon one set of material facts for his relief and also on another and even inconsistent set of material facts for relief in the alternative but where such alternative cases are alleged, the facts belonging to them respectively should not be mixed up but should be stated separately so as to show on what facts each alternative relief is claimed [1]

See Order 6 Rule 2 Note 5 and Order 7 Rule 7 Note 3

O. 7 R. 9

R. 9. [S 58] *(1)* The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it; and, if the plaint is admitted, shall present as many copies on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, in which case he shall present such statements

Procedure on admitting plaint

Concise statements

(2) Where the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, such statements shall show in what capacity the plaintiff or defendant sues or is sued

(3) The plaintiff may, by leave of the Court, amend such statements so as to make them correspond with the plaint

(4) The chief ministerial officer of the Court shall sign such list and copies or statements if, on examination, he finds them to be correct

[1877, S 58 See O 7 Rr 4 and 5]

Local Amendments

ALLAHABAD

(a) For the semicolon *after* ' it in clause (1) *substitute* a full stop and *delete* the rest of this clause as well as clauses (2) and (3) and

(b) Re number clause (4) as clause (2) *deleting* the words or statements' therein

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[*See* (23) AIR 1923 Lah 24 (25)]

[**But see** (29) AIR 1929 All 699 (701) (Subsequent events being brought to the knowledge of the Appellate Court it was held that the attention of the lower Court should be drawn to them)]

Order 7 Rule 8 — Note 1

1 (1878) 7 Ch D 473 (480) Davy v Garrett [Per Thesiger L J]
(20) AIR 19 0 Cal 93 (95)
(1887) 35 Ch D 492 (49) Re Morgan
[*See also* (29) AIR 19 9 Nag 347 (347)]

CALCUTTA

Cancel clause (1) and *substitute* therefor the following

(1) The plaintiff shall endorse on the plaint or annex thereto a list of the documents (if any) which he has produced along with it

(1A) The plaintiff shall present with his plaint

(i) as many copies on plain paper of the plaint as there are defendants unless the Court by reason of the length of the plaint or the number of the defendants or for any other sufficient reason permits him to present a like number of concise statements of the nature of the claim made or of the relief claimed in the suit in which case he shall present such statements

(ii) draft forms of summons and fees for the service thereof

MADRAS

After the word and occurring in clause (1) *delete* the comma and the five words following *viz* if the plaint is admitted and *insert* the expression along with the plaint *after* the words shall present

NAGPUR

Substitute the following *for* Rule 9

'9 (1) The plaintiff shall endorse on the plaint or annex thereto a list of the documents (if any) which he has produced along with it

(2) The chief ministerial officer of the Court shall sign such list and the copies of the plaint presented under Rule 1 of Order 4 if on examination he finds them to be correct

OUDH

In sub rule (1) *for* the words and if the plaint is admitted shall present *substitute* the words and shall at the same time present Also *delete* the words unless the Court present such statements as well as sub rules (2) and (3) and *re number* sub rule (4) as sub rule (2) *deleting* the words or statements

RANGOON

In sub rule (1) *add* the words on the day on which the plaint is admitted *after* the word present

SIND

Substitute the following *for* sub rule (1)

9 (1) The plaintiff shall endorse on the plaint or annex thereto a list of the documents (if any) which he has produced along with it and shall present along with the plaint as many copies of it on plain paper as there are defendants on application made the Court may by reason of the length of the plaint or the number of the defendants or for any other sufficient reason accept instead a like number of concise statements of the nature of the claim made or of the relief claimed in the suit presented along with the plaint

1 Procedure on admitting plaint — This rule relates to the procedure adopted when a plaint is admitted It provides for presentation into Court of concise statements instead of copies of plaints for service on the defendants in the cases mentioned in the rule These statements should contain the nature of the claim made or of the relief claimed and the capacity in which the party sues or is sued (sub rule 2) As to the representative capacity of plaintiff see O 7 R 4 and as to the representative capacity of defendants see O 7 R 5

O. 7 R. 10

[a]**R. 10.** [S. 57.] *(1)* The plaint shall at any stage of the suit[2] be returned to be presented to the Court in which the suit should have been instituted.[7]

Return of plaint.

(2) On returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it.

Procedure on returning plaint.

[1877, S. 57; 1859, S. 30.]

a This rule has been applied to suits for the recovery of rent under the Chota Nagpur Tenancy Act, 1908 (Ben VI of 1908), S 265

Synopsis

1. **Scope of the Rule.**
2. **"At any stage of the suit"**
3. ***Return of plaint by Appellate Court.***
4. **Return of plaint by Small Cause Court**
5. **Return of plaint by Civil Court to Revenue Court and vice versa.**
6. **Return of applications**
7. **Court in which the suit should have been instituted.**
8. ***Court-fee.***
9. **Limitation.**
10. **Chartered High Courts.**
11. **Appeal.**
12. **Revision.**

Other Topics (miscellaneous)

In what cases plaint may be returned See Note 1
Rule mandatory See Note 2
Want of jurisdiction See Note 1

1. Scope of the Rule. — It is enacted in Section 15 *ante*, that every suit shall be instituted in the Court of the *lowest grade competent* to try it Where a suit is instituted in a wrong Court, *i e*, in a Court which is either not *competent* to try it, or which though competent, is not the Court of the *lowest grade* competent to try it, the plaint should be *returned*, under the provisions of this rule, to be presented to the proper Court The reason is this where the Court has no jurisdiction over the suit, a judgment given by it will be a determination *coram non judice* and it would be a futile proceeding for the judge to go on with an investigation which would have *no jural* effect[1] Where the Court has jurisdiction, but is *not* the Court of the *lowest grade* competent to try it it would, if such suits are entertained and tried, be overcrowding Courts of higher grade with suits, which it is the object of the Legislature to prevent[3]

Where however in such a case the evidence has been gone into and concluded and the *objection is raised at the time of arguments, the Court should, instead* of returning the plaint, proceed to decide the same[3]

Where the Court comes to the conclusion that the suit should have been instituted in another Court, the only thing that it can do is to *return* the plaint for presentation to that Court and not to *dismiss* the suit[4] But it has been held that a

Order 7 Rule 10 — Note 1

1. ('84) 8 Bom 313(317)(FB) (Even after a trial is concluded the Court can return a plaint for presentation to the proper Court)
2. See Section 15 Note 1.
3. ('34) AIR 1934 Cal 524 (525)

[illegible]

('68) 5 Bom H C R 212 (213)
('32) AIR 1932 All 413 (414)
('82) 11 Cal L Rep 300 (302)
('68) 10 Suth W R 335 (337)
('66) 5 Suth W R Act X 67 (67).

British Indian Court has no jurisdiction to return a plaint for presentation to a Court *outside British India*[5]

The provisions of this rule are wide enough to cover all cases where the Court is unable to entertain the suit for want of jurisdiction whatever may be the nature of the objection to its jurisdiction[6] The shape in which the suit is *originally instituted* is the test of jurisdiction Therefore, where it is found *in the course of the hearing* as the result of admissions made by the parties or of the evidence led by them, that the relief which the plaintiff was really entitled to was not cognizable by that Court the rule does not apply[7]

Illustrations

1 *M* filed a plaint in a Sub-Court praying for a declaration that a certain tax was illegal and also for damages for illegal entry into his house The Judge amended the plaint by striking out the reliefs other than that for damages and then holding that the claim for damages would lie only in the Small Cause Court returned the plaint for presentation to that Court It was held that the order was not justified *Motabhai Motilal* v *The Surat City Municipality* I L R 20 Bombay 675

2 *S* sued *R* his co-owner in the Sub-Court claiming Rs 1 152 13 0 as his share of profits for certain years The suit was dismissed and *S* appealed in respect of Rs 450 only The Appellate Court remanded the case for re trial in respect of that claim The Subordinate Judge who had pecuniary

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(1864) 1864 Suth W R 65 (65)
(75) 23 Suth W R 263 (263)
(69) 11 Suth W R 177 (180) (If Court has no jurisdiction plaint is to be rejected — Decision under S 31 of Act 8 of 1859)
(81) 7 Cal 157 (163)
(30) AIR 1930 Lah 195 (196 197) (Should not send it to District Judge for transfer under S 24)
(26) AIR 1926 Mad 140 (141)
(18) AIR 1918 Mad 590 (591)
(10) 6 Ind Cas 702 (702) (Mad)
(84) 7 Mad 171 (174)
(85) 8 Mad 62 (63)
(86) 9 Mad 208 (213) (Where the amount of the jurisdiction)
(33) AIR 1933 Lah 851 (851) (Case of an insolvency petition)
(35) 153 Ind Cas 53 (54) (Lah) (Value of suit exceeding jurisdiction—Order directing presentation to proper Court is proper)]
[**See however** (16) AIR 1916 Oudh 229 (230) 18 Oudh Cas 364 (But if the valuation of the suit is not fraudulent and is admitted by defendant plaint should not be returned although it is found that the market value exceeds pecuniary jurisdiction)]
[**But see** 2 Hay 386]

5 (11) 9 Ind Cas 824 (824) (All)

(27) AIR 1927 Pat 254 (255) 6 Pat 358
(25) AIR 1925 Oudh 735 (736) (Should not decide the suit on the merits)
(1892 96) 1892 96 Upp Bur Rul 338
(09) 4 Ind Cas 814 (815) (Upp Bur) (Transfer by High Court to another Court beyond its jurisdiction not proper — The plaint must be returned for presentation to the proper Court)
[*See also* (26) AIR 1926 Pat 28 (29) (Where transfer of some of the defendants as plaintiffs raises the value of the suit after transfer the plaint should be returned for presentation to

7 (96) 20 Bom 675 (676 677)
(33) AIR 1933 Sind 296 (298)
(32) AIR 1932 Sind 67 (68 69)
(30) AIR 1930 Sind 252 (253) 25 Sind L R 63
(22) AIR 1922 Bom 152 (154) 46 Bom 229
(28) AIR 1928 Lah 484 (486)
(24) AIR 1924 Pat 267 (268) 2 Pat 746 (Suit to eject trespassers—Defendants found to be not trespassers but non occupancy ryots—Suit must be dismissed — Plaint cannot be returned for

O. 7 R. 10
Note 1

It has been held that this rule is sufficiently wide to cover a case in which by operation of legislation the situation arises even after a suit has been instituted, that it should have been instituted in another Court[8]

A Court has no jurisdiction to act under this rule after it has passed a decree in the suit[9] Nor can it do so unless it comes to a definite *finding* that the suit should have been instituted in another Court[10] Thus a Court has no power to return the plaint for presentation to the proper Court merely on the ground that it would be more advantageous to the defendant to have the suit tried in that Court[11]

Where a Court returns a plaint for presentation to the proper Court on the ground that it was beyond its jurisdiction the plaintiff is entitled to relinquish a portion of the claim so as to bring the suit within the pecuniary jurisdiction of the former Court and to re present the plaint in the same Court[1]

Suppose now that two reliefs are claimed in a plaint one of which the Court is not competent to grant Can the Court return the plaint as regards the relief which it is not competent to grant? There is a conflict of opinion on this point According to one view it is competent for the Court to return the plaint in respect of the cause of action which is not within its jurisdiction and proceed with the suit in respect of the cause of action within its jurisdiction on a certified copy of the plaint[13] A contrary view has been taken in the undermentioned cases[14] which hold that the Court should retain the plaint striking out therefrom such portions as are not within its jurisdiction and in respect of which the plaintiff could file another suit

It is open to a Court to ignore a relief as being based on no cause of action and then to return the plaint under this rule if it finds that the rest of the claim is within the jurisdiction of an inferior Court[15] The Court can also return a plaint when it finds that the plaint has been overvalued[16]

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(29) AIR 1929 All 907 (907)
(29) AIR 1929 Lah 107 (109 110) (Suit for accounts within the jurisdiction of the Court — On taking of accounts the amount exceeded Court's jurisdiction—Yet preliminary decree not void)
(17) AIR 1917 Pat 334 (334) 2 Pat L Jour 334

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tion found to be bar ed on find ng arriv d at by Court—Dismissal of s t is proper)
(38) AIR 1938 All 39 (41) (Allegations as to

8 (38) AIR 1938 Oudh 221 (225) 14 Luck 218

14. (26) AIR 1926 Bom 283 (283 284)
(17) AIR 1917 Oudh 49 (50)
(12) 16 Ind Cas 752 (752) (Lah) (Relief beyond the jurisdiction of the Court should be treated as surplusage)
15 (20) AIR 1920 Oudh 21 (23)
16 (85) 8 Mad 334 (337)
(38) AIR 1938 Nag 149 (150) I L R (1939) Nag 300 (In case of overvaluation patent on face of the plaint it is the duty of Court to return the plaint under this rule)
(35) AIR 1935 All 157 (160) (Court finding in course of preliminary inquiry that value of relief has been overvalued—Court's duty is to return plaint for presentation in proper Court—It is

A Court which has once returned the plaint for presentation to another Court has no jurisdiction to re entertain it, although the latter Court has returned it for presentation to the former Court, unless the order of the former Court is set aside by a superior Court [17]

Where a Munsif s Court returns a plaint for presentation to the proper Court and in appeal against that order the District Court holds that the Munsif s Court *has* jurisdiction to entertain the plaint, the Munsif s Court is bound by such order [18] But where a Munsif returns a plaint for presentation to the Revenue Court and the Revenue Court returns it as being not cognizable by it, and the District Judge *in an appeal from the order of the Revenue Court* holds that it is a suit cognizable by the Civil Court, the Munsif is not bound by the order of the District Judge He may make such order on the plaint as he thinks proper when it is re presented to him [19]

Where a plaint is returned under this rule the *vakalatnama* should also be returned as it enures for the suit in the Court in which it is subsequently presented [20] The plaint that should be returned under this rule is the plaint which is the basis of the suit at the time when its return is ordered and so, where at such time an application for amendment of the plaint is pending the plaint that should be returned under this rule is the original plaint and not the proposed amended plaint [21]

This rule is made applicable to proceedings under the Chota Nagpur Tenancy Act [22]

2. At any stage of the suit — The direction in this rule is imperative[1] and as soon as the Court arrives at a conclusion at any stage of the suit that it should have been instituted in some other Court the plaint should at once be returned [2] The words 'at any stage of the suit have been newly added and give effect to the Full Bench decision in I L R 8 Bombay 313

A Court which has no jurisdiction over a suit cannot pass any judicial order in such a suit except the orders which the statute empowers it to pass[3] and all the

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not necessary that defendant should state that relief has been overvalued to oust jurisdiction of one Court)

17. (29) AIR 1922 Pat 368 (369)

18 (15) AIR 1915 Mad 613 (613 614)

19 *(26) AIR 1926 Mad 365 (365)*

20 (23) AIR 1923 Nag 182 (187) 19 Nag L R 36

21 (35) AIR 1935 Rang 310 (314)

22 Bengal Act VI of 1908 S 265 (3) (M)

Note 2

O 7 R 10 is mandatory)

(87) 10 Mad 211 (212)

(30) AIR 1930 Lah 195 (196)

(35) AIR 1935 All 157 (160)

2 (84) 8 Bom 313 (318) (FB) (Overruling 7 Bom 487)

(82) 8 Cal 831 (836) (After hearing evidence)

(19) AIR 1919 Mad 1071 (1075) 41 Mad 701 (Court has no power to allow withdrawal under O 23 R 1)

(79) 2 All 357 (358)

(70) 13 Suth W R 358 (359) (Even in appeal to the High Court plaint may be returned)

(69) 11 Suth W R 177 (178) (Return may be made at any time before judgment)

(19) AIR 1919 Lah 26 (27) 1 Lah 203

(07) 1907 Pun W R No 16 (Returned after trial of an issue)

(10) 10 Ind Cas 980 (980) 4 Sind L R 264 (Returned at a late stage)

(69) 1869 Pun Re No 88 (Plaint registered does not become unreturnable)

(38) AIR 1938 All 76 (78) (Order returning plaint at stage of preliminary arguments when the suit

[**But see** (67) 8 Suth W R 46 (48) (Suit found to be undervalued at the time of hearing must be dismissed)]

3 (19) AIR 1919 Mad 1071 (1075) 41 Mad 701

(28) AIR 1928 Mad 384 (384 385) (Plaint cannot be amended so as to give jurisdiction)

O. 7 R. 10
Note 9

9 Limitation — Where a suit has been instituted in a Court having no jurisdiction and it is found necessary to raise a second suit in a Court of proper jurisdiction the second suit cannot be regarded as a continuation of the first even though the subject matter and the parties to the suit are identical[1] Therefore for purposes of limitation the date of the institution of the suit is the date on which the plaint is presented to the Court in which it ought to have been instituted[2] If at the time of the presentation of the plaint in the proper Court the law of limitation has been altered it is the law as so altered that will apply to the case[3]

But the plaintiff can in such cases avail himself of the provisions of Section 14 of the Limitation Act and claim the exclusion of the time during which the *prior* proceeding was prosecuted provided that such proceeding was prosecuted in *good faith*[4] *A* filed a suit in Court *X* on 23rd October 1924 and the same was returned for presentation to the proper Court on 16th March 1925 On 11th March 1925 however *A* had filed an appeal against the order returning the plaint but pending the appeal he re presented the suit to the proper Court on 28th April 1925 The latter Court dismissed the suit under O 9 R 2 of the Code on 13th August 1925 The appeal was dismissed on 29th July 1926 On the same day, *A* presented a fresh plaint on the same cause of action to the proper Court and claimed the exclusion of the period from 16th March 1925 to 29th July 1926 It was held that when he re presented the plaint on 28th April 1925 *A* must be deemed to have accepted the order of return as correct that the prosecution of the appeal against the order of return could not thereafter be said to have been in good faith and that therefore the period from 28th April 1925 to 29th July 1926 could not be excluded in computing the period of limitation for the suit[5]

The period that can be deducted under Section 14 of the Limitation Act is only the period from the date of the *filing of the plaint* to the date on which it was *finally returned* by the Court for re presentation[6] No period *preceding* the original presentation of the plaint can be deducted under that Section[7] But, if after deducting

crediting the plaintiff with the court fee originally paid)

Note 9

1 (?9) AIR 1929 P C 103 (107) 56 Ind App

tation again to District Court—Suit is a continuation of the original one)]
[**But see** (15) AIR 1915 All 344 (344)]

2 (14) AIR 1914 Cal 858 (860)
(30) AIR 1930 Lah 394 (395)
(28) AIR 1928 Lah 484 (486)
(13) 36 Mad 482 (483)
(21) AIR 1921 Mad 654 (655) 44 Mad 817
(39) AIR 1939 Mad 7?4 (7?8)
[*See also* (13) 20 Ind Cas 767 (767) (Mad)

date)]
[**But see** (71) 16 Suth W R 47 (48) (The date of original presentation is the date of institution)]

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t *bona fide* in determining valuation of suit can be deducted under Section 14)
(22) AIR 1922 Pat 369 (369)
(31) AIR 1931 Mad 632 (634) (Plaint first returned for amendment — After amendment it was returned for re-presentation to the proper Court — For limitation the period taken in making the amendment was also excluded in favour of the plaintiff — High Court refused to interfere —*Obiter*)

endorsed under sub rule 2)
(37) AIR 1937 Lah 464 (465)
[**But see** (93) 3 Mad L Jour 190 (191) (Dissented from in AIR 1926 Mad 178)]

7 *See Illustration 2 and the following cases*
(23) AIR 1923 Mad 114 (119)

the period allowed under that Section the limitation expires on a day on which the Court is closed the plaint can be presented on the re opening day [8]

Illustrations

1 A presented a plaint in Court X and the same was ordered to be returned on the 25th March for presentation to the proper Court but the Office returned it only on the 10th of April It was held that A was entitled to count in his favour the days up to the 10th of April when the plaint was *finally returned* [9]

2 The last day of limitation for a suit expired on 5 9 1927 on which date the Court was closed for the vacation and the plaintiff presented the plaint in Court X on 7 10 1927 which was the re-opening day It was returned for presentation to the proper Court on 8 10 1927 It was held that the period between 5 9 1927 and 7 10 1927 could not be excluded under Section 14 of the Limitation Act [10]

3 A presented a plaint in a wrong Court and the same was finally returned on 20 3 1924 for presentation to the proper Court The next 3 days were holidays for the Court in which the plaint was to be presented and the plaintiff re presented the same on 24 3 1924 It was held that the re presentation was proper [11]

It has been held by the Madras High Court that where a plaint is returned under this rule as being beyond the pecuniary jurisdiction of the Court and the plaintiff, after amending the plaint so as to bring the claim within the jurisdiction of the Court, re presents the plaint in the same Court, the plaint can be treated as a continuation of the former suit without any necessity of falling back on the provisions of Section 14 of the Limitation Act [12]

A plaint cannot be returned under this rule merely because the plaintiff has not mentioned in it the list of documents on which he relies Hence if a plaint is returned for this defect and is then re presented the date of the institution of the suit for purposes of limitation is the date of the original presentation of the plaint [13]

There is a difference of opinion on the question whether the Court returning a plaint under this rule can allow the plaintiff a period within which he might re present it in the proper Court In an earlier case of the Calcutta High Court[14] it was held that the Court had a discretion to grant a reasonable time within which the plaintiff might present the plaint to the proper Court But the same High Court has, in a later decision [15] held that the order granting time is a nullity and will not save the suit from the bar of limitation This view has also been followed by the Patna High Court [16] In the undermentioned case[17] where the Court had granted such time the High Court of Lahore did not say that the order was wrong but decided the case on other grounds

10. Chartered High Courts — Order 49 Rule 3 sub rule 1 provides that this rule is not applicable to Chartered High Courts As to the practice of the High Court of Bombay on its original side see the undermentioned cases [1] The High Court can however under its inherent powers direct in a suit which it has dismissed for want of jurisdiction that the plaint should be returned to the plaintiff so that he may file it in the proper Court and thus avoid the payment of court fee twice over [2]

[But see (21) AIR 1921 Bom 379 (380) 45 Bom 443]
8 *See Illustration 3*
9 (33) AIR 1933 Lah 611 (611)
10 (29) AIR 1929 Lah 425 (426) 11 Lah 12 [*See also* (37) 1937 Lah 464 (465)]
11 (29) AIR 1929 Cal 315 (317 318)
12 (39) AIR 1939 Mad 397 (399)
13 (30) AIR 1930 Lah 480 (480)
14 (10) 6 Ind Cas 637 (637) (Cal)
15 (17) AIR 1917 Cal 794 (795)
16 (37) AIR 1937 Pat 495 (496)
17 (29) AIR 1929 Lah 425 (426) 11 Lah 12

Note 10

1 (84) 8 Bom 313 (317) (F B) (Practice is to return plaint even in the course of the trial)
(84) 8 Bom 380 (387) (The practice of the original side is to retain the plaint unless it has been returned on presentation)
2 (34) AIR 1934 Rang 342 (343)

O. 7 R. 10
Note 11

11. Appeal — An order under this rule, returning a plaint to be presented to the proper Court is appealable under O 43 R 1 (a) whether the order is made by the Court of the first instance[1] or by the Court of first appeal in the exercise of its powers under Section 107 *ante*[2] But where such an order is reversed or confirmed in appeal a *second appeal* is barred by the provisions of Section 104 sub section (2)[3] The appellate order reversing that of the Court of first instance cannot also be construed as an order of remand under O 41 R 23 so as to be appealable under O 43 R 1 (u) inasmuch as the order is not one passed on appeal from a decree[4] But the aggrieved party can under Section 105 dispute the correctness of the order in an appeal from the decree if he is otherwise entitled to do so[5]

Where a Small Cause Court returns a plaint under Section 23 of the Provincial Small Cause Courts Act to be presented to an ordinary Civil Court in order to decide a question of title to immovable property, the Civil Court has no jurisdiction to return again the plaint under this rule as the reference to the Civil Court by the Small Cause Court was under a special provision of law empowering the Small Cause Court to make such reference[6] Section 192 of the Madras Estates Land Act excludes the operation of Order 43 to proceedings under that Act and consequently where, in an appeal to the District Court from a decree in a suit under that Act the District Court holding that the Revenue Court had no jurisdiction directed the plaint to be presented to the proper Court it was held that no appeal lay against the order of the District Court to the High Court[7]

It has been held by the High Courts of Madras and Lahore and the Judicial Commissioner s Court of Nagpur that a plaintiff whose plaint is returned for presentation to the proper Court and who accordingly presents the plaint to the proper Court does not forfeit his right of appeal against the order of return simply on the ground that he chose to file his plaint in the latter Court[8] But the High Court of Calcutta and the

Note 11

1 (79) 2 All 357 (358)
(82) 4 All 478 (480)

appeal is filed the correctness of the order can not be challenged in Court in which it is re filed nor in appeal therefrom)]

2 (03) 25 All 174 (176) (F B) (Appeal lies to ... Over ... (Order ... to the

588 (b) corresponding to O 43 R 1 (a) applies only to order of Court of first instance)]

3 (11) 9 Ind Cas 666 (667) 33 All 479
(30) 125 Ind Cas 581 (581) (All)
(81) 3 All 655 (856)

(26) AIR 1926 Lah 141 (141)
(38) AIR 1938 Oudh 224 (224) 14 Luck 218
(35) AIR 1935 Mad 574 (575)
[**But see** (78) 1 All 620 (622) (Decision under the Code of 1877 holding the order of the first Court to be a decree—It is no longer law under this Code)]

4 (35) AIR 1935 Mad 574 (575)

5 (26) AIR 1926 Mad 900 (901 902)

6 (18) 18 Ind Cas 325 (325) (Cal)
(26) AIR 1926 Cal 83 (84) (If the Civil Court returns plaint it is not under O 7 R 10)

7 (18) AIR 1918 Mad 191 (193) 41 Mad 554

8 (19) AIR 1919 Mad 1062 (1063) 41 Mad 721
(30) AIR 1930 Nag 207 (208) 26 Nag L R 300
(39) AIR 1939 Lah 18 (19)

Judicial Commissioner s Court of Oudh have taken a contrary view[9] The High Court of Calcutta has, however, in a later case held that the plaintiff will not forfeit his right of appeal if he specifically *reserves* his right to do so[10] In the undermentioned case[11] a plaint was returned for presentation to the proper Court In the latter Court the plaint was rejected for non payment of deficit court fees Thereafter an appeal was filed against the order returning the plaint In appeal, the case was remanded for trial to the first Court in ignorance of the rejection of the plaint by the other Court It was held that there was no plaint to try and the remand was ineffectual **O. 7 R. 10 Notes 11-12**

An Appellate Court which reverses an order returning a plaint under this rule has no jurisdiction to *remand* the case to the lower Court for fresh disposal the proper procedure is to annul the order of the trial Court and direct it to dispose of the suit according to law[12]

Where a memorandum of appeal is returned for presentation to the proper Court is the order of return appealable? The High Courts of Calcutta, Allahabad and Lahore[13] have held that the word "plaint in this rule does not include a memorandum of appeal and that, therefore, no appeal lies from such an order The High Court of Madras and the Chief Court of Lower Burma have, on the other hand, held that an appeal does lie in such cases[14]

It has been held that where a plaintiff does not appeal against an order returning the plaint under this rule and submits to the decision of the Court on the point of jurisdiction, the question cannot be re agitated in a subsequent suit between the same parties[15]

12. Revision. — Where a Munsif s Court returned the plaint for presentation to the Small Cause Court and the latter Court returned the plaint for presentation to the Munsif s Court and the Munsif s Court refused to go back on its original order and receive the plaint the High Court in revision against the second order of the Munsif directed the Small Cause Court to try the case[1] As to whether an order of the *Appellate Court* confirming or reversing an order of the Court of first instance returning a plaint under this rule is revisable see Note 15 to Section 115 and the undermentioned cases[2]

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9 (07) 5 Cal L Jour 580 (582)
(08) 11 Oudh Cas 98 (100)
10 (19) AIR 1919 Cal 447 (448)
11 (29) AIR 1929 Bom 209 (201)
12 (25) AIR 1925 Oudh 393 (394) 29 Oudh Cas 91
(09) 4 Ind Cas 780 (781) 12 Oudh Cas 388 (The Appellate Court cannot itself proceed to hear the merits)

(18) AIR 1918 All 96 (96) 40 All 659
(28) AIR 1928 Lah 635 (635) (Seems to have been assumed that no appeal lay)
14 (91) 14 Mad 462 (464)
(1900) 1 Low Bur Rul 32 (33)
15 (36) AIR 1936 Oudh 222 (223)

Note 12

1 (22) AIR 1922 Pat 368 (369)

turned for presentation to proper Court Appeal against this order was dismissed by District Judge — *Held* a revision to the High Court was not competent)
[*See also* (17) AIR 1917 Oudh 49 (50)]

O. 7 R. 11

Rejection of plaint.

R. 11. [Ss. 53 & 54.] The plaint shall be rejected in the following cases:—

(*a*) where it does not disclose a cause of action[3]:

(*b*) where the relief claimed is undervalued,[4] and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so:

(*c*) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped,[5] and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so:

(*d*) where the suit appears from the statement in the plaint to be barred by any law.[7]

[1877, Ss 53, 54; 1859, Ss. 29, 31, 32.]

Local Amendment

CALCUTTA

Add the following as clause (e)

"*(e)* Where any of the provisions of Rule 9 (1A) is not complied with and the plaintiff on being required by the Court to comply therewith within a time to be fixed by the Court, fails to do so"

Synopsis

1. Legislative changes.
2. Scope of the Rule.
3. "Where it does not disclose a cause of action."
4. "Where the relief claimed is undervalued"
5. Where the plaint is insufficiently stamped
6. Memorandum of appeal insufficiently stamped
7. Where the suit appears to be barred by any law — Clause (d).
8. Rejection of plaint on other grounds
9. Rejection of plaint in part.
10. At what stage plaint can be rejected
11. Appeal.
12. Revision.
13. Review.

Other Topics (miscellaneous)

Applicability of this rule to Chartered High Courts See Note 2
Court's duty to examine plaint See Note 3
Extension of time See Note 5
Rule how far mandatory See Notes 5 and 10
Within a time to be fixed by the Court See Note 5

1. Legislative changes. —

1 Clause (a) corresponds to clause (a) of Section 53 of the old Code which provided that 'the plaint may, at the discretion of the Court, at, or any time before the settlement of issues be rejected . " See Note 10 and the undermentioned cases decided under the old Code [1]

2 The words "positive rule of' before "law' in clause (d) have been omitted

3 Clause (d) of Section 54 of the old Code has been omitted, as this Code does not anywhere provide for return of pleadings for amendment

Order 7 Rule 11 — Note 1

1. ('81) 7 Cal 313 (315) (*Held* too late to reject a plaint in appeal for want of cause of action as the proceedings in the lower Court showed that plaintiff was entitled to relief)

('05) 2 Cal L Jour 534 (537) (Do)

2 Scope of the Rule. — This rule enacts that the plaint shall be rejected in the four classes of cases mentioned in clauses (a) to (d) But the instances given cannot be regarded as exhaustive of *all* the cases in which a Court can reject a plaint or as limiting the inherent powers of the Court in respect thereof [1] Thus a Court has jurisdiction, in a proper case to reject the plaint filed by the next friend of a minor on the ground that it is not in the *interests of the minor* that the suit should be proceeded with [2] So also where it is alleged that a suit was instituted without the signature and authority of the plaintiff, the Court will frame a preliminary issue on the point and reject the plaint if it finds the issue against the plaintiff [3] An Appellate Court has the same powers of rejecting a plaint as the Court of first instance [4]

In disposing of a suit under this rule, the Court ought not to dismiss the suit but should *reject* the plaint [5] The effect of rejection as distinguished from a dismissal is that in the former case, the plaintiff would not under Rule 13 *infra*, be precluded from filing a fresh plaint in respect of the same cause of action if he so desires

A plaintiff is not entitled to have the dismissal of a suit for default set aside under O 9 R 9 on the ground that the plaint should have been rejected [6]

This rule does not apply to Chartered High Courts in the exercise of their ordinary, or extraordinary original civil jurisdiction (see O 49 R 3 *infra*) The High Court of Allahabad has in the undermentioned case[7] held that this rule is inapplicable to their *appellate* jurisdiction also notwithstanding the provisions of Section 107 of the Code

3. "Where it does not disclose a cause of action." — When a plaint is filed it is the duty of the Court to see that the plaint contains the necessary allegations which must be proved before a decree could be given and if there are not the necessary allegations to reject the plaint [1] To enable a Court to reject a plaint on this ground it

Note 2

1 (24) AIR 1924 Oudh 413 (414) (See also cases cited in S 2 (2) N 13 Foot note 3)

2 (15) AIR 1915 Mad 483 (484) (Order 32 is not exhaustive and does not deal with the case of a suit filed contrary to the interests of a minor)

3 (10) 7 Ind Cas 600 (600) (Sind)

4 (85) 1885 All W N 294 (294)
(24) AIR 1924 Nag 80 (80)

no cause of action)
(69) 11 Suth W R 223 (223) (Mis-statement of cause of action may be allowed to be amended)
(98) 8 Mad L Jour 187 (189) (Court fee not paid on the alternative prayer — Dismissal is not proper)
[*See* (38) AIR 1938 All 497 (500) (The rejection of the plaint under O 7 R 11 is a matter prior to the issue of notice to a defendant and after

apply where Appellate Court acts under S 12 of the Court fees Act — S 10 of the Court fees Act will apply)]

6 (24) AIR 1924 Pat 271 (272) 2 Pat 784

7 (90) 12 All 129 (152) (FB) (In this case clauses (a) and (b) of S 54 of the Code of 1877 only were considered)

Note 3

1 (28) AIR 1928 Cal 425 (425) 55 Cal 590 (Case against numerous defendants—Court must examine the plaint before issuing the summonses to see if the plaint reveals a cause of action — If no cause of action is revealed plaint must either be rejected or returned for amendment)
(23) AIR 1923 Lah 290 (291) (Plaint disclosing no cause of action — Suit dies and no question of jurisdiction arises)
(17) AIR 1917 Low Bur 28 (29 30) 9 Low Bur Rul 37 (Before admitting a plaint for mere declaration as to property Court must see that allegations as to plaintiff being in possession of the property are made)
(92 96) 2 Upp Bur Rul 244
(72 92) 1872 92 Low Bur Rul 365 (Court shall consider the plaint before action is taken upon it)

(39) AIR 1939 Lah 158 (160)

O. 7 R. 11
Notes 3-4

should look at the *plaint* and at nothing else[1] In asking the Court to decide an issue like this (which is essentially a *demurrer*) the defendants must be taken to admit *for the sake of argument* that the allegations of the plaintiff in his plaint are true *modo et forma* — in manner and form[3] In doing so they must be taken to reserve their right to show that those allegations are wholly or partially false in the further stages of the action, should the preliminary point be overruled The power to reject a plaint under this clause must be exercised only if the Court comes to the conclusion that even if all the allegations are proved, the plaintiff would not be entitled to any relief whatever[4]

As to cases where a cause of action accrues after the presentation of the plaint, see Order 7 Rule 7

The expression "cause of action" as used in this rule does not mean a claim which is still enforceable under the law of limitation Where, therefore, a suit is barred by time it cannot be said that the plaint does not disclose a cause of action, and that it falls to be dealt with under clause (a) The Court may, however, proceed under clause (d)[5]

4. "Where the relief claimed is undervalued." — If the Court comes to the conclusion that the plaintiff s valuation of a suit is fictitious it can require him to make a correct valuation and can reject the plaint on his failure to do so[1] and this rule applies even to cases in which under the Court fees Act it is provided that the amount of court fee is to be determined according to the amount at which the relief sought is valued in the plaint (see Court fees Act, Section 7, sub s 4)[2] But the Court cannot *itself* fix a valuation in place of the plaintiff s valuation[3] If the correct valuation would make the Court incompetent to try the suit, then the matter falls under Rule 10 *ante*, and not under clause (b) of this rule (see O 7 R 10 Note 2)

In order to determine whether a suit is properly valued or not, the Court must confine its attention to the *plaint* and should not look to other circumstances which

2 (17) AIR 1917 All 355 (356) 39 All 516 (Per Walsh J)
(73) 10 Bom H C R 182 (185) (Should not refer

of action in determining whether there is cause of action for suit — It is not precluded from considering other allegations in the plaint)
(35) AIR 1935 Pat 449 (450) (For the purpose of deciding whether the plaint discloses any cause of action evidence of defendant is not necessary—Such question should be decided on

3
4

rejection)
(73) 10 Bom H C R 17 (18)
(70) 7 Bom H C R 93 (101)
(*See also* (31) AIR 1931 Cal 659 (661) 58 Cal 539)
5 (32) AIR 1932 All 543 (545) 54 All 525

Note 4

not proper)

3 (17) AIR 1917 All 78 (79) 39 All 723

may subsequently influence the judgment of the Court as to the true value of the relief sought[4]

See also Note 5 below and Section 6 Note 4

As to Court s powers of rejection for undervaluation in cases where the plaintiff is entitled to put his own valuation see the undermentioned cases[5]

5. Where the plaint is insufficiently stamped — Where the plaint is *properly valued* either at the time of the presentation itself or at a time subsequent thereto, in pursuance of an order of the Court under clause (b) but is *insufficiently stamped*, the Court can act under this rule[1] But the Court cannot exercise the powers conferred under this clause after the suit has been *decided finally* so far as that Court is concerned[2] Where however, the order for making good the deficiency in court fee is made before the final decision in the suit the fee can be realised in execution even after the final decision[3]

Under the old Code there was a conflict of opinion as to whether a suit would become barred by limitation where the deficiency in court fee is supplied *after* the period of limitation for the suit but *within the time fixed* by the Court The conflict has now been set at rest by the enactment of Section 149 For a full discussion of the subject see Note 7 to Section 149 and the undermentioned cases[4]

A plaint cannot be rejected under this rule for undervaluation or for insufficiency of stamp unless the plaintiff is *given an opportunity* to correct the valuation or to supply the deficient stamp, as the case may be within a time to be fixed by the Court, and he fails to do so[5] Nor does the use of the words 'shall be rejected prevent

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(89) 13 Bom 517 (519)
(30) AIR 1930 Cal 686 (688) 58 Cal 281 (This rule is not meant to enlarge any taxing Section)
[**But see** (07) 11 Cal W N 705 (711 712)]
4 (24) AIR 1924 Cal 969 (969)
(35) AIR 1935 Cal 273 (274 275)
[*See* (35) AIR 1935 Cal 338 (340) (Mere form

—Future mesne profits or future damages can not be taken into account for purpose of court fees)]
5 (30) AIR 1930 Cal 473 (474) 56 Cal 275
(29) AIR 1929 Mad 396 (398)
(31) AIR 1931 Pat 78 (79) 10 Pat 432

Note 5

1 (32) AIR 1932 Cal 685 (686)
(31) AIR 1931 Lah 622 (623)
(34) AIR 1934 All 989 (990)
2 (85) 7 All 528 (532)
(35) AIR 1935 Lah 75 (76) (Decree itself directing levy of additional court fee is bad and can not stand)
(25) AIR 1925 Lah 326 (327) (Suit dismissed on merits—Order for additional court fee is incompetent)
3 (34) AIR 1934 Oudh 396 (398)
4

(05) 1905 Pun Re No 104 p 319 (FB)
(01) 4 Oudh Cas 108 (114) (The Court has a discretion to extend time)
(09) 3 Ind Cas 557 (558) (All) (Deficiency made

Cases under the new Code in addition to those given in Note 7 to S 149

(37) AIR 1937 Pat 550 (553) 16 Pat 600 (S B) (Suit filed in time—Deficiency made up within time allowed by Court after limitation— Plaint is within time)
(38) AIR 1938 Mad 560 (562) (Plaint insufficiently stamped filed on last day of period of limitation—Court allowing certain time for payment of deficient court fee — Proper court fee paid within time allowed but beyond period of limitation for suit—Suit is not time barred)
5

plaint)

O. 7 R. 11 Note 5

the Court from exercising its powers under Section 148 of the Code and enlarge the time fixed by it from time to time[6] But the plaintiff cannot, as of right claim extension of the time fixed by the Court The question depends on the discretion of the Court[7] No *express* order is necessary for such extension of time An extension may be *inferred* from the fact that the Court has actually allowed a thing to be done beyond the prescribed time[8]

The rule does not apply to applications for leave to sue in forma pauperis Hence a Court is not bound on its dismissing an application for leave to sue in *forma pauperis* to grant a time within which a properly stamped plaint could be filed[9]

Where a plaint is written upon insufficiently stamped paper and the plaintiff does not supply the requisite stamp within the time fixed by the Court can he be allowed to reduce his claim so as to bring it within certain court fees? There is a conflict of opinion on this point The High Courts of Allahabad and Madras have held that it is open to the plaintiff to relinquish a portion of the claim in order to bring it

(88) 1888 Pun Re No 156 p 417
(26) AIR 1926 Mad 676 (677) (Under S 149 Court can accept deficient court fees after the time fixed but it cannot refuse to fix time under O 7 R 11)
(98) 8 Mad L Jour 187 (189)
(30) AIR 1930 Oudh 104 (105) 5 Luck 474 (Reasonable time should be allowed to make up deficiency)
(22) AIR 1922 Pat 56 (56)
(14) AIR 1914 Lah 268 (269) 1914 Pun Re No 35 (Deficiency not supplied within time fixed — Plaint must be rejected)
(1900) 27 Cal 376 (378) (If within that time period of limitation expires the suit is barred by time if the deficiency is made up after the time fixed)

sufficient court fee has been by design or due to inadvertence the Court is bound by the mandatory terms of O 7 R 11 to give effect to the

up deficiency and can reject plaint if deficiency

that the action of the plaintiff in instituting a plaint on a deficient court fee is not bona fide and the worst that the Court can do is to ask the plaintiff to make up the court fee on the very day on which the plaint is presented)
[*See also* (24) AIR 1924 Pat 271 (272) 2 Pat 784 (Dismissal for default cannot be set aside on ground that plaint ought to have been rejected under this rule)]
[**But see** (38) AIR 1938 Lah 361 (364) (F B) (Per Din Mohammad and Coldstream JJ in Order of Reference—It is not incumbent upon a Court of Justice to allow the plaintiff an opportunity to make good the deficiency under O 7 Rule 11)]

6 (97) 19 All 240 (243 244)
(92) 16 Bom 263 (266)
(04) 31 Cal 75 (78)
(19) AIR 1919 Cal 261 (261)
(09) 2 Ind Cas 1 (2) (Cal)
(10) 6 Ind Cas 424 (425) (Cal)
(05) 2 Cal L Jour 70 (72 73) (Deficit court fee paid one day after time fixed—If on that date suit is not barred it can go on)
(28) AIR 1928 Lah 274 (275)
(94) 1894 Pun Re No 113 p 435
(26) AIR 1926 Mad 676 (677)
(99) 9 Mad L Jour 348 (348)
(27) AIR 1927 Oudh 507 (507) (Refusal to take the deficit court fee for delay by one day is an

misappropriated the amount and repeatedly applied for time—Plaint was finally rejected— applied for

55) *I L R* (1938) All 470 (Payment of deficiency—Ques

7 (36) AIR 1936 Pat 310 (311)
(38) AIR 1938 Mad 542 (543 544)
8 See Note 8 to Section 148 *ante*
(07) 34 Cal 20 (24 29) (F B)
[*See also* (26) AIR 1926 Mad 676 (677)]
9 (35) AIR 1935 Mad 878 (879)

within a certain court fees[10] The High Courts of Calcutta and Bombay held in earlier decisions that under such circumstances the Court had no jurisdiction to allow the plaintiff to reduce his claim and was bound to reject the plaint on the ground that this rule is mandatory[11] A contrary view has however been taken in the undermentioned decisions of the same High Courts[12]

Where a plaintiff is given time to pay additional court fees under this rule and he does not appear on the date fixed in consequence of which the Court dismisses the suit the order though one of dismissal must be deemed to be an order under this rule and not under O 9 R 8 so that a fresh suit on the same cause of action will not be barred under O 9 R 9[13] Clause (c) of this rule does not apply to the case of failure of a plaintiff to pay stamp duty on a partition decree[14]

Where plaintiff is given time to make up the deficiency in court fees and within the time so allowed the plaintiff applies for permission to continue the suit as a pauper, the application should be considered on its merits and the plaint should not be considered as rejected for failure to pay the deficiency in court fees[15]

It has been held that when a plaint was re presented in a proper Court after being returned by the wrong Court where it was originally filed the proper Court is not debarred from requiring the proper stamp to be affixed though no objection was taken in the wrong Court[16]

6 Memorandum of appeal insufficiently stamped — This rule applies in terms to *plaints* insufficiently stamped Where a *memorandum of appeal* is found to be presented with an insufficient court fee the Court *can* allow time for paying the deficit court fee[1] But is the Court *bound* to grant time to the appellant to make up the deficiency? There is a conflict of opinion on this point According to the High Courts of Bombay[2] Calcutta[3] and Patna[4] and the Chief Court of

10 ('05) 27 All 151 (152)
('29) AIR 1929 All 308 (309)
('31) AIR 1931 Mad 716 (716)

11 ('17) AIR 1917 Cal 77 (78) 44 Cal 352 (Court has no power to allow amendment by omitting prayer in respect of which extra court fee was ordered)
('14) AIR 1914 Bom 117 (118)

12 ('39) AIR 1939 Bom 354 (357) (*Prima facie* O 7 R 11 is mandatory only *rebus sic stantibus* that is to say when the Court has to deal simply with the position referred to in the rule and would not preclude an amendment of the ... made at ... 11 and ... power to allow abandonment of claim before rejecting ...

... value of property and put in deficit court fee—Non compliance with order—Suit dismissed for default on rejecting permission to withdraw ... on of ... R 1 ... Condi-tional decree that it was to be of no effect unless deficit court fee is paid—Such order is to be deemed an order of rejection)]

14 ('19) AIR 1919 All 269 (270)

15 ('33) AIR 1933 Cal 238 (239)
('33) AIR 1933 Mad 498 (499)
('29) AIR 1929 Mad 828 (829) 53 Mad 43
('36) AIR 1936 Cal 221 (222) (Mandatory provision contained in Rule 11 is intended for cases where no other complications intervene and Court has sufficient inherent power to depart from normal procedure to suit exigencies of the situation)

16 ('31) AIR 1931 Pat 39 (40)

Note 6

1 ('38) AIR 1938 Nag 322 (323)
('35) AIR 1935 Lah 448 (450) 17 Lah 129

2 ('14) AIR 1914 Bom 249 (250) 21 Ind Cas 337 (337 338) 38 Bom 41

3 [*See* ('32) AIR 1932 Cal 482 (484 485) 59 Cal 388 (Rejection of memorandum of appeal for deficiency in stamp—Properly stamped memorandum can be filed)]

4 ('39) AIR 1939 Pat 437 (432) 180 Ind Cas 791 (791)
('39) AIR 1939 Pat 13 (13)
[*See also* ('39) AIR 1939 Pat 83 (85) 17 Pat 687 (If an insufficiently stamped memoran

O. 7 R. 11
Notes 6–7

Oudh [5] this rule applies to memorandum of appeals also by virtue of Section 107 A contrary view has been taken by the High Courts of Allahabad,[6] Lahore[7] and Madras[8] and the Judicial Commissioner s Court of Nagpur [9] This view proceeds on the ground that the insertion of Section 582 in the old Code corresponding to Section 149 providing for memorandum of appeals, shows that the rule does not apply to memorandum of appeals

Where an appeal is filed in time and the deficient court fee is paid within the time fixed by the Court though on that date the appeal would have been barred by limitation, the appeal must be deemed to have been filed on the date when it was presented [10]

7 Where the suit appears to be barred by any law — Clause (d) — This clause authorises the rejection of a plaint where the suit appears from the statement in the plaint to be barred by any law [1] Where a plaint appears to be barred by limitation and no ground of exemption from limitation is mentioned therein the Court

dum of appeal has in fact been accepted by the Court by inadvertence or when the amount of the court fee payable is open to doubt or the amount of the fee cannot be ascertained by the Court till the record is received or it appears

[But see (17) AIR 1917 Pat 26 (27)
(35) AIR 1935 Pat 201 (201) (When deficiently stamped memo of appeal is filed Court can reject it at once or allow deficit to be made good)]

5 (30) AIR 1930 Oudh 104 (105) 5 Luck 474
(35) AIR 1935 Oudh 119 (120) 10 Luck 476
[See also (37) AIR 1937 Oudh 414 (416) 13 Luck 307 (Appeal on insufficiently stamped

late Court has no right to reject a memorandum of appeal on the ground that it is insufficiently stamped)
(80) 2 All 875 (876) (Should fix time under S 54 (b) of 1882 Code)]

7 (20) AIR 1920 Lah 92 (93) 1 Lah 234 (Decided on the assumption that S 149 applied and not this rule—Time for payment was refused as not being a *bona fide* case of mistake)
[But see (88) 1888 Pun Re No 156 p 417 (This would appear not to be good law in view of A I R 1920 Lah 92)]

8 (15) 1915 Mad 426 (427)
(38) AIR 1938 Mad 316 (316)
[But see (32) 1932 Mad W N 101 (101)

9 (30) AIR 1930 Nag 221 (225) 26 Nag L R 183

10 (92) 15 Mad 78 (79)

[See (92) 15 Mad 29 (34) (Memorandum of appeal insufficiently stamped—Court is competent to levy the deficient stamp duty)
(38) AIR 1938 Mad 316 (317) (Court refusing to allow time for payment of deficient court fee —Memorandum of appeal cannot be held to be presented in time)]
[But see (90) 12 All 129 (149) (FB) (Deficit court fee if supplied after limitation appeal

Note 7

1 (03) 25 All 197 (193) (Suit against Secretary

been rejected under this rule as the suit was barred by limitation — It is submitted that in such a case the suit ought to be dismissed under S 3 of the Limitation Act and not to be rejected under this rule)
(1900 07) 1 Low Bur Rul 16 (17) (Plaint not showing that Court has jurisdiction might be

(23) AIR 1923 Oudh 495 (498) (Suit not barred by any law on the face of the plaint — But if

may in proper cases allow an amendment of the plaint under O 6 R 17 so as to make a plea of exemption if any[3] **O. 7 R. 11 Notes 7–10**

8 Rejection of plaint on other grounds — As has been seen in Note 2 *ante* the instances given in this rule are not exhaustive of the cases in which a Court may reject a plaint But a Court has no power to reject a plaint merely because it is defective in that it does not comply with some provisions of law [1] The proper procedure in such a case is to call on the plaintiff to cure the defect and on his failure to do so to proceed to decide the suit forthwith and to dismiss it under O 17 R 3 or to reject the plaint under the Court s inherent powers [2] Section 203 sub section 4 of the Madras Estates Land Act (I of 1908) provides that the following clause shall be deemed to be added to this rule as clause (e) *viz* —

> *(e)* In any suit to which Section 203 of the Madras Estates Land Act 1908 applies if the certified copy therein mentioned is not annexed to the plaint and the plaintiff on being required by the Court to produce it fails to do so within the time allowed by the Court

9 Rejection of plaint in part —A plaint cannot under this rule be rejected *in part* and returned in part It should be rejected as a *whole* [1] Thus where in a suit by two plaintiffs against the Secretary of State for India one of them has failed to give notice as required by Section 80 of the Code the plaint should be rejected as a whole and not merely as regards the plaintiff who had failed to give notice [2]

10 At what stage plaint can be rejected — The provisions of this rule are imperative and can be brought into operation at *any stage* of the suit Therefore the registration of a plaint does not prevent its rejection under this rule [1] Where however

(38) AIR 1938 Pat 127 (128) (Secretary of State impleaded in suit along with other defendants —No statement in plaint about issue of notice under Section 80)

2 (09) 3 Ind Cas 159 (160) 34 Bom 250
[*See also* (32) AIR 1932 Cal 146 (146) 59 Cal 150)]

Note 8

1 (20) AIR 1920 Pat 82 (83)
(24) AIR 1924 Lah 608 (608) (Non production of a document under O 7 R 18)
(1864) 2 Bom H C R 369 (369) (Do)
(12) 17 Ind Cas 580 (581) (Mad) (Want of signature and verification)
(11) 10 Ind Cas 731 (732) 7 Nag L R 33 (Want

parties and causes of action or nonjoinder of parties)
(03) 7 Cal W N 615 (616 617) (Insufficient identification of property)
[*See* (97) 1 Cal W N 574 (576)]
But see the following cases under the old Code
(87) 14 Cal 435 (439)
(01) 1901 Pun Re No 56 p 178 (Nonjoinder of a necessary party as plaintiff)
(67) 8 Suth W R 15 (16) (FB) (Misjoinder of defendants and causes of action)
2 (20) AIR 1920 Pat 82 (83)

Note 9

1 ('07) 29 All 325 (326)
(31) AIR 1931 Mad 175 (176) 54 Mad 416
(21) AIR 1921 Sind 106 (108) 17 Sind L R 9
(35) AIR 1935 Mad 389 (390)
(36) AIR 1936 Lah 1091 (1092) (Note appended to an issue to the effect that the plaint was rejected to the extent of the claim for interest—Note does not amount to rejection of plaint as contemplated by Code)
[**See however** (37) AIR 1937 Lah 800 (801) (Suit on pro note executed by *A* *B* *C* and *D* — Court ordering that suit could not proceed against *A* on ground that pro note was signed by him at place beyond that Court s jurisdiction—Order *held* to be tantamount to rejection of plaint as regards *A* and appeal was therefore competent)]

2 (31) AIR 1931 Mad 175 (176) 54 Mad 416
(35) AIR 1935 Mad 389 (390)

Note 10

1 (1900) 27 Cal 876 (878)
(22) AIR 1922 Cal 506 (508) 49 Cal 880
(97) 1 Cal W N 670 (671)

53 of the was held want of
cause of action only at or before the first hear

O. 7 R. 11
Notes 10-11

a plaint is rejected in the early stages of the suit, there is no justification for allowing excessive costs to the defendant [2]

11. Appeal. — An order rejecting a plaint, whether under this rule or not, is a *decree* as defined in Section 2, sub-section 2 *ante* and hence is appealable as such [1] But in cases coming under clause (b) of this rule, if the order is based merely upon a valuation of the subject-matter of the suit and the only question involved is as to the *amount* upon which the court-fee has to be paid, the decision of the first Court is final under Section 12 of the Court-fees Act Where, however, the question is, what provision of the Court-fees Act applies to the relief sought for in the plaint or under what category the suit falls, the decision is not final under that Section and an appeal is not barred [2]

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by the Appellate Court and remanded is of no moment)

Mad 000)]

2. ('14) AIR 1914 Lah 268 (269) 1914 Pun Re No 35

Note 11

1 ('29) AIR 1929 Cal 226 (227)
('21) AIR 1921 Lah 43 (43) (Memorandum of appeal must bear an *ad valorem* court fee)
('29) AIR 1929 Lah 83 (84) (It is not essential that a decree should be drawn up)
('86) 13 Cal 189 (191) (Plaintiffs proved on evi-

therefore was competent — Even if no appeal lay revision was competent as there was case decided)

All 484 (Rejection of plaint does not amount

appeal and plaint if any can be ordered only

decree sheet)]
(**But see** ('10) 5 Ind Cas 371 (372) (All) (*Order of rejection by a Court acting under the Agra Tenancy Act is not a decree under S 177 of that Act*)]
2. ('77) 1 All 360 (362)
('86) 10 Bom 610 (616) (F B) (The decisions in

Judge was not one within his proper function—Appeal lies)
('01) 28 Cal 334 (338)
('81) 6 Cal 249 (250) (Section 588 (Act X of 1877) removed the finality declared by S 12 of Court fees Act)

lies as rejection is not under S 12, Court fees Act)
('94) 1894 Bom P J 425 (Decision final under

Court fees Act, was appealable)]

An Appellate Court can reject a memorandum of appeal under this rule read with Section 107[3] But a memorandum of appeal cannot be rejected on the ground that the court fee on the *plaint* in the trial Court has not been paid by the plaintiff appellant[4]

As to whether the rejection of a memorandum of appeal is a decree see Note 13 to Section 2 sub section 2 *ante*

Where a plaint returned under R 10 *ante* for presentation to the proper Court is rejected by the latter Court for not making up the deficiency in court fee and the order of return is reversed on appeal the plaintiff having suppressed the fact of rejection the appellate order is void and the only remedy of the plaintiff is to appeal against the order of rejection[5]

See also the undermentioned cases[6]

12 Revision — An order rejecting a plaint being a decree and appealable as such a revision against such an order is incompetent[1] But where appeal is barred under Section 12 of the Court fees Act[2] or where an appeal against an order under this rule is rejected as incompetent[3] or where the plaint is rejected by a Provincial Small Cause Court[4] the order is revisable if the conditions of Section 115 are satisfied There is a conflict of opinion on the question whether an order demanding *additional court fee* is open to revision so long as the order has not resulted in the rejection of the plaint for non compliance with the order It has been held in the undermentioned cases[5] that no revision lies since the plaintiff has another remedy open to him by way of appeal on the rejection of the plaint The contrary opinion has been maintained in the undermentioned cases[6] on the ground that the question is really one of jurisdiction as the plaint has to be rejected if the stamp duty has not been paid According to the High Court of Calcutta[7] where the plaintiff s valuation is accepted by the Court as correct on an examination of the facts alleged the order is not open to revision inasmuch as such an order does not fall within Section 115 and as the decision could be challenged in an appeal from the decree in the suit

3 (37) AIR 1937 All 280 (281) I L R (1937) All 484
4 (37) AIR 1937 All 280 (281) I L R (1937) All 484
5 (29) AIR 1929 Bom 20? (204 205)
6 [illegible]

and d recting the tr al Court to proceed with the tr al of the suit Such order is not an order under O 41 R 23 and is not appealable under O 43 R 1 (u))
(35) AIR 1935 Nag 83 (86) (F B) (Order rejecting plaint for fa lure to pay addit onal court fee

Appeal and second appeal are competent—Revision from Appellate Court s order is not competent)
[*See also* (19) AIR 1919 Lah 11 (11 12) 1919 Pun Re No 120 (Where under Court fees Act the order is final neither appeal nor revision lies)
[illegible]

Note 12

[illegible]

O. 7 R. 11
Notes 12-13

See also the undermentioned case [8]

13. Review. — An order rejecting a plaint can be reviewed if the conditions of O 47 R 1 are satisfied [1] It has been held by the Allahabad High Court that the Court has power to restore the suit to the file after it has rejected a plaint under this rule [2] It has also been held that the Court can treat an application for restoration as a fresh plaint under O 7 R 13 *infra* [3]

O. 7 R. 12

R. 12. [S. 55.] Where a plaint is rejected the Judge shall record an order to that effect with the reasons for such order.

Procedure on rejecting plaint

[1877, S. 55.]

1. Rejection of memorandum of appeal. — It has been held by the High Court of Allahabad that where a memorandum of second appeal is rejected by virtue of this rule read with Section 107, the procedure prescribed by this rule should be followed [1]

O. 7 R. 13

R. 13. [S. 56.] The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

Where rejection of plaint does not preclude presentation of fresh plaint.

[1877, S. 56; 1859, S. 36.]

1. Rejection of plaint does not preclude fresh plaint. — Where a plaint is rejected under Rule 11 *ante*, the plaintiff is not thereby precluded from presenting a fresh plaint in respect of the same cause of action, provided his right of action is not barred by the law of limitation [1] But where the order is in substance one of *dismissal* though in form one of rejection, as where the Court purports to reject the plaint after a full trial on the merits and after recording a finding adverse to the

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8. ('35) AIR 1935 Cal 336 (337) 62 Cal 61 (Suit filed when claim is about to be barred—*Rejection of plaint* — No appeal filed from order — Court cannot use inherent power to set aside order—If it uses it High Court can interfere in revision)

Note 13

1. -- ting ... pay ... 1 C1 ... ng a plaint can be reviewed under O 47 R 1, C P C)]

2. ('39) AIR 1939 All 452 (453)

3. ('35) AIR 1935 All 985 (986) (It can allow the old court fee paid on the rejected plaint to be computed towards court fee on the fresh plaint, under Sec. 149 and under its inherent powers derived under S 151 C P C)

Order 7 Rule 12 — Note 1

1. ('93) 15 All 367 (370) (Per Aikman J)
[*See also* ('39) AIR 1939 Sind 221 (221) I L R (1939) Kar 527 (Provisions of O 7 by reason of S 141 of the Code apply *mutatis mutandis* to memoranda of appeals as well as to plaints)]

Order 7 Rule 13 — Note 1

... of suit for default in paying deficit court fees and in not giving correct valuation of property — Order is one of rejection and fresh suit is not barred)

plaintiff, a subsequent suit in respect of the same subject matter based upon the same cause of action will be barred as *res judicata* [3] **O. 7 R. 13 Note 1**

See also Note 13 to Order 7 Rule 11 *ante*

Documents Relied on in Plaint

R. 14. [S 59] *(1)* Where a plaintiff sues upon a document in his possession or power, he shall produce it in Court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint **O. 7 R. 14**

Production of document on which plaintiff sues

(2) Where he relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint.

List of other documents

[1877, Ss 58, 59, 62, 63; 1859, S 39]

Local Amendments

OUDH

Substitute the following *for* sub rule (2)

(2) Where he relies on any other documents as evidence in support of his claim, he shall enter all of them in a list to be added or annexed to the plaint and shall produce in Court when the plaint is presented such of them as are in his possession or power In regard to the documents not in his possession or power he shall if possible state in whose possession or power they are and shall cause them to be summoned for production before the Court on a date to be fixed by the Court for the purpose

Explanation — A certified copy of a public document is a document ' in the power of a party but where a document is in the possession of a person other than the plaintiff it will not be deemed to be in the power of the plaintiff

N.-W F P

Add to sub rule (2) and shall also produce such documents as are in his possession or power

Synopsis

Other Topics (miscellaneous)

(*See also* (90) 12 All 129 (148) (F B) (Similarly in the case of dismissal of a suit under S 10 Court fees Act) (86) 8 All 289 (287) (Do))

2 (20) AIR 1920 Mad 449 (451)

O. 7 R. 14 Note 1

1. Scope and object of the Rule. — This rule makes a distinction between a document *sued* on and a document *relied* on by the plaintiff as evidence in support of his claim [1] Where a plaintiff *sues* upon a document he should *produce* the document into Court when the plaint is presented[2] except where such document is an entry in a shop book or account, in which case he should produce a *true copy* of the entry to be filed with the plaint and the procedure laid down in Rule 17, *infra*, should be followed Where the plaintiff *relies* on any document as *evidence* in support of his claim, he should enter such document in a list to be annexed to the plaint, whether the document is in his power or not [3] But even such documents should, if they are in his possession or power, be *produced* into Court at or before the first hearing of the suit [4] (See O 13 R 1, *infra*) A document on which the plaintiff has not in terms sued, and which is not produced into Court when the plaint is presented, can only be treated, if subsequently produced, as a piece of *evidence* and not as *creating any* rights in favour of the plaintiff [5]

The object of this rule is to exclude documents as to the existence of which, at the date of the suit there may be reasonable doubt and as to the genuineness of which suspicions might arise when subsequently tendered [6] The provisions of this rule therefore are imperative[7] and compel the plaintiff to produce or disclose all documents on which he relies in support of his claim [8] But the plaintiff s failure to produce or disclose the documents as provided by this rule does not entail the return[9] or rejection of the plaint or the dismissal of the suit [10] The only penalty for such default is that he cannot produce the documents in evidence at the hearing without the leave of the Court (see Rule 18 *infra*)

This rule however, does not apply if the plaintiff himself is not *aware* of the existence of any documents which he subsequently discovers as supporting his claim [11]

It has been held by the Privy Council that if the plaintiff produces the document sued on, as required by this rule, and the document is lost subsequently from the custody of the Court, the plaintiff should be allowed to adduce secondary evidence of the document under Section 65 of the Evidence Act, 1872, without showing how the original document was lost [12]

Order 7 Rule 14 — Note 1

1 [illegible]

the documents later on of which a list was not given in the plaint, Appellate Court must consider them)

('03) 12 Cal W N 312 (315) (When a list of documents has been attached to the plaint he need [illegible]

evidence at a late stage)

[*See also* (31) AIR 1931 Cal 458 (461) 58 Cal 418 (The documents themselves need not be annexed to the plaint)]

4 (22) AIR 1922 Pat 569 (571)

5 (16) AIR 1916 P C 217 (219) (P C)

(37) AIR 1937 Mad 122 (123)

6 (09) 2 Ind Cas 946 (948) (Cal)

('20) AIR 1920 Pat 811 (812) (If the documents are shown to be not fabricated they may be received in evidence later on)

7. (09) 2 Ind Cas 946 (948) (Cal)

8 (17) AIR 1917 PC 6 (8) 40 Mad 402 44 Ind App 98 (P C) (Practice of withholding documentary evidence by parties trusting upon abstract doctrine of onus of proof deprecated by Privy Council)

9 (30) AIR 1930 Lah 480 (480)

10 (98) 22 Bom 971 (972)

(66) 2 Bom H C R 369 (369, 370)

(21) AIR 1921 All 218 (218)

('21) AIR 1921 Lah 608 (608)

11. (21) AIR 1921 Nag 49 (49 50)

12 (25) AIR 1925 P C 80 (92) (P C)

2. Right of the defendant to inspect the documents relied on by the plaintiff. — See Order 11 Rule 15, Note 3. O. 7 R. 14 Notes 2-4

3. Failure to comply with this Rule. — See Note 1 and Rule 18

4. Loss of document after production. — See Note 1

R. 15. [S. 60.] Where any such document is not in the possession or power of the plaintiff, he shall, if possible, state in whose possession or power it is. O. 7 R. 15

Statement in case of documents not in plaintiff's possession or power.

[1877, S. 60.]

Local Amendment

OUDH

Delete the rule

R. 16. [S. 61.] Where the suit is founded upon a negotiable instrument, and it is proved that the instrument is lost, and an indemnity is given by the plaintiff, to the satisfaction of the Court, against the claims of any other person upon such instrument, the Court may pass such decree as it would have passed if the plaintiff had produced the instrument in Court when the plaint was presented, and had at the same time delivered a copy of the instrument to be filed with the plaint. O. 7 R. 16

Suits on lost negotiable instruments.

[1877, S. 61.]

1. Suit on a lost negotiable instrument. — In a suit based on a *lost* negotiable instrument, the plaintiff should give sufficient indemnity against possible claims of persons in respect of that instrument.[1]

R. 17. [S. 62.] *(1)* Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891, where the document on which the plaintiff sues is an entry in a shop-book or other account in his possession or power, the plaintiff shall produce the book or account at the time of filing the plaint, together with a copy of the entry on which he relies. O. 7 R. 17

Production of shop-book.

Order 7 Rule 16 — Note 1

1. ('12) 16 Ind Cas 769 (771) (Lah)
('20) AIR 1920 Mad 336 (336)

O. 7 R. 17 Note 1

Original entry to be marked and returned.

(2) The Court, or such officer as it appoints in this behalf, shall forthwith mark the document for the purpose of identification; and, after examining and comparing the copy with the original, shall, if it is found correct, certify it to be so and return the book to the plaintiff and cause the copy to be filed.

[1877, Ss. 58, 62, 63; 1859, S. 39.]

Local Amendments

ALLAHABAD

Add the following proviso to sub-rule (2)

Provided that, if the copy is not written in English or is written in a character other than the ordinary Persian or Nagri character in use, the procedure laid down in Order 13 Rule 12 as to verification shall be followed, and in that case the Court or its officer need not examine or compare the copy with the original

LAHORE

After sub rule (2) *add* the following Explanation

Explanation —When a shop-book or other account written in a language other than English or the language of the Court is produced with a translation or transliteration of the relevant entry, the party producing it shall not be required to present a separate affidavit as to the correctness of the translation or transliteration, but shall add a certificate on the document itself, that it is a full and true translation or transliteration of the original entry, and no examination or comparison by the ministerial officer shall be required except by a special order of the Court

OUDH

Add the following proviso.

Provided that, if the copy is not written in English or is written in a character other than the ordinary Persian or Nagri character in use, the procedure laid down in Order 13 Rule 12, as to verification shall be followed, and in that case the Court or its officer need not examine or compare the copy with the original

1. Shop-book or account. — Section 4 of the Bankers' Books Evidence Act[1] provides that a certified copy of any entry in a banker's book shall in all legal proceedings be received as *prima facie* evidence of the existence of such entry and shall be admitted as evidence of the matters, transactions, and accounts therein recorded in every case where, and to the same extent as the original entry is now by law admissible, but not further or otherwise The term "Bankers' Books" includes ledgers, daybooks, cash books, account books and all other books used in the ordinary course of business of a bank.[2] Therefore, if the document sued on is a banker's book it is not necessary to produce the original book itself along with the plaint it is enough if a certified copy of the entry or entries is produced But it should be shown that the bank is one to whose books the provisions of the Bankers' Books Evidence Act have been extended [3]

If the document sued on is not a banker's book but is an entry in a shop-book or account, the plaintiff should produce the book or account at the time of filing the

Order 7 Rule 17 — Note 1

1. Act XVIII of 1891
2. The Bankers' Books Evidence Act 1891, S 2 (3)
3. (1900) 4 Cal W N 433 (434) (F B). Act VIII of 1891, S 2 (2) and S 3.

plaint together with a true copy of the entry sued on[4] Thereupon the Court or its officers should mark the document for identification[5] and should, if the copy is found to be correct, file the copy along with the plaint

But the fact that the original document is *not* presented along with the plaint, as provided by this rule and the plaint is registered, is not a ground for rejecting the plaint but the plaintiff cannot afterwards produce the document in evidence except with the leave of the Court as provided by Rule 18 *infra*[6]

R. 18. [S. 63.] *(1)* A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

Inadmissibility of document not produced when plaint filed.

(2) Nothing in this rule applies to documents produced for cross-examination of the defendant's witnesses, or in answer to any case set up by the defendant or handed to a witness merely to refresh his memory.

[1877, Ss. 58, 62, 63; 1859, S. 39.]

Synopsis

1. Scope and object of the Rule. — The policy underlying this rule is to exclude evidence, the existence of which at the date of the suit is doubtful, and as to the genuineness of which suspicion may arise because it was produced at a late stage of the suit[1] The Court has, however, a wide discretion with regard to the reception of documents which were not produced with the plaint or entered in the list of documents[2] and where there can be no doubt about the genuineness of the documents produced, such as certified copies of public documents or records of judicial proceedings, Courts will not as a rule shut them out[3] But even in such cases leave may be refused

4. ('20) AIR 1920 Lah 136 (140) 1 Lah 6 [See however ('29) AIR 1929 Pat 555 (557) 7 Pat 589 (In this case it was held that the ac-

Order 7 Rule 18 — Note 1

1. (09) 2 Ind Cas 916 (918) (Cal)
2. ('27) AIR 1927 Cal 168 (169, 173)
3. ('08) 12 Cal W N 312 (315)
('82) 4 Mad 417 (418) (Improper rejection — Urged as a ground in appeal)
('84) 8 Bom 377 (379).

O. 7 R. 18 Notes 1-3

where there has been unreasonable delay in the production of documents, unless satisfactory reasons are assigned for the delay[4] An Appellate Court will not ordinarily interfere with the discretion exercised by the lower Court under this rule[5]

The leave granted by the Court need not be *express*, but may be gathered from the records and the circumstances of the case[6]

2. Cases where leave is not necessary. — Sub rule 2 of this rule enacts that the rule as to the inadmissibility of documents not produced with, or referred to in the plaint, does not apply to the following cases —

(1) Where the document is to be handed over to the witness for the purpose of refreshing his memory and not to be relied upon as a probative document in itself in support of the plaintiff's case[1]

(2) Where the documents are produced in answer to any case set up by the defendant[2]

(3) Where they are produced for the cross examination of the defendant's witnesses[3] The words "defendant's witnesses' include also plaintiff s witnesses who have turned hostile to the plaintiff and whom the plaintiff is permitted to cross examine[4]

3. Revision. — The question of admission of evidence is not ordinarily a question of jurisdiction but is merely one of law and no revision will lie in such cases[1]

Local Amendments

ALLAHABAD

Add the following Rules 19 to 25

O. 7 R 19 (Allahabad)

'19 Every plaint or original petition shall be accompanied by a proceeding giving an address written in English in block letters at which service of notice, summons or other process may be made on the plaintiff or petitioner Plaintiffs or petitioners subsequently added shall, immediately on being so added, file a proceeding of this nature

O. 7 R. 20 (Allahabad)

20 An address for service filed under the preceding rule shall be within the local limits of the District Court within which the suit or petition is filed, or of the

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('18) AIR 1918 Cal 329 (330)
(1864) 1864 Suth W R Act X 67 (68)
('21) 60 Ind Cas 372 (374) (Pat) (If document is proved to be not fabricated it can be received

pers

'16

(Documents produced after close of argument cannot be received in evidence)

5 ('85) 8 Mad 373 (374 375) (Documents not filed along with the plaint received by the trial Court — Appellate Court is bound to consider them)
('21) AIR 1921 Nag 49 (50) (Objection as to admissibility of documents cannot be taken for the first time in appeal)
(1861) 1 Suth W R 12 (12) (Documents received

('69) 12 Suth W R 32 (32) 13 Moo Ind App 77 (PC) (Where trial Court admitted documents at a late stage)

Note 2

Defendant denying receipt of consideration — Plaintiff in answer producing documents not included in list of documents filed with plaint —Adverse inference could not be drawn against plaintiff)]

3. ('37) AIR 1937 All 55 (56) (Plaintiff is entitled to tender in evidence previous statement in writing by defendant for purpose of contradicting him under S 145 Evidence Act)

4. ('20) AIR 1920 Nag 43 (43 44) [*See also* ('33) AIR 1933 Cal 65 (66) 60 Cal 341]

Note 3

1. ('14) AIR 1914 Cal 826 (827)

District Court within which the party ordinarily resides if within the limits of the United Provinces of Agra and Oudh **O. 7 R 20 (Allahabad)**

21 Where a plaintiff or petitioner fails to file an address for service he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect and the Court may make such order as it thinks just **O 7 R 21 (Allahabad)**

22 Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served is present a copy of the notice or process shall be affixed to the outer door of the house If on the date fixed such party is not present another date shall be fixed and a copy of the notice summons or other process shall be sent to the registered address by registered post, and such service shall be deemed to be as effectual as if the notice or process had been personally served **O 7 R 22 (Allahabad)**

NOTES—Where service has been effected by affixture of the notice on the outer door of the house but the party is not present on the date fixed for his appearance the Court ought under this rule to order notice by *registered post* Otherwise the service cannot be considered to be sufficient [1]

This rule applies also to appellate proceedings by virtue of O 41 R 38 (3) (added by Allahabad High Court)[2]

23 Where a party engages a pleader notices or processes for service on him shall be served in the manner prescribed by Order 3 Rule 5 unless the Court directs service at the address for service given by the party **O 7 R 23 (Allahabad)**

24 A party who desires to change the address for service given by him as aforesaid shall file a verified petition and the Court may direct the amendment of the record accordingly Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform and may be either served upon the *pleaders for such parties or be sent to them by registered post as the Court thinks fit* **O 7 R 24 (Allahabad)**

25 Nothing in these rules shall prevent the Court from directing the service of a notice or process in any other manner if for any reasons it thinks fit to do so **O 7 R 25 (Allahabad)**

BOMBAY

The following shall be *added* as Rules 19 to 26

19 Every plaint or original petition shall be accompanied by a memorandum in writing giving an address at which service of notice or summons or other process may be made on the plaintiff or petitioner Plaintiffs or petitioners subsequently added shall immediately on being so added file a memorandum in writing of this nature **O 7 R 19 (Bombay)**

Address to be filed with plaint or original petition

20 An address for service filed under the preceding rule shall be within the local limits of the District Court within which the suit or petition is filed or if he cannot conveniently give an address as aforesaid, at a place where a party ordinarily resides **O 7 R 20 (Bombay)**

Nature of address to be filed

21 Where a plaintiff or petitioner fails to file an address for service he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect and the Court may make such order as it thinks just **O 7 R 21 (Bombay)**

Consequences of failure to file address

22 Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served is present a *copy of the notice or* process shall be affixed to the outer door of the house If on the date fixed such party is not present another date shall be fixed and a copy of the **O 7 R 22 (Bombay)**

Procedure when party not found at the place of address

Order 7 Rule 22 (Allahabad)

1 ('21) AIR 1921 All 52 (52 53) 43 All 411 2 ('21) AIR 1921 All 52 (59) 43 All 411

O. 7 R. 22 (Bombay) notice, summons or other process shall be sent to the registered address by registered post pre-paid for acknowledgment, and such service shall be deemed to be as effectual as if the notice or process had been personally served

O. 7 R. 23 (Bombay) 23 Where a party engages a pleader, notice or processes on him shall be served in the manner prescribed by Order 3 Rule 5, unless the Court directs service at the address for service given by the party

Service of notice on pleaders

O. 7 R. 24 (Bombay) 24 A party who desires to change the address for service given by him as aforesaid shall file a fresh memorandum in writing to this effect and the Court may direct the amendment of the record accordingly Notice of such memorandum shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be served either upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit

Change of address

O. 7 R. 25 (Bombay) 25 Nothing in these rules shall prevent the Court from directing the service of a notice or process in any other manner, if, for any reasons, it thinks fit to do so

Rules not binding on Court

O. 7 R. 26 (Bombay) 26 Nothing in these rules shall apply to the notice prescribed by Order 21 Rule 22

Applicability to notice under Order 21 Rule 22

LAHORE

Add the following as Rules 19 to 25

O. 7 R. 19 (Lahore) "19 Every plaint or original petition shall be accompanied by a proceeding giving an address at which service of notice summons or other process may be made on the plaintiff or petitioner Plaintiffs or petitioners subsequently added shall, immediately on being so added, file a proceeding of this nature

O. 7 R. 20 (Lahore) 20 An address for service filed under the preceding rule shall be within the local limits of the district Court within which the suit or petition is filed, or of the district Court within which the party ordinarily resides if within the limits of the territorial jurisdiction of the High Court of Judicature at Lahore

O. 7 R. 21 (Lahore) 21 Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect, and the Court may make such order as it thinks just

O. 7 R. 22 (Lahore) 22 Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice, summons or other process can be served is present, a copy of the notice summons or other process shall be fixed to the outer door of the house If on the date fixed such party is not present another date shall be fixed and a copy of the notice summons or other process shall be sent to the registered address by registered post, and such service shall be deemed to be as effectual as if the notice, summons or other process had been personally served

O. 7 R. 23 (Lahore) 23 Where a party engages a pleader, notices, summonses or other processes for service on him shall be served in the manner prescribed by Order 3 Rule 5, unless the Court directs service at the address for service given by the party

O. 7 R. 24 (Lahore) 24 A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit

25 Nothing in these rules shall prevent the Court from directing the service of a notice, summons or other process in any other manner, if, for any reasons, it thinks fit to do so" **O. 7 R. 25 (Lahore)**

NAGPUR

Add the following as Rules 19 to 23

Registered address

"19 Every plaint or original petition shall be accompanied by an address at which service of process may be made on the plaintiff or the petitioner The address shall be within the local limits of the civil district in which the suit or petition is filed or of the civil district in which the party ordinarily resides, if within the limits of the Central Provinces and Berar This address shall be called the "registered address and it shall hold good throughout interlocutory proceedings and appeals and also for a further period of two years from the date of final decision and for all purposes including those of execution **O 7 R. 19 (Nagpur)**

Registered address by a party subsequently added as plaintiff or petitioner

20 Any party subsequently added as plaintiff or petitioner shall in like manner file a registered address at the time of applying or consenting to be joined as plaintiff or petitioner **O 7 R 20 (Nagpur)**

Consequences of non filing of registered address

21 (1) If the plaintiff or the petitioner fails to file a registered address as required by Rule 19 or Rule 20, he shall be liable, at the discretion of the Court, to have his suit dismissed or his petition rejected **O 7 R. 21 (Nagpur)**

An order under this rule may be passed by the Court *suo motu* or on the application of any party

(2) Where a suit is dismissed or a petition rejected under sub rule (1) the plaintiff or the petitioner may apply for an order to set the dismissal or the rejection aside and if he files a registered address and satisfies the Court that he was prevented by any sufficient cause from filing the registered address at the proper time the Court shall set aside the dismissal or the rejection upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit or petition

Affixing of process and its validity

22 Where the plaintiff or the petitioner is not found at his registered address and no agent or adult male member of his family on whom a process can be served is present, a copy of the process shall be affixed to the outer door of the house and such service shall be deemed to be as effectual as if the process had been personally served **O 7 R. 22 (Nagpur)**

Change of registered address

23 A plaintiff or petitioner who wishes to change his registered address shall file a verified petition and the Court shall direct the amendment of the record accordingly Notice of such petition shall be given to such other parties to the suit or proceedings as the Court may deem it necessary to inform' **O 7 R. 23 (Nagpur)**

N -W F. P.

Add the following as Rules 19 to 22

"19 Every plaint or original petition shall be accompanied by a proceeding giving an address at which service of notice, summons, or other process may be made on the plaintiff or petitioner Plaintiffs or petitioners subsequently added shall immediately, on being so added file a proceeding of this nature **O 7 R. 19 (N -W.F.P)**

20 An address for service filed under the preceding rule shall be within the local limits of the district Court within which the suit or petition is filed or, of the district Court within which the party ordinarily resides, if within the limits of the North-West Frontier Province **O. 7 R. 20 (N -W.F.P.)**

O. 7 R. 21 (N.-W. F. P.) 21 Where a plaintiff or petitioner fails to file an address for service he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect, and the Court may make such order as it thinks just

O. 7 R. 22 (N.-W. F. P.) 22 A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit "

OUDH

Add the following as Rules 19 to 27

O. 7 R. 19 (Oudh) '19 Every plaint or original petition shall be accompanied by an address at which service of notice summons or other process may be made on the plaintiff or petitioner This address shall be called the 'registered address" and service thereat shall be deemed to be sufficient service

O. 7 R. 20 (Oudh) 20 Any party subsequently added as plaintiff or petitioner shall, in like manner, file a registered address at the time of applying or consenting to be joined as plaintiff or petitioner

O. 7 R. 21 (Oudh) 21 A registered address shall be within the local limits of the District Court within which the suit or petition is filed if the plaintiff or petitioner resides or carries on business within those limits

O. 7 R. 22 (Oudh) 22 If a plaintiff or petitioner fails to file a registered address as required above, he shall be liable, at the discretion of the Court, to have his suit dismissed or his petition rejected

An order under this rule may be passed by the Court *suo motu* or on the application of any party

O. 7 R. 23 (Oudh) 23 Where the registered address of the plaintiff or petitioner is within the limits of a head quarters town or of a municipality of India (including Burma) or Ceylon, a notice summons or other process may be served on him at that address by registered post and such service shall be deemed to be as effectual as if the notice or process had been personally served

O. 7 R. 24 (Oudh) 24 In all cases to which Rule 23 does not apply where a plaintiff or petitioner is not found at his registered address and no agent or adult male member of his family on whom a notice or process can be served is present, a copy of the notice or process shall be affixed to the outer door of the house If on the date fixed, such plaintiff or petitioner is not present another date shall be fixed and a copy of the notice, summons or other process shall be sent to his registered address by registered post, and such service shall be deemed to be as effectual as if the notice or process had been personally served

O. 7 R. 25 (Oudh) 25 Whenever a plaintiff or petitioner has engaged a pleader to act for him a notice or process for service on him shall be served in the manner prescribed by O 3, R 5, unless the Court directs service at his registered address

Provided that where a notice is served on a pleader under the above rule, he shall be given sufficient time to communicate with his client and to receive instructions

Explanation — Where ten days' time has been allowed under this rule, this shall be deemed sufficient time within the meaning of this proviso in the absence of an application made within such ten days by the pleader concerned for further time

26 A plaintiff or petitioner who wishes to change his registered address shall file a verified petition, and the Court shall direct the amendment of the record accordingly Notice of such petition shall be given to such other parties to the suit or proceedings as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit O. 7 R. 26 (Oudh)

27 Nothing in Rules 19 to 26 shall prevent the Court from directing the service of a notice or process in any other manner, if for any reason it thinks fit O. 7 R. 27 (Oudh)

PATNA

Add the following as Rules 19 to 22

"19 Every plaint or original petition shall be accompanied by a statement giving an address at which service of notice, summons or other process may be made on the plaintiff or petitioner, and every plaintiff or petitioner subsequently added shall, immediately on being so added, file a similar statement O. 7 R. 19 (Patna)

20 An address for service filed under the preceding rule shall state the following particulars — O. 7 R. 20 (Patna)

(1) the name of the street and number of the house (if in a town),
(2) the name of the town or village,
(3) the Post Office,
(4) the district, and
(5) the munsif (if in Bihar and Orissa) or the District Court (if outside Bihar and Orissa)

21 Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu*, or any party may apply for an order to that effect and the Court may make such order as it thinks just O. 7 R. 21 (Patna)

22 A party who desires to change the address for service given by him as aforesaid shall file a verified petition and the Court may direct the amendment of the record accordingly Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit" O. 7 R. 22 (Patna)

SIND

Add the following as Rules 19 to 25

'19 *Address to be filed with plaint — Every* plaint shall be accompanied by a memorandum in writing giving an address at which service of notice, or summons or other process may be made on the plaintiff Plaintiffs subsequently added, shall immediately on being so added file a memorandum in writing of this nature O. 7 R. 19 (Sind)

20 *Nature of address to be filed* — An address for service filed under the preceding rule shall be within the local limits of the district Court within which the suit is filed or if he cannot conveniently give an address as aforesaid, at a place where a party ordinarily resides O. 7 R. 20 (Sind)

21 *Consequences of failing to file address* — Where a plaintiff fails to file an address for service, he shall be liable to have his suit dismissed by the Court *suo motu* or any party may apply for an order to that effect, and the Court may make such order as it thinks just O. 7 R. 21 (Sind)

22 *Procedure when party not found at the place of address* — Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served is present, a copy of O. 7 R. 22 (Sind)

O 7 R 22 (Sind) the notice or process shall be affixed to the outer door of the house and such service shall be deemed to be as effectual as if the notice or process had been personally served

O 7 R 23 (Sind) 23 *Service of notice on pleaders* — Where a party engages a pleader notice or process on him shall be served in the manner prescribed by O 3 R 5 unless the Court directs service at the address for service given by the party

O 7 R 24 (Sind) 24 *Change of address* — A party who desires to change the address for service given by him as aforesaid shall file a fresh memorandum in writing to this effect and the Court may direct the amendment of the record accordingly Notice of such memorandum shall be given to all the other parties to the suit and may be served either upon the pleaders for such parties or be sent to them by registered post as the Court thinks fit

O 7 R 25 (Sind) 25 *Rules not binding on Court* — Nothing in these rules shall prevent the Court from directing the service of a notice or process in any other manner if for any reasons it thinks fit to do so

ORDER VIII.

WRITTEN STATEMENT AND SET-OFF

O. 8 R 1 **R. 1.** [S 110] The defendant may, and, if so required by the Court, shall, at or before the first hearing or within such time as the Court may permit, present a written statement of his defence

Written Statement

[1877, S 110, 1859, S 120]

Local Amendments

LAHORE

After the word defence place a semicolon and *add* the following

and with such written statement or if there is no written statement at the first hearing, shall produce in Court all documents in his possession or power on which he bases his defence or any claim for set off

(2) Where he relies on any other documents as evidence in support of his defence or claim for set off he shall enter such documents in a list to be added or annexed to the written statement or where there is no written statement to be presented at the first hearing If no such list is so annexed or presented the defendant shall be allowed a further period of ten days to file this list of documents

(3) A document which ought to be entered in the list referred to in sub clause (2) but which has not been so entered shall not without the leave of the Court be received in evidence on the defendant s behalf at the hearing of the suit

(4) Nothing in this rule shall apply to documents produced for cross examination of plaintiff s witnesses or handed to a witness merely to refresh his memory

N W F P

Add the following as sub clause (2)

The defendant at the time of presenting a written statement shall where he relies on any documents (whether in his possession or power or not) enter such documents in a list and produce those documents which are in his possession or power

OUDH

Add the following as Rule 1 (2) and *read the existing Rule 1 as Rule 1 (1)*

1 (2) The defendant shall file with his written statement a list of all the documents on which he relies as evidence in support of his case shall produce with the written statement such of the documents as are in his possession or power and shall cause the others to be summoned on a date to be fixed by the Court for the purpose

Explanation — A certified copy of a public document is a document in the power of a party but where a document is in the possession of a person other than the defendant it will not be deemed to be in the power of the defendant

Synopsis

1 Written statement — A written statement is the pleading of the defendant and must be filed by him *personally* or on his behalf by *a duly constituted agent* The filing of a written statement by a *third* person on behalf of the defendant is not sanctioned by the Code [1]

Where after the service of summons the defendant has not had sufficient time to enable him to file a written statement[2] or where the Court requires him to file a written statement [3] it should grant an adjournment for that purpose An Appellate Court cannot call for a written statement from any of the parties [4] As to what a written statement should or should not contain see O 6 Rr 2 and 7

The omission to file a written statement does not amount to an admission of the facts stated in the plaint [5]

2 Supplemental written statement — See O 6 R 7 and O 8 R 9

3 First hearing, meaning of — The first hearing of a suit does not mean the day on which the *witnesses are examined* or the trial taken up It means the day on which the Court goes into the pleadings in order to understand the contentions of the parties [1] In suits in which issues have to be framed the day on which such issues are framed is the first hearing of the suit[2] inasmuch as on that day the Court looks into the pleadings with a view to understand the contentions of the parties This is

Order 8 Rule 1 — Note 1

1 [illegible]

lant)
(1865) Bo rke Oudh Cas 153 (Th rd party w ll [illegible]

[illegible] t—Statement not necessary in the absence of spec fic notice in the summons— If the Court wants a wr tten statement it should grant time)

4 (66) 5 Suth W R 50 (51) (Issuing the writ ten statement as an ev dence cannot be allowed in the Appellate Court)

5 (35) AIR 1935 Pat 306 (331) 14 Pat [illegible]

Note 3

1 (39) AIR 1939 Nag 110 (119) I L R (1939) Nag 452

2 (26) AIR 1926 Mad 347 (348 349) (First hearing in O 13 R 1 means the day on which issues are framed)

(22) AIR 1922 Pat 252 (254) 6 Pat L Jour 650 Hearing is used in d fferent rules with a view [illegible]

O. 8 R. 1
Notes 3-4

made clear by the provisions of O 10 R 1 under which 'the Court shall at the *first hearing* of the suit ascertain from each party or his pleader whether he admits or denies such allegations or facts as are made in the plaint or written statement if any, of the opposite party

In cases in which no issues need be framed such as small cause suits the first hearing will it is conceived be the day on which the Court goes into the case of the parties for the purpose of trial

4 Court-fee not leviable on written statement — Written statements called for by the Court after the first hearing are specially exempted from a fee by Section 19, clause 3 of the Court fees Act 1870 But it cannot be inferred therefrom that written statements filed at or before the first hearing are chargeable with a fee since the Legislature has expressly repealed the provision in the Code of 1859 requiring court fee on all written statements[1] See also the undermentioned case

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O 8 R 2

R. 2. [New] The defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality.

New facts must be specially pleaded

[R S C, O. 19 R. 15 See O. 6 Rr. 4 and 8]

Synopsis

1 **Scope of the Rule**
2 **Special defences**
3 **Alternative defences** See O 6 R 7
4 **Fraud** See Order 6 Rule 4
5 **Limitation**
6 **'Facts showing illegality'**
7 **Joint contractors — Separate defences**

Other Topics (miscellaneous)

Payment See Note 2
Performance See Note 2
Special pleas — Instances See Note 2

1. Scope of the Rule — It is the duty of a defendant to *particularise* in his defence all points either of fact or of law which he desires to take[1] If he does not do so he will not be allowed to raise a new plea depending upon evidence for its

('19) AIR 1919 Cal 70 (71) (First hearing of suit means the day when the case is actually gone into)
[*See also* ('68) 10 Suth W R 179 (181)]

Note 4

1 ('81) 5 Bom 400 (402 403)
('82) 12 Cal L Rep 367 (370)
2 ('34) AIR 1934 All 332 (3??) 56 All 747
(Exemption in S 19 (3) of Court fees Act is not limited to written statement in a suit but extends also to a written statement in a miscellaneous case)

Order 8 Rule 2 — Note 1

1 ('23) AIR 1923 Cal 578 (578)
('15) AIR 1915 Cal 478 (481) 4? Cal 6?? (Plea of purchaser for value without notice)
('03) 5 Bom L R 991 (??) (Do)

determination for the first time in appeal[2] The rule requires that the defendant must raise by his pleading all matters which show that the suit is not maintainable Hence, the defendant will not be entitled, as of right, to rely on any ground of defence which he has not taken in his written statement[3] It has been held by the High Court of Calcutta that a plea of *estoppel* is not one 'which shows the suit to be not maintainable' and that therefore such plea can be allowed to be raised for the first time in appeal under O 41 R 2 though not raised in the written statement[4] Whether a matter has been pleaded sufficiently to give the Court the right to form a judgment depends upon the allegations and form of the pleadings the Courts must not look to the mere wordings of the plaint but to the issues settled and the manner of the treatment in the lower Court[5] The effect of the rule is for reasons of practice and justice and convenience, to require the party to tell his opponent what he is coming to the Court to prove If he does not do that, the Court will deal with it in one of two ways It may say that it is not open to him that he has not raised it and will not be allowed to rely on it, or it may give him leave to amend by raising it and protect the other party, if necessary by letting the case stand over The rule is not one that excludes from the consideration of the Court the relevant subject matter for decision simply on the ground that it is not pleaded It leaves the party in mercy and the Court will deal with him as is just[6] Thus, a plea though not taken in the statement can be raised provided it is taken before the trial has commenced and no prejudice is caused to the plaintiff[7]

Where service of notice on defendant by the plaintiff is the foundation of defendant s liability and where no allegation of service of such notice is made in the plaint the plaintiff is not relieved from proving service of such notice merely because the defendant has not raised the plea in his written statement but raises it at the time

[*See also* (3_) AIR 1932 Cal 146 (147) 59 Cal 150 (The proper way to plead to the jurisdiction of the Court is to take the plea in the written statement)]

2 (?6) 95 Ind Cas 573 (574) 28 Bom L R 513 (515) (Plea of want of notice to quit)

(22) AIR 1922 Pat 356 (358) 1 Pat 61? (Want of legal n ce ity)

(8) AIR 19 8 All 596 (606) 51 All 186 (FB) (Abandoning the pl a of legal necessity in the lower Court—It cannot be raised in appeal)

3 (36) AIR 1936 Bom 10 (11) 60 Bom 34 (Defendant not objecting to suit in lower Court on ground that suit was not in representative capacity under S 53 T P Act—Defendant deemed to have waived objection and cannot raise such objection in appeal)

(37) AIR 1937 Mad 571 (574) I L R (1937) Mad 990 (D f ndant not pl ading S 6 Married Women s Property Act is bar to maintainability of suit — Defendant cannot have benefit of defence which h did not plead)

(37) AIR 1937 Bom 476 (477) (Plea that suit not maintainable as not having been brought as a representative suit)

(35) 18 Nag L Jour 97 (99) (Where a defendant deliberately abstains from setting out in his plead ing a fact of which he is then aware he cannot be allowed t bring it in at a late stage in the evid ce [illegible] the plaintiff has closed his case)

(38) AIR 1938 Lah 96 (96) (Suit by firm—Defendant not denying registration of firm—Suit cannot be dismissed on ground that such registration was not proved)

[*See also* (37) 41 Cal W N 534 (536) (Where a [illegible]

4 [illegible]

6 (1912) 1 Ch 717 (728) In re Robinson s settlement Gant v Hobbs (Per Buckley, L J)

7. (25) AIR 1925 All 241 (242 243) 47 All 291 (Plea that notice was not given under S 80 C P C)

(36) AIR 1936 Lah 141 (141) (Witnesses summoned but not examined—Defendant taking up new plea of defence going to root of case — Plea allowed)

[*See also* (67) 7 Suth W R 120 (121) (Defendant may avail himself of any equity arising on the facts proved at trial though it is not raised in the written statement)]

O 8 R 1
Notes 3-4

made clear by the provisions of O 10 R 1 under which 'the Court shall at the *first hearing* of the suit ascertain from each party or his pleader whether he admits or denies such allegations or facts as are made in the plaint or written statement if any, of the opposite party

In cases in which no issues need be framed such as small cause suits the first hearing will it is conceived, be the day on which the Court goes into the case of the parties for the purpose of trial

4 **Court-fee not leviable on written statement** — Written statements called for by the Court after the first hearing are specially exempted from a fee by Section 19, clause 3 of the Court fees Act, 1870 But it cannot be inferred therefrom that written statements filed at or before the first hearing are chargeable with a fee since the Legislature has expressly repealed the provision in the Code of 1859 requiring court fee on all written statements [1] See also the undermentioned case

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O. 8 R 2

R. 2. [New] The defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality

New facts must be specially pleaded

[R S C., O 19 R 15 See O. 6 Rr. 4 and 8]

Synopsis

1 **Scope of the Rule**
2 **Special defences**
3 **Alternative defences** See O 6 R 2
4 **Fraud** See Order 6 Rule 4
5 **Limitation**
6 **"Facts showing illegality"**
7. **Joint contractors — Separate defences**

Other Topics (miscellaneous)

Payment See Note 2
Performance. See Note 2
Special pleas — Instances See Note 2

1. Scope of the Rule — It is the duty of a defendant to *particularise* in his defence all points either of fact or of law which he desires to take [1] If he does not do so he will not be allowed to raise a new plea depending upon evidence for its

('19) AIR 1919 Cal 70 (71) (First hearing of suit means the day when the case is actually gone into)
[*See also* (68) 10 Suth W R 179 (181)]

Note 4

1 (81) 5 Bom 400 (402 403)
(82) 12 Cal L Rep 367 (370)
2 (34) AIR 1934 All 332 (333) 56 All 747
(Exemption in S 19 (3) of Court fees Act is not limited to written statement in a suit but extends also to a written statement in a miscellaneous case)

Order 8 Rule 2 — Note 1

1 (23) AIR 1923 Cal 576 (78)
(15) AIR 1915 Cal 478 (481) 42 Cal 625 (Plea of purchaser for value without notice)
(03) 5 Bom L R 991 (995) (Do)

R. 3. [New.] It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages. **O. 8 R 3**

Denial to be specific

[R. S. C., O. 19 R. 17.]

Synopsis

1 Scope of the Rule. | 2 "Except damages"

1. Scope of the Rule. — A defendant can either admit or deny the several allegations made in the plaint If he decides to deny any such allegation he must do so *clearly and explicitly* [1] Thus, in *Grocott* v *Lovatt** the plaintiff alleged in para 3 of his statement of claim that the defendant, on or about a certain date, falsely and maliciously wrote, printed and published a certain handbill The reply of the defendant to this was "the defendant denies the facts alleged in para 3 of the statement of claim" The Court of Appeal held that the denial was sufficient But a statement that the defendant "puts the plaintiff to proof of the several allegations in the plaint" or that he "does not admit the correctness of the statements contained in the plaint" is not a sufficient denial within the meaning of this rule (see Rule 5 below) The rule is not limited to denial alone, it includes non admission as well, so that where a defendant pleads that he does not admit a particular allegation in the plaint, it would be a sufficient traverse [3] As to the effect of failure to deny specifically, see O 8 R 5

No party should traverse matter not alleged, he should be content to answer the case that is actually laid against him and should not plead that which he thinks his opponent meant or ought to have raised [4]

2. "Except damages." — The exception in this rule makes it unnecessary for the defendant to deny the claim to or amount of damages [1] It is probably intended that damages shall be deemed to be put in issue in all cases, unless expressly admitted

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R. 4. [New.] Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient **O. 8 R. 4**

Evasive denial

Order 8 Rule 3 — Note 1

1 (1876) 8 Ch D 637 (6 0) [illegible]

[illegible]

money accounts incorrect is not a specific denial)

('38) 1938 Oudh W N 1080 (1084) (Plaint allegations as to the terms of lease deed—Defendant replying that terms will appear from agreement — No specific denial)

2 (1916) 61 S J 28

[*See also* (1894) 63 L J Q B 361 (363) Adkins v North Metropolitan Tramways Co]

3 (1876) 3 Ch D 637 (640), Thorp v Holdsworth (Per Jessel M R)

('27) AIR 1927 All 275 (276)

([illegible]

('09) 4 Ind Cas 318 (318) (PC)

4. (1893) 1 Q B 571 (575) Rassam v Budge (In an action for slander defence justifying words other than those complained of will be struck out)

Note 2

1 (1888) 21 Q B D 501 (50[illegible] 508) Wood v Earl of Durham (Matters in mitigation of damages need not be specifically pleaded)

('17) AIR 1917 Cal 269 (272) 43 Cal 1001 (It is sufficient if the defendant pleads generally to the damages)

O. 8 R. 4
Note 1

to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances

[R S C, O 19 R 19]

1. Plaint allegations not to be denied evasively. — *A* sues *B* for dissolution of partnership alleging that he agreed to enter into partnership with him to carry on certain business *B* in his written statement admits that he agreed to enter into partnership as alleged but adds that 'the terms of the arrangement between himself and the plaintiff were not definitely agreed upon as alleged' This is an *evasive* denial of the fact of partnership and is not permissible[1] Similarly, where several circumstances are set out in the plaint as constituting the details of certain transactions and the defendant instead of denying the several circumstances specifically denies them as a whole using almost the precise language of the allegations denied the denial will as a rule be considered *evasive*[2] Thus if the plaintiff in an action for wages alleges that he has served the defendant as a hired servant from the 25th March 1908 to 24th June 1909 at Epson in the County of Surrey it would be a bad traverse for the defendant to plead the plaintiff did not serve the defendant as a hired servant from the 25th March 1908 to 24th June 1909 at Epson in the County of Surrey He must deny that the plaintiff ever served him at all or else state how long he admits the plaintiff did serve him He must not traverse the place which is immaterial, or if he does he must add the words 'or at any other place after the words 'the plaintiff did not serve him at Epson[3] But where the plaintiff, claiming title under one *S* alleged that she died on the 28th of September 1906 and the defendant pleaded that he did not admit that *S* died on the 28th of September 1906 and that the suit was barred by limitation the denial is not *evasive* inasmuch as there is only *one fact and* that has been stated to be not admitted[4] Where a denial is evasive leave to amend may be given under O 6 R 17 except where the defendant is found to have acted *mala fide*[5]

O 8 R. 5

R. 5. [New] Every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability :

Specific denial

Order 8 Rule 4 — Note 1

1 (1876) 3 Ch D 637 (640 641) 45 L J Ch 406 Thorp v Holdsworth

cision)
(29) AIR 1929 All 721 (723) (Pleading should be specific)
(33) AIR 1933 Cal 578 (578)

3 See Odger s Principles of Pleadings and Practice 10th Edn page 166

4 (24) AIR 1924 Mad 838 (839)

5 (1878) 10 Ch D 393 (396 397) Tildesby v Harper (On appeal from (1878) 7 Ch D 403)

O. 8 R. 5 Note 1

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission

[R. S. C, O. 19 R. 13.]

Synopsis

1. Scope of the Rule. — "The whole object of pleadings is to bring the parties to an issue, and the object of this Order is to prevent the issue being enlarged, which would prevent either party from knowing, when the cause came on for trial, what the real point to be decided was"[1] This rule states the effect of the failure to conform to Rule 3 *ante*, and must not be read in a sense inconsistent with Rule 3 therefore a *general* denial cannot mean a denial by *implication*[2] The rule permits the traversal of a statement in the plaint by saying that it is not admitted[3] The word "specifically qualifies also the words "or stated to be not admitted' and therefore, a refusal to admit must also be stated specifically[4] The words ' if not denied specifically or stated to be not admitted must be read to mean "if not denied specifically or if *not* stated to be not admitted In other words, every allegation of fact in the plaint will be deemed to be admitted, if in the written statement it is neither specifically denied nor specifically stated to be not admitted[5]

The principle of the rule does not apply to allegations in the *written statement* and hence, it cannot be said that where there is no specific denial by the plaintiff of such allegations, he admits them[6]

This rule does not apply where the allegation in the plaint as to the fact which is said to be admitted by the want of a specific denial under this rule is vague and inconclusive[7]

In the undermentioned case,[8] it was held by Niamatullah J, of the Allahabad High Court that the principle of this rule may be applied to a judgment debtor on whom a notice of application for execution of a decree containing an allegation of fact is served

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Order 8 Rule 5 — Note 1

1 (1876) 3 Ch D 637 (639) Thorp v Holdsworth (Per Jessel M R)

2 (25) AIR 1925 Mad 950 (957 958)

3 (34) AIR 1934 Mad 579 (579) (AIR 1924 Mad 838 Followed)

4 (25) AIR 1925 Mad 950 (957)

5 (27) AIR 1927 All 225 (226 227)
(1877) 35 L T 848 (849) Hall v L & N W Ry Co (Per Grove J)
(1879) 12 Ch D 758 (759) Rutter v Tregent
(33) AIR 1933 All 521 (522) 55 All 700 (Allegation stated to be not admitted amounts to denial)
(38) AIR 1938 Mad 225 (226)

6 (37) AIR 1937 Pat 428 (429)
[See however (38) AIR 1938 Nag 163 (164) ILR (1938) Nag 469 (Where an assertion is made in the written statement by a party to the effect that the parties are members of a

O. 8 R. 5
Note 2

2. Facts not denied specifically will be taken as admitted. — The effect of this rule is to relieve the plaintiff from the obligation of *proving* such allegations in his plaint as are neither specifically denied nor stated to be not admitted in the written statement[1] Thus, where in a suit for ejectment the land from which it is sought to eject a tenant is alleged to be 'old waste' under the Madras Estates Land Act, 1908, and this is not *traversed in* the written statement the defendant cannot afterwards plead that the land is not 'old waste'[2] A plea that the defendant *does not admit any of the allegations* in the plaint except such as have been expressly admitted and *that he puts the plaintiff to the proof of all allegations not so admitted is not* a sufficient denial within the meaning of this rule, every allegation so denied will be deemed to have been admitted[3] But a plea in a written statement that a particular allegation in the plaint is not admitted is *a sufficient denial within the meaning of this* rule so as to put the plaintiff to the proof thereof[4] A denial of knowledge of a particular fact is not a denial of the fact and has not the effect of putting the fact in issue *It merely means that the defendant denies that he has any knowledge of the* fact and a man can admit a fact of which he has no personal knowledge[5] Thus where a plaintiff suing as a curator of the estate of a deceased person stated in the plaint that he was authorised by the *Court to sue and the defendant stated in reply that* those allegations were not known to him, it was held that it was not open to him to raise again the question of the plaintiff's authority to sue[6] But where a landlord sues a *tenant for recovery of possession on the ground that the defendant had forfeited his* lease by denial of his title and this plea is not traversed by the defendant, such non denial, though amounting to an admission of the denial of title, will not by itself work a *forfeiture of which the plaintiff can take advantage in that suit* inasmuch as the forfeiture must have accrued *before* the suit was instituted[7]

As to the effect of admissions made in the written statement, see the undermentioned cases[8] and also *Evidence Act, Sections 17 to 31* and Section 58

Note 2

1 (19) AIR 1919 Pat 162 (162)
(16) *AIR 1916 Bom 103 (103 104) 41 Bom 89*
(11) 9 Ind Cas 470 (472) (Low Bur) (No reference to notice in the written *statement—Held* defendant must be deemed to have admitted notice)
(02) 26 Bom 735 (737 738)
(20) AIR 1920 Lah 66 (66)
(23) AIR 1923 Nag 7 (7)
(72) 18 Suth W R 287 (287) (Averments upon which *no issue is framed must be taken to be* admitted)
(38) 1938 Oudh W N 1080 (1084) (Suit for damages for breach of lease—Lease not registered — Defendant not specifically denying terms of lease alleged in plaint — *Held* suit could be decreed on such admission in written statement though *lease was inadmissible in evidence*)
(38) AIR 1938 Bom 108 (108) I L R (1938) *Bom 102*
[*See also* (31) AIR 1931 Lah 203 (204) (*Statements on certain point by plaintiff—Defendant* agreeing—That much part of plaintiff's claim should be deemed to be admitted, no further proof being necessary)
(1863) 1 Bom H C R 85 (86)
(31) AIR 1931 Lah 473 (475) 12 Lah 623 (Allegations not denied will be presumed to be correct)]

2 (19) AIR 1919 Mad 927 (927) 42 Mad 315
3 (25) AIR 1925 Mad 950 (957)
(1878) 7 Ch D 877 (877) *Harris v Gamble.*
4 (33) AIR 1933 All 521 (522) 55 All 700
(*'24) AIR 1924 Mad 838 (839)*
(34) AIR 1934 Mad 579 (579)
5 (34) *AIR 1934 Rang 278 (280) (Defendant in* a mortgage suit merely denied knowledge of the *mortgage—It is not a specific denial of the mortgage* and mortgage *held* to be admitted)
6 (*31) AIR 1931 All 423 (424)* ('Not known' does not mean 'not admitted')
7. (*29) AIR 1929 Lah 409 (410)*
8 (68) 9 Suth W R 290 (291) (Defendant's admission *should be taken as a whole*)
(68) 9 Suth W R 130 (130) (A written statement *is not a plea by way of avoidance and confession* and the whole statement must be taken together)
(*68) 9 Suth W R 190 (191 192) (F B) (Do)*
(67) 7 Suth W R 29 (30) (Whole admission should be put in)
(1864) 1864 Suth W R (Gap) 305 (306) (Admission when relied upon as against the opponent must be taken as a whole — This rule does not apply to pleadings)
(74) 22 Suth W R 220 (221) (Admission in a written statement—Whole of the written statement must be put in)

3 "Except as against a person under disability." — The rule of admission by non denial does not apply where the defendant is a person under disability such as a minor[1] But this exception has nothing to do with *the conduct of the suit* Thus, if at the time of the framing of issues or at the trial the person representing a minor defendant admits certain allegations of fact it cannot be said that this rule in any way affects such admissions[2]

4. Admission, if binds co-defendants — As to whether and when an admission made by a defendant in his written statement will bind co defendants see Sections 17 to 23 of the Evidence Act and the undermentioned cases[1]

5 Court may require the facts so admitted to be proved — In England the rule as to admission by non denial is very stringent and a defendant who omits to traverse in his defence any allegation of fact in the statement of claim is not allowed to traverse that fact at the trial In India the general practice is not to construe the pleadings very strictly and on this principle the defendant who had omitted to traverse in his written statement allegations made in the plaint, was allowed in cases arising under the old Code to traverse them at the hearing under special circumstances[1] The proviso to this rule now makes it clear that the failure of the defendant to deny the allegations in the plaint does not necessarily amount to proof and that the Court can in its discretion require proof of such allegations[2] The discretion should be

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(24) AIR 1924 Nag 103 (103) 20 Nag L R 7 (Admission should be taken as a whole — Prin

(68) 1 Beng L R A C 133 (136) (A qualified statement cannot be used apart from the qualification against the person making it — But where a series of unqualified statements are made any one of them can be used)

(81) 5 Bom 143 (152) (Suit for specific performance of an agreement—Defendant in his written

of deed by a defendant does not dispense with necessity of proving its validity by plaintiff)

Note 3

1 (23) AIR 1923 Mad 114 (115)

2 (19) AIR 1919 Mad 698 (698)

(36) AIR 1936 Pat 428 (429) (Admission by father —Minor represented by pleader not denying it—Minor is bound by admission)

Note 4

1 (75) 23 Suth W R 214 (219) 2 Ind App 113 (P C) (Will not bind co defendants)

(28) AIR 1928 Lah 769 (770 771) (Admission by one defendant is no evidence against the co defendants)

(85) 7 All 353 (359) (Defendant by his admission cannot bind the shares of the co defendants)

(89) 16 Cal 627 (635) 16 Ind App 96 (P C) (Do)

(84) 6 All 395 (397) (Do)

(81) 9 Cal L Rep 359 (360) (Do)

(97) 2 Cal W N 166 (167 168) (Do) (Admission by one co tenant as to who is the landlord is not binding on the others)

(85) 11 Cal 588 (590 591) (But co contractors are bound if admission is made with reference to the transaction in issue)

Note 5

1 (85) 11 Cal 111 (117 118) 11 Ind App 186 (P C) (Case under S 8 of Regulation 17 of 1806)

(

in India)

(07) 34 Cal 57 (64) (Do)

(84) 6 All 406 (413 414)

(70) 7 Bom H C R A C 136 (137) (Mere fact that an allegation in the plaint is not traversed by the defendant does not relieve the plaintiff of the onus of proving his case)

(73) 21 Suth W R 59 (60) (Pleadings in Indian Courts should not be construed with the same strictness as they are done in English Courts)

(72) 17 Suth W R 171 (172) (Mere fact of non traverse of the plaintiff s allegation of heirship was *held* not to amount to an admission of title)

(70) 14 Suth W R 55 (57) (The procedure in this country is not such that if a defendant fails to dispute or contest a point he thereby admits it)

2 (14) AIR 1914 Cal 842 (842 843) (Appellate Court can decide point in issue in spite of failure of denial of the specific point)

O. 8 R. 5
Notes 5-6

exercised where the Court suspects that the admission is made collusively, or to avoid a rule of public policy [1] or where the defendant's failure to deny the allegation is due to ambiguous and unsatisfactory assertions in the plaint [4] or where the defendant is taken by surprise or misunderstands the plaint [5] The discretion should usually be exercised by the Court of first instance [6]

6. Rule does not apply where no written statement is filed. — It is clear *from the wording of this rule that it is not intended to apply to a case where the* defendant *has not put in a written statement* A Court is, therefore not justified in passing a decree on no evidence where the defendant does not file a written statement [1]

O. 8 R. 6

R. 6. [S. 111.] *(1)* Where in a suit for the recovery of money[3] the defendant claims to set-off against the plaintiff's demand any ascertained sum of money[4] legally recoverable[6] by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court,[8] and both parties fill the same character[9] as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off.

Particulars of set off to be given in written statement

(2) The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off: but this shall not affect the lien, upon the amount decreed, of any pleader[16] in respect of the costs payable to him under the decree.

Effect of set-off

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off.

('24) AIR 1924 All 160 (162) 46 All 55 (Words not admitted ... at least amount to a denial by implication)
('24) AIR 1924 Lah 744 (744) (Fact admitted by defendant's mukhtear may be required to be proved)
('19) AIR 1919 Mad 469 (470) (Admission of execution of document will not cure the defect from want of proper attestation)
('18) AIR 1918 Cal 402 (402, 403) (Pleadings in mofussil are not to be strictly construed)
('23) AIR 1923 Nag 83 (84) (Ex parte case—Court requiring proof under this rule must state points to be proved in the form of issues)
('28) AIR 1928 Nag 165 (166) (Ex parte case—Points to be proved must be stated in form of issues)
('15) AIR 1915 Mad 770 (772, 773)
('18) AIR 1918 Cal 178 (179) (As the standard of pleadings in this country is not very high they ought not to be strictly construed)

3 ('20) AIR 1920 Mad 588 (589)
4 ('24) *AIR 1924 All 150 (152) 45 All 571*
5 ('23) AIR 1923 Mad 114 (115)
6 ('20) AIR 1920 Mad 588 (589)

Note 6

1 *('17) AIR 1917 Cal 269 (272, 274) 43 Cal 1001*
('29) AIR 1929 Lah 769 (771)
('30) AIR 1930 Pat 293 (296) (In such a case defendant is not debarred from giving evidence traversing allegation made in plaint)
('25) AIR 1925 Nag 350 (351) (Does not apply to oral pleading)
('35) AIR 1935 Pat 306 (331) 14 Pat 70 (Omission to file written statement does not amount to admission *of facts stated in plaint*)
[**But see** ('36) AIR 1936 Bom 285 (295, 296) 60 Bom 788 (Rule applies even to cases where no written statement is filed)]

Illustrations

(a) *A* bequeaths Rs 2 000 to *B* and appoints *C* his executor and residuary legatee *B* dies and *D* takes out administration to *B* s effects *C* pays Rs 1 000 as surety for *D* then *D* sues *C* for the legacy *C* cannot set off the debt of Rs 1 000 against the legacy for neither *C* nor *D* fills the same character with respect to the legacy as they fill with respect to the payment of the Rs 1 000

(b) *A* dies intestate and in debt to *B* *C* takes out administration to *A* s effects and *B* buys part of the effects from *C* In a suit for the purchase money by *C* against *B* the latter cannot set off the debt against the price for *C* fills two different characters, one as the vendor to *B*, in which he sues *B*, and the other as representative to *A*

(c) *A* sues *B* on a bill of exchange *B* alleges that *A* has wrongfully neglected to insure *B* s goods and is liable to him in compensation which he claims to set off The amount not being ascertained cannot be set off

(d) *A* sues *B* on a bill of exchange for Rs 500 *B* holds a judgment against *A* for Rs 1 000 The two claims being both definite pecuniary demands may be set off

(e) *A* sues *B* for compensation on account of trespass *B* holds a promissory note for Rs 1 000 from *A* and claims to set off that amount against any sum that *A* may recover in the suit *B* may do so, for, as soon as *A* recovers both sums are definite pecuniary demands

(f) *A* and *B* sue *C* for Rs 1 000 *C* cannot set off a debt due to him by *A* alone

(g) *A* sues *B* and *C* for Rs 1 000 *B* cannot set off a debt due to him alone by *A*

(h) *A* owes the partnership firm of *B* and *C* Rs 1,000 *B* dies, leaving *C* surviving *A* sues *C* for a debt of Rs 1 500 due in his separate character *C* may set off the debt of Rs 1,000

[1877, S. 111; 1859, S. 121; R. S. C., O. 19 R. 3., See O. 20 Rule 19.]

Local Amendment

PATNA

Add the following words

"and the provisions of Order 7, Rules 14 to 18 shall *mutatis mutandis*, apply to a defendant claiming set off as if he were a plaintiff "

Synopsis

1. Legislative changes. — Sub clause (3) of this rule is new

2. Scope and applicability of the Rule. — The doctrine of set off may be defined as ' the extinction of debts of which two persons are reciprocally debtors to one another, by the credits of which they are reciprocally creditors to one another "[1]

Order 8 Rule 6 — Note 2

1. ('84) 6 All 351 (355) (Reciprocal acquittal of debts between two persons) ('18) AIR 1918 Mad 995 (997) - 40 Mad 1001

O. 8 R. 6 Note 2

A plea of *set off* must be distinguished from a plea of *payment* A payment refers to a satisfaction or extinguishment of a debt effected *prior to the raising of the defence* of payment while a plea of set off *prays for* a satisfaction or extinguishment thereof commencing in the future after the date of the plea[2] In order to enable a defendant to claim a set off the following conditions must exist[3] —

(1) The suit must be for *recovery of money*

(2) The defendant s claim must be for an *ascertained* sum of money

(3) It must be *legally recoverable*

(4) Both the parties must fill the *same character* as they fill in the plaintiff s suit

(5) The sum claimed by way of set-off *should not exceed the pecuniary limits* of the jurisdiction of the Court

As Illustration (d) to the rule shows a defendant can claim as set off under this rule a sum for which he has already obtained a decree against the plaintiff[4]

Order 20 Rule 19 clause (1) shows that a decree can be passed in favour of a defendant pleading a set off, therefore the defendant is in the position of a plaintiff as regards a set off pleaded by him in respect of the balance claimed by him[5] No Court can entertain a plea of set off if it has no jurisdiction to take cognizance of a suit if one is brought for the recovery of the money sought to be set off[6] But it is not necessary that the Court should have territorial jurisdiction over the subject matter of the claim of set off if a separate suit is brought in respect of it[7]

Where the defendant does not specifically plead a set off in his written statement the Court may decline to allow the same to be set up subsequently[8] Similarly where no issues are framed on the plea and no application is made by the

2 ('25) AIR 1925 Rang 22 (25) 2 Rang 349
('10) 5 Ind Cas 67 (68) (Cal) (The suit was for rent due for 1311 1312 & 1313 The defendant pleaded that the rent due from the plaintiffs to them for 1309 & 1310 should be set off — *Held* that the matter was not of set off' in the technical sense but of account and set off in the general sense)
('7J) 4 Cal L Rep 296 (297) (Suit for arrears of rent — That Collector who was in charge of the land on behalf of the defendant had paid the rent is a plea of payment not of set off)
[*See also* ('27) AIR 1927 Nag 120 (120) (Plea of satisfaction)
('89) 16 Cal 711 (714) (Right of set off to be allowed even in cases of cross demands arising out of the same transaction)]

3 ('31) AIR 1931 Nag 12 (13) (Suit on negotiable instrument — Set off can be claimed)
('20) AIR 1920 Mad 819 (820 821) 42 Mad 873 (Suit on contract — Equitable set off barred at the date of the suit cannot be claimed)
('92) 15 Mad 29 (33)
('32) AIR 1932 Bom 617 (618). (Difference between set off and counter claim pointed out)
('86) 1886 All W N 172 (172)
('36) AIR 1936 Pesh 57 (60 61) (Essentials of set off indicated)
[*See also* ('39) AIR 1939 Pat 142 (144) (The claim must be ascertained and legally recoverable)]

4 ('39) AIR 1939 Bom 386 (389)

5 ('20) AIR 1920 Mad 819 (870) 42 Mad 873
('34) AIR 1934 All 543 (545) 56 All 912 (Decree may be granted to defendant though plaintiff s suit is dismissed)
('92) 15 Mad 29 (34)
('70) 5 Beng L R 639 (642)
('69) 6 Bom H C R A C J 151 (152) (Defendant denying plaintiff s claim can plead set off)
('09) 9 Cal W N 748 (749) (Set off admitted in plaint — Defendant entitled to decree though plaintiff s suit fails)

6 ('93) 15 All 404 (405) (The Court of Revenue cannot entertain a set-off in a case in which the help of the Civil Court is required)
('32) AIR 1932 Bom 617 (618) (Suit on subject-matter of set off not entertainable by Court trying suit on grounds of jurisdiction — Set-off can be entertained)
('99) 1899 All W N 143 (145 147)
('12) 15 Ind Cas 526 (528) (Oudh)

7 ('32) AIR 1932 Bom 617 (619)

8 ('27) AIR 1927 Lah 431 (432)
('15) AIR 1915 Mad 242 (243) (No plea of set-off can be raised without filing a written statement)
('70) 14 Suth W R 473 (473) (Defendant seeking to claim set off is bound to tender a written statement)
[*See also* ('97 01) 1897 01 Upp Bur Rul 214]
[**See however** ('10) 6 Ind Cas 162 (162 163) 32 All 525 (But in a suit by a principal against an agent for accounts it is unnecessary for the defendant to plead a set off)]

defendant therefor, it is not open to him to raise it in appeal[9] Nor can a defendant who has failed to claim a set off before decree in a suit, claim it in execution proceedings[10] Where, however, he states in the written statement that he will file a separate suit in respect of his claim, he is not precluded from proving a set off afterwards on getting the written statement amended[11]

Where the defendant sets up a plea of set off falling under this rule, the Court has no option to refuse to adjudicate on it[12] But a plaintiff cannot compel a defendant to plead a set off Thus, where a plaintiff in a suit deducted a sum of money due from him to the defendant with a view to bring the suit within the jurisdiction of the Small Cause Court, it was held that the procedure was illegal and that the plaintiff could not enforce a set off on the defendant[13]

3. Suit must be one for the recovery of money. — Under the Code of 1859, it was necessary that the suit should have been for a *debt* A set off could not, therefore be pleaded in a suit for *mesne profits,* such suit not being for the recovery of a debt[1] Under the present rule it is sufficient that the suit is one for the *recovery of money* The Illustrations to this rule show that no matter what the title may be, no matter whether such title arises *ex delicto* or *ex contractu,* so long as the *relief sought is to recover money,* it is a suit for money, and a set off can be pleaded therein under this rule[2] A suit on a negotiable instrument is a suit for money[3] But a suit merely for dissolution of a partnership or for an account is not a suit for money,[4] though, if there is also a prayer for the payment of such balance as might be found due to the plaintiff, the suit would be one for the payment of money[5] The High Court of Rangoon has held that a suit on a mortgage for payment of money and in default thereof for the sale of the mortgaged property is a suit for the recovery of money within the meaning of this rule[6] The High Court of Calcutta has however, held that a suit to enforce a mortgage under which the right to a personal decree is barred is not a suit for money and no set off can be pleaded therein under this rule[7]

4. "Any ascertained sum of money." — See Illustrations (c) (d) and (e) above An 'ascertained sum of money' means a sum of money of which the amount is fixed and known it does not necessarily mean a sum *admitted* by the other side or *decreed* by Court the words are used in contradistinction to unliquidated damages[1] The mere fact that an arithmetical calculation is necessary to arrive at the total sum

9 ('86) 13 Cal 124 (135) 13 Ind App 48 (PC)
10 ('24) AIR 1924 Oudh 434 (435) 27 Oudh Cas 248
11 ('25) AIR 1925 Mad 298 (299)
12 ('20) AIR 1920 Mad 142 (143)
13 ('94) 21 Cal 419 (426 427)
('25) AIR 1925 Sind 319 (320)

Note 3

1 ('66) 5 Suth W R 160 (160)
2 ('85) 10 All 587 (598 599) (Suit for dissolution of partnership with a prayer for such sum ...)
(Suit for account only is not one for money)
('88) 10 All 587 (593)
5 ('88) 10 All 587 (593)
6 ('33) AIR 1933 Rang 13 (14) (8 Cal W N 174 distinguished as a case where there was no personal remedy)
7. ('04) 8 Cal W N 174 (177) (Claim also cannot be regarded as one for equitable set off as it does not arise out of the same transaction)

Note 4

1 ('10) 5 Ind Cas 67 (68) (Cal)
('33) AIR 1933 Rang 13 (14) (Plea of set-off in respect of a sum not admitted by plaintiff is yet a claim for an ascertained sum of money)
('24) AIR 1924 All 672 (673) 46 All 922
('31) AIR 1931 Nag 12 (13) (Ascertained sum excludes such items as unliquidated damages and mesne profits)
('16) AIR 1916 Pat 167 (169) (Ascertained sum means amount which is beyond challenge and beyond dispute concluded and conclusive)
('10) 5 Ind Cas 211 (212) (All) (A plea of set-off can succeed even where no money is found due to plaintiff)
(1880) 5 Q B D (N S) 569 (575) Stooke v Taylor (For difference between set-off and counter-claim, see the observations of Cockburn C J)

O. 8 R 6
Notes 4-5

cannot render such total an unascertained sum of money[2] Thus where in a suit by a landlord against his tenant for rent the tenant pleaded that he was entitled to set off a commission of three per cent on the amount of the collection made by him on behalf of the landlord it was held that the set off was for an ascertained sum of money[3] But where the set off is in respect of a claim for damages which are not ascertained[4] or where the amount can be ascertained only on taking accounts[5] or by determining the *quantum* of the share due to the defendant,[6] or where the claim is for interest on a sum due to the defendant fixed by him at an arbitrary rate[7] this rule will not apply Unascertained sums may, however be set off by the *consent of parties* when they compromise the suit[8]

5 **Equitable set-off in cases of unascertained sums of money** — The right to set off dealt with by this rule is called a *legal* set off But the rule does not take away from the parties any right to set off which they would have had *independently* of the Code[1] Thus in cases of mutual debits and credits and in cases where cross demands arise out of the same transaction or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant driven to a cross suit Courts of Equity in England have allowed a plea of set off even though the amount may be *unascertained* This set off is known as an *equitable* set off and such a right is recognised in this country also apart from the provisions of this rule[2] The provisions of O 20 R 19 sub rule (3) also show that this

of a d finite amount received on behalf of defendant)
(17) AIR 1917 Pat 909 (960) (Several orders

for rent)

not seeking to set aside the contract of mortgage, is in the nature of an unliquidated claim)
2 (04) 2 Low Bur Rul 186 (187 189) (FB) (Ascertained means ascertained at the time of pleading and not subsequently)
3 (16) AIR 1916 Pat 84 (84)

mitted by the mortgagee against latter s claim for mortgage money)
(68) 3 Agra H C R 43 (44) (Unascertained damages for breach of contract)
(36) AIR 1936 All 527 (593)
5 (31) AIR 1931 Cal 23 (24) 57 Cal 855
(19) AIR 1919 Sind 68 (69) 12 Sind L R 70 See Illus (d) to the rule
6 (17) AIR 1917 Pat 533 (535) 2 Pat L Jour 451 (Defendant pleader claiming to set off a sum

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8

Note 5

1 (07) 34 Cal 97 (99) (*Obiter*)
(83) 9 *Cal* 914 (918)
(10) 7 Ind Cas 1006 (1006) 1910 Pun Re No 77 *See also cases in foot note (2) below*

tenant — Agreement to deduct costs for rent brings the matter within same transaction in *suit for arrears of rent*)
(30) AIR 1930 All 875 (876) (Equitable set off— No court fee necessary)
(33) AIR 1933 Sind 247 (249) (In a suit for accounts defendant is entitled to say that on taking accounts he would be entitled to something and Court can pass a decree in his favour)
(05) 27 All 145 (148)
(93) 15 All 9 (10)
(97) 21 Bom 126 (135 136) (Question whether equitable set off should be granted depends upon the facts of each case)

rule is not exhaustive The distinction, however between a legal set off and an equitable set off is that while in the former case the Court is *bound* to entertain and adjudicate upon the plea when raised [3] the defence of equitable set off cannot be claimed as a *matter of right* [4] but the Court has a discretion to adjudicate upon it in the same suit or to order it to be dealt with in a separate suit [5] Thus, where a Court thinks that the investigation into the claim of equitable set off will cause great delay, it may refuse to allow it[6] or may order the enquiry to proceed on such terms as it thinks fit [7]

It is not the law that a claim to set off a definite sum of money can only be put forward under O 8 R 6 Nor is it the case that an equitable set off can be claimed only where the claim is to an *unascertained* amount An equitable set off can be claimed also where the claim of the defendant is to an *ascertained* sum [8]

It is essential for a valid claim to an equitable set off that the cross demands should have arisen out of the *same transaction* A plea of equitable set off will not be available where it relates to a different transaction [9] Thus, where a plaintiff who promised to supply seven hundred tons of coal, supplied only 469 tons and sued the defendant for the price thereof the latter can claim set off in respect of damages for the

('80) 4 Bom 407 (413) (Demands connected with same transaction — Amount payable by plaintiff was capable of being determined immediately—Set off allowed)
('85) 7 All 284 (286 287)
('75) 7 N W P H C R 157 (163 164) (On facts set off was not allowed)
('23) AIR 1923 Bom 113 (118)
('13) 21 Ind Cas 716 (718) (Cal) (A time barred debt can be claimed by way of equitable set off)
('89) 16 Cal 711 (714)
('85) 11 Cal 557 (560 561)
('31) AIR 1931 Cal 358 (359)
('13) 19 Ind Cas 901 (903) (Cal) (Principal and agent)
('05) 32 Cal 576 (580) (Law of equitable set off applies where the cross claims though not arising out of the same transaction are closely connected together)
('05) 9 Cal W N 178 (189 190)
('93) 20 Cal 527 (531)
('69) 4 Mad H C R 120 (126 127) (See as to when set off can be claimed)
('85) 1885 Pun Re No 47 p 89
('13) 19 Ind Cas 390 (390) 6 Sind L R 138
('14) AIR 1914 P C 153 (154 155) 17 Oudh Cas 33 (P C)

('36) AIR 1936 Cal 7 (?8)
('38) AIR 1938 Bom 3(?50) I L R (1938) Bom 3
[See ('3?) AIR 1938 All ?? (?93) (In this case

[See also ('14) AIR 1914 Sind 137 (138) 8 Sind L R 193 (Suit for accounts and to recover money due on a dissolved partnership—Defendant s claim for decree on account is not a counter claim)]
[But see ('68) 10 Suth W R 295 (295)]
3 ('20) AIR 1920 Mad 142 (143)
4 ('97) 21 Bom 126 (135)
5
6
7
8

[But see ('36) AIR 1936 Nag 290 (290) I L R (1937) Nag 481]
9 ('04) 8 Cal W N 174 (177)

by way of set-off an amount as share of profits realized by plaintiff)
('23) AIR 1923 Bom 94 (95) 47 Bom 18?
('?4) ?? Suth W R 15 (16 17) (Circumstances under which equitable set-off will be allowed considered)
('38) AIR 1938 Lah 484 (485) (A purchaser pro

O. 8 R. 6 Notes 5-6

breach of contract caused by the failure to supply the full stock promised[10] Similarly, in a suit for the recovery of the principal and interest due on a mortgage bond, the defendant can plead an equitable set off in respect of the loss occasioned by the plaintiff s failure to make repairs while in possession of the mortgaged properties[11]

Similarly, where a washerman who lost some of the articles given to him for washing, sued his employer for wages it was held that the latter could equitably set off the price of the articles so lost[12] In all the above cases it will be seen that the cross demand of the defendant arose out of the same transaction as that on which the plaintiff s claim was based But where the plaintiff sues a limited company for recovery of dividend payable to him as a shareholder, the company is not entitled to set off damages for breach of a contract by him to deliver cotton[13] The reason is that the latter claim arises out of a *different transaction* altogether from that on which the plaintiff s claim is based

6. "Legally recoverable from plaintiff." — Where a *legal set off* is claimed it is necessary that the amount set off must be 'legally recoverable' from the plaintiff The words legally recoverable' have no reference to the ability of the debtor to pay the demand in full a sum is legally recoverable, though, in the result the creditor must be satisfied with a dividend[1] A sum cannot be said to be 'legally *recoverable* where the plaintiff is not bound by law to pay it[2] or where he is not liable to the defendant in respect of that debt[3] or where the claim is barred by *res judicata*[4] or is based upon a decree incapable of execution[5] or upon a document not receivable in evidence[6] A *barred debt* is not legally recoverable and therefore, in order to enable a defendant to claim a set off under this rule the sum due to him must not have been barred by the law of limitation *on the date of the suit*[7] The right to plead this defence arises when the action is brought so that it does not become barred subsequently by

—Sale and mortgage being separate transactions *B s claim held could not be reduced and being* unliquidated *held* was not allowable under O 8 R 6 C P C)
(36) 40 Cal W N 751 (752) (A claim for equitable *set off* will not arise simply because there are cross demands there must be some connexion between them which will make it inequitable to drive the defendant to a separate suit The two *claims* must arise out of the same transaction and there must be knowledge on both sides of an existing debt due to one party and a credit by the *other* party founded on and trusting to such *debt as a means of discharging it*)
[*See also* (94) 21 Cal 419 (423)]

10 (10) 6 Ind Cas 924 (925) 37 Cal 334
(93) 15 All 9 (11)

11 (92) 15 Mad 290 (291)

12 ('10) 7 Ind Cas 1006 (1006) 1910 Pun Re No 77

13 (23) AIR 1923 Bom 24 (25 26) 47 Bom 182

Note 6

1 (06) 30 Bom 173 (193 194)

2 (92) 16 Mad 29 (34)
('79) 4 Cal 576 (581)
(82) 11 Cal L Rep 140 (142)
(66) 6 Suth W R (Civ Ref) 26 (27) (Case of rent —Suit for house rent — Tenant repairing the house without permission from the lessor cannot set off the expenses of repair)
(74) 22 Suth W R 1 (2) (Suit for rent—Tenant cannot set-off money in deposit with plaintiff unless at the time of suit the deposit had become payable)

3 (26) AIR 1926 Oudh 301 (302 303) (Suit by vendee for return of purchase *money* on the ground of dispossession by vendor s relatives — Set off of mesne profits cannot be allowed)
(26) AIR 1926 Sind 225 (228) 21 Sind L R 385
(06) 11 Cal W N 215 (216) (*Suit by benamidar* against *A*—Costs awarded to *A*—Subsequent suit by real owner against *A*—Latter cannot set off costs)

4 (71) 15 Suth W R 252 (252)
[*See also* (86) 8 All 396 (401) (Claim for set-off was not barred by res judicata—Claim was allowed)]

5 (71) 16 Suth W R 309 (309 310)

6 (70) 13 Suth W R 307 (309)

7 (21) AIR 1921 Cal 67 (68) 48 Cal 817
(*21*) *AIR 1921 Mad 688* (688) (Time barred *debt* cannot be claimed by way of set off)
(19) AIR 1919 Cal 916 (917) (Debt barred at the time of filing the written statement cannot be set off)
(18) AIR 1918 Mad 259 (262)
(85) 8 Mad 381 (383) (Only so much of the claim as is not barred will be allowed to be set off)
(*30*) *122 Ind Cas 490* (*490*) (*Lah*)
(98) 1898 Pun Re No 53, page 178

the statute of limitations[8] A claim which is barred by limitation according to the law of the place where the suit is instituted, but is subsisting according to the *lex loci contractus* is a legally recoverable claim[9]

Where *A* transfers to *C* a debt due to him by *B*, *C* takes it subject to the liabilities and equities to which *A* is subject as against *B*, under the provisions of Section 132 of the Transfer of Property Act, 1882 If *B* therefore has a legally recoverable claim against *A* in respect of another debt, he can enforce the same as against *C* also, by way of set off[10]

In cases of *equitable set off*, can a barred debt be pleaded by way of set off? It has been held that where there is a fiduciary relationship, as of trustee and *cestui que trust* or where there is accountability as between plaintiff and defendant, even barred debts can be set off[11] But in the undermentioned case[12] the High Court of Madras refused to extend this principle to a case of lessor and lessee and to allow an equitable set off in answer to a suit *for rent*, on the ground that equity cannot act contrary to the statute of limitations or evade its operation See also the undermentioned cases[13]

Where on a plea of set off it is found that money is due to the defendant *in excess* of that due to the plaintiff, and the defendant's claim is barred *on the date of the written statement* but not on the date of the plaint, the question arises whether the Court can pass a decree for the balance in favour of the defendant The High Courts of Madras[14] Bombay,[15] Allahabad,[16] and Calcutta[17] and the Judicial Commissioner's

(36) AIR 1936 Pesh 57 (61) (Set off based on

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8. (1850) 15 Q B 1016 Walker v Clements
(21) AIR 1921 Cal 67 (68) 48 Cal 817

9. ('13) 35 All 238 (239 240)

10 ('12) 16 Ind Cas 686 (687) (Mad) (Assignee by operation of law)
(07) 30 Mad 235 (238)
(07) 17 Mad L Jour 481 (482) (Suit by receiver of estate of *A* against *B*—*B* having claim against

payee to the maker)
[*See* (36) AIR 1936 Nag 217 (218) (Right to

305 (Trustee and *cestui que trust*)
(05) 32 Cal 576 (580) (Between mortgagor and mortgagee)

(13) 21 Ind Cas 701 (701 702) (Mad) (Do)
(80) 5 Cal 333 (335) (Do)
(93) 6 C P L R 22 (23) (Do)
(26) AIR 1926 Lah 633 (634) (Do)
(26) AIR 1926 Pat 77 (79) (Do)
('13) 21 Ind Cas 716 (718) (Cal)
(07) 12 Cal W N 60 (62)

debt)]

12. ('17) AIR 1917 Mad 258 (259) 39 Mad 939

13. (20) AIR 1920 Mad 819 (821 822) 43 Mad 873 (Where defendant could sue independently if the claim were within time — Such claim if barred by limitation cannot be pleaded as set off)
('23) AIR 1923 Bom 113 (118) (Equitable set-off not allowed if claim barred on the date of suit)
(36) AIR 1936 Nag 290 (290) ILR (1937) Nag 481 (Ascertained sum barred by limitation—No equitable set-off can be claimed)

14 (20) AIR 1920 Mad 819 (820 821 822) 43 Mad 873

15 (23) AIR 1923 Bom 113 (118) (In the case of a counter-claim it is enough if it is proved to have been barred when it was pleaded)

16 (34) AIR 1934 All 427 (428 430) 56 All 821 [But see (85) 7 All 254 (257 255)]

17. (36) AIR 1936 Cal 277 (278 279) (In a case

O. 8 R. 6
Notes 6-9

Court of Nagpur[18] have held that the plea is a weapon of defence, up to the amount of the plaintiff's claim but that it is one of attack so far as the amount is in *excess* of the claim and that, therefore, limitation in regard to its recovery must be determined with reference to the date of the *written statement*

7. Separate debt not to be set-off against joint debt. — Illustrations (f) and (g) to this rule adopt the general principle of law that a joint debt and a separate debt cannot be set off against each other [1] Where the debt sought to be set off is due jointly to the defendant and another who is not a party to the suit, it cannot be pleaded by way of set off, for, the defendant could not have sued the plaintiff without making the other person a party to the suit [2]

See also the undermentioned cases [3]

8. "Not exceeding the limits of the pecuniary jurisdiction of the Court." — It has been seen in Note 2, *ante*, that a Court cannot entertain a plea of set off if it has no jurisdiction to take cognizance thereof It follows that the value of the claim of set off must be within the *pecuniary jurisdiction* of the Court [1] Where both the amount of claim and the value of the set off are each within the jurisdiction of the Court, it is immaterial that the *combined amount* of the two claims is beyond its jurisdiction [2] The words not exceeding the pecuniary limits of the jurisdiction of the Court must be construed as applying to the whole of the ascertained sum, therefore the valuation of the set off for purposes of jurisdiction is the *entire* sum pleaded and not the difference between the plaintiff's claim and the defendant's claim.[3] But where the plaintiff *admits* in the plaint any portion of the defendant's claim, that portion must be deducted in determining the jurisdiction of the Court to try the set off [4] In a small cause suit a set off beyond the pecuniary limits of the Small Cause Court's jurisdiction cannot be entertained, even though it may be within the pecuniary limits of that Court sitting on the original side [5]

9. Both parties must fill the same character. — In order to entitle a defendant to plead a set off it is necessary that the parties should fill *the same character* as they fill in the plaintiff's suit [1] See also Illustrations (a) and (b) to this

amount due to him the claim must be legally recoverable at the date of the written statement in which he makes the claim)

18 ('25) AIR 1925 Nag 445 (447)
(*See also* ('37) AIR 1937 Nag 210 (210 211) (Suit for money due in partnership business—Defendant pleading discharge and payment of loan to plaintiff and claiming same—Claim is counter claim and if barred on the date of written statement cannot be allowed)]

Note 7

1. ('85) 9 Bom 373 (404)
('78) 2 Cal L Rep 414 (418) (Case of rent — For set off, the debts should be mutual due from and to the same parties and in the same right)
1 Ind Jour (NS) 354
('75) 23 Suth W R 134 (134, 135) (Rights not mutual to the opposing parties cannot be set off)
2. ('10) 5 Ind Cas 570 (571) (Cal)
3. ('34) AIR 1934 All 543 (545, 546) 56 All 912 (To a suit for joint debt defendant, if he denies former debt may plead set off due to him alone — Illus (g) to O 8 R 6, does not apply)
('36) AIR 1936 Pesh 57 (61) (Suit by depositor against Bank to recover deposit—Bank claiming set off in respect of debt on promissory note executed by depositor and others—Set-off cannot be allowed)

Note 8

1. ('71) 3 N W P H C R 114 (116)
('32) AIR 1932 Bom 617 (617)
('83) 1883 All W N 5 (5) 5 All 236 (Provided the set off is within the limits it is immaterial if it exceeds the claim of the plaintiff)
2 ('89) 1889 Pun Re No 69 page 220
3. ('25) AIR 1925 Rang 65 (66, 67) 2 Rang 462 (Same rule applies to equitable set-off)
('25) AIR 1925 Rang 22 (25) 2 Rang 349.
('93) 20 Cal 527 (532)
('90) 1890 Pun Re No 17, page 46
4 ('25) AIR 1925 Rang 65 (66) 2 Rang 462
5. ('90) 14 Bom 371 (372) (See S 33 Act IX of 1887)
(**But see** ('88) 12 Bom 31 (33) (Submitted not correct)]

Note 9

1 ('27) AIR 1927 Lah 223 (229) 8 Lah 105 (Dealings " not mutual " cannot be set off one against the other)

rule Thus, an amount due to the defendant in the capacity of a *manager* cannot be set off against a *personal* claim against him [2]

10. Winding-up proceedings.—A debtor to a company, who is not a member thereof, is entitled in an action by the liquidators to recover the amount due from him, to plead by way of set off an ascertained sum of money due to him from the company, provided it had become payable before the date of suit [1] But a debt due by the company to a firm of which the defendant is a partner cannot be set off since the defendant does not fill the *same character* as in the plaintiff's suit [2] A member of a company with limited liability, which is under liquidation, is not entitled to set off paid up calls or calls to be paid up against a debt due by him to the company and thus give himself a preference over the other creditors of the company [3] But, in a suit by the liquidator of a company for recovery of money due to the company from a director, the director can plead a set off in respect of sums due to him from the company [4]

11. Insolvency proceedings. — Section 47 of the Presidency Towns Insolvency Act (III of 1909) and Section 46 of the Provincial Insolvency Act (V of 1920) provide for set off in case of *mutual dealings* between an insolvent and his creditors There can be no set off unless there are mutual dealings [1] Mutual credits which may be set off include credits which have a natural tendency to terminate in debts, and not merely credits which must *necessarily* terminate in debts [2] This principle of set off in insolvency is a doctrine of equity and its object is not merely to avoid cross actions, but to do substantial justice Therefore, it cannot be extended to a case where at the time of insolvency the debtor of the insolvent, with full knowledge that the latter has become hopelessly involved, buys a third person's claim against the insolvent in order to relieve himself of the liability of having to pay his just debts [3]

12. Proceedings under the Agra Tenancy Act and other special Acts. — Section 193 (g) of the Agra Tenancy Act (II of 1901) provides that no set off shall be allowed in any suit under that Act except a sum due to the defendant on an *unsatisfied decree under that Act* or any other enactment repealed thereby [1] No set off can be allowed, under Section 140 of the Oudh Rent Act (XXII of 1886), in a suit for

(92) 15 Mad 29 (33) (Debt due to defendant by deceased can be set off in a suit by the legal re

[illegible] claim as mamdar — Defendant s as pujari—No set off)
(91) 15 Bom 186 (189) (Different character)
(25) AIR 1925 Sind 142 (143 144) (Do)
(36) AIR 1936 Pesh 57 (61) (Suit by depositor against Bank to recover deposit—Bank claiming set-off in respect of debt on promissory note executed by depositor and others — Parties do not fill same character)
2 (83) 5 All 299 (301)

Note 10

1 (05) 28 Mad 240 (243)
('15) AIR 1915 Lah 201 (205 207) 1915 Pun Re No 63
2 (27) AIR 1927 Lah 228 (229) 8 Lah 105
3 (18) AIR 1918 Mad 995 (996 997) 40 Mad 1004
4. (06) 30 Bom 173 (194)

Note 11

1. (1836) 1 Moo Ind App 87 (147 148 149) (P C)
(80) 6 Cal L Rep 294 (295) (Set off allowed as a case of mutual credits)
2 (10) 5 Ind Cas 845 (846) 33 Mad 53 (54) [**But see** (92) 19 Cal 146 (158) (Reciprocal demands must terminate in a debt)]
3 (14) AIR 1914 Lah 317 (318) 1914 Pun Re No 53

Note 12

1 (24) AIR 1924 All 341 (344 349) 46 All 398 (F B) (Decree for rent against assignors of plaintiff not allowed to be set off)

O. 8 R. 6 Notes 12-14 arrears of rent[2] A Revenue Court acting under Section 24 of the Bengal Tenancy Act (X of 1859) has jurisdiction to allow the claim of set off[3] No set off, whether legal or equitable, shall be pleaded by way of defence to any suit under the Madras Estates Land Act (I of 1908)[4]

13. Effect of not claiming set-off. — A defendant who has a claim *for* set off is not *bound* to put it forward in answer to the suit against him and his omission to do so does not preclude him from bringing a separate suit in respect of it[1] But if he *does* set up such claim he must do so in respect of the *entire* amount due He cannot claim a set off in respect of a portion only, and subsequently sue for the balance[2] There is however, an exception to this rule In all actions for goods sold and delivered with a warranty, or for work and labour as well as in actions for goods agreed to be supplied according to a contract, it is competent for the defendant to show how much less the subject matter of the action was worth by reason of the breach of the contract and to the extent that he obtains or is capable of obtaining an abatement of the price on that account *he must be considered as having received satisfaction for the breach of contract* and he is precluded from recovering in another action to that extent *but no more*[3]

Illustration

A an agent sued B his principal for recovery of money alleged to be due to him on account of advances made by him for purchase of chillies giving credit in the plaint for the price of 82 bags of chillies belonging to *B* and sold by him *B* then sued *A* in another Court for damages on the ground that the sale of the 82 bags was unauthorised *B*s suit was stayed under Section 10 of the Code He did not agree to have the question of damages tried by way of set off in *A*s suit and a decree was passed in favour of *A* as claimed in the plaint Then in B s suit *A* pleaded that B having already recovered a portion of the damages in his suit namely to the extent which he *(A)* had given credit in his plaint the claim for the balance is barred It was held that the suit was not barred on the principle stated above[4]

14 Court-fee. — Before this Code was enacted the general trend of opinion among the several Courts was that *ad valorem* court fee must be paid on a written statement pleading a set off *under this rule*[1] It has now been made clear by the

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('37) AIR 1937 All 320 (321) (Suit for profits — Prior settlement of account between parties in respect of transactions other than profits — Agreement between them to set off sum due from plaintiff towards his share of profits—Court can recognize such set off already agreed upon tho gh under Sch 2 No 10 Agra Tenancy Act Court cannot allow set off in suit for profits — Plea of set off is in effect plea of re payment in such cases)

2 ('93) 1 Oudh Cas 100 (102) (Suit for rent against thekadars — Sec 140 applies)

3 ('72) 18 Suth W R 339 (340)

4. Section 192 (e)

Note 13

1 ('15) AIR 1915 Mad 1218 (1219)

('19) AIR 1919 Lah 220 (220) 1919 Pun Re No 74

('26) AIR 1926 Mad 1020 (1021) (Same rule applies to cases of equitable set-off)

('25) AIR 1925 Mad 830 (831) (Do)

('39) AIR 1939 Pat 264 (265) (Landlord taking advances and buying goods from tenant—Under standing to set off dues against rent—Rent suit by landlord — Tenant not claiming set-off but filing cross suit—Cross suit is not barred)

[*See* ('23) AIR 1923 Bom 24 (25) 47 Bom 182 (Set off can be the subject of a separate suit)]

[**See however** ('20) AIR 1920 Mad 531 (532 533) (Suit upon mortgage — Mortgagor not counter claiming amounts due from mortgagee —Later suit in respect of it is barred)]

2 ('05) 32 Cal 654 (657 659 660 662)

3 (1841) 9 M & W 858 (871 872) Mondel v Steel (1871) 6 Q B 687 (689) Davis v Hedges

4 ('25) AIR 1925 Mad 830 (832)

Note 14

1 ('92) 15 Mad 29 (31) (The written statement should be treated as a plaint for purposes of cross claim)

('89) 13 Bom 672 (673) (Written statement claiming set off is chargeable with court fees chargeable for a plaint of that nature)

('06) 10 Cal W N 199 (200)

('86) 8 All 396 (401)

('85) 7 All 284 (288) (Defendant not paying court fee on the set off claimed — The excess should not be decreed in favour of the defendant — Per Duthoit J)

[**But see** ('04) 8 Cal W N 174 (178) (Defendant not paying court fee on the set off claimed — *Obiter*)

('03) 2 Low Bur Rul 186 (190) (FB) (Written statement claiming set-off under S 111 C P Code of 1882 need not bear court fee stamps)]

amendment of the Court-fees Act referred to in Schedule IV of this Code that court-fee must be paid on such statements, regarding them as plaints.[3]

It has been held in the undermentioned cases that written statements pleading *equitable set-off* are not chargeable with court-fee[3] But the High Court of Madras has held that the word "set-off" in Article 1, Schedule I of the Court-fees Act includes also an equitable set-off and as such court-fee is payable on such set-off.[4] The same view has been held by the Allahabad High Court in the undermentioned decision[5] and also by the Nagpur High Court[6] A plea of set off should not be entertained by a Court until the court-fee with respect to it has been paid by the defendant.[7]

Although the proviso to Article 1, Schedule I of the Court-fees Act refers only to the maximum fee leviable on a plaint or a memorandum of appeal, there is no authority for charging a larger sum on a written statement pleading a set-off or counter-claim[8]

No court-fee is payable on a written statement pleading an *adjustment* of the plaintiff's claim.[9]

15. Counter-claim. — A set-off is a statutory defence to a plaintiff's action, a counter-claim is substantially a cross action The counter-claim need not be an action of the same nature as the original action or even analogous thereto[1] Though there is no provision in the Code for making a counter-claim,[2] a Court has got the power to treat the counter-claim as the plaint in a cross suit and hear the two together if the counter-claim is properly stamped[3] It has, however, been held by the Calcutta High

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ndant to be taken in suit for partition — No counter claim put forward—Court fee on sums claimed is not required)

('35) AIR 1935 Pat 110 (111)

by defendant—Plaintiff's claim and damages arising out of same contract—No separate court-fee is necessary)

6. ('36) AIR 1936 Nag 290 (291) I L R (1937) Nag 481

7. ('17) AIR 1917 Low Bur 179 (180) (Where no

discretion under S 149 to order the court fees to be paid at any stage of the suit and the order was proper)]

[**But see** ('39) AIR 1939 Bom 386 (388) (Though a defendant pleading a set off should fail to pay the necessary court fees on his claim the omission to pay the court fees does not affect his claim to the set off since he can be called upon to pay the necessary court fees at any stage of the proceedings under S 149 C P C)]

8. ('30) AIR 1930 Oudh 140 (141) 5 Luck 621.

9. ('37) AIR 1937 Lah 62 (62).

Note 15

1. (1881) 17 Ch D 174 (182), Beddall v. Maitland. (Per Try, J)

('32) AIR 1932 Bom 617 (618) (Difference be-

claim if the defendant so desires but every counter claim cannot be pleaded as a set off)]

2. ('24) AIR 1924 Rang 346 (346) 2 Rang 276

[*See* ('30) AIR 1930 Bom 216 (216) (Rule 119 B of the Bombay High Court Rules provides for counter-claim being made)]

3 ('24) AIR 1924 Rang 346 (346) 2 Rang 276 (In a suit for possession of land, defendant counter claimed on the strength of an agreement of sale in his favour)

('35) AIR 1935 Rang 116 (117) (When the defen-

[*See also* ('34) AIR 1934 Rang 160 (161) (Suit by plaintiff and counter-claim by defendant—

O. 8 R. 6
Notes 15-16

Court that it has no such power[4]

16. Solicitor's lien for costs.— "A solicitor has, at Common Law, and apart from any order of the Court or statute, a lien over property recovered or preserved or the proceeds of any judgments obtained for the clients by his exertions"[1] This lien in the High Courts of India is governed exclusively by the law as it existed in English Courts before the passing of 23 & 24 Vic, Ch 127, by which statute the lien was very much extended[2] It applies to property of every description including costs ordered to be paid to the client[3] except that it does not attach to real property[4] But the Calcutta High Court has held in the undermentioned case[5] that it applies to immovable property also This lien has priority over any attachment by a judgment-creditor so long as the moneys attached remain within the jurisdiction of the Court, that is, until they are realised and paid off to the judgment creditor[6] The Solicitor's lien is a particular lien, it is, therefore, not available for the general balance of account between the solicitor and the client[7] Although a defendant has the right to compromise with a plaintiff without the knowledge of the plaintiff's attorney, such compromise must be made with the honest intention of ending the litigation, and not with any design to deprive the attorney of his costs, and he cannot make a payment to the plaintiff under that compromise, if he has notice of the lien for the costs of the plaintiff's attorney[8] As to the power of the Court to enforce the lien by summary procedure, see Note 38 to Section 35, *ante*

Under sub rule (2) of this rule a set off cannot be made so as to affect the lien of the pleader in respect of his costs[9] Thus, costs ordered to be paid by a petitioning creditor to a debtor when an adjudication in bankruptcy is set aside, cannot be set off to the prejudice of the solicitor's lien against the debts due to the petitioning creditor[10] But, it has been held by the Calcutta High Court that a solicitor's lien *upon a judgment* obtained by his client is only a claim or right to ask for the intervention of the Court for his protection when, having obtained judgment for his client, he finds there is a probability of the client depriving him of his costs and that the lien is subject to all the equities between the client and the other parties interested in the

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comes before the Court as plaintiff in general gives the Court jurisdiction to entertain a counter claim or in other words a cross action against him)]

4 (22) AIR 1922 Cal 1 (1)
[*See* (33) AIR 1933 P C 29 (32) 60 Ind App 297 60 Cal 980 (PC) (Counsel admitted that in moffussil court a counter claim is incompetent)]
[**See however** (33) AIR 1933 Cal 27 (28) 59 Cal 833]

Note 16

lations of documents)

2. ('86) 10 Bom 248 (253)

3 (27) AIR 1927 Bom 542 (545) 51 Bom 855

4 (28) AIR 1928 Bom 108 (110) 52 Bom 336 (27) AIR 1927 Bom 542 (545) 51 Bom 855

5. (17) AIR 1917 Cal 652 (654, 655) 43 Cal 675.

6. (25) AIR 1925 Bom 351 (352) 49 Bom 505 (87) 14 Cal 374 (375 376)

7. (09) 4 Ind Cas 398 (398) 33 Mad 255 (*Money realized in one case cannot be appropriated for dues in another case*)

8. (06) 30 Bom 27 (33)
(35) AIR 1935 Cal 168 (172 173) 61 Cal 1005 (Bona fide compromise between parties—Court will not interfere for preserving solicitor's lien—But if it is collusive Court will interfere)
(98) 25 Cal 887 (890)
[*See also* (74) 12 Beng L R 110 (112 113) (Where there is no fraud the compromise will not be set aside at the instance of the attorney)]

9 (06) 30 Bom 173 (195)

10 (30) AIR 1930 Bom 516 (517) 55 Bom 377 (1867) 2 Ch 808 (812, 813) Exparte Cleland In re Davies

property, so that it ought not to intercept the right claimed by the judgment-debtor to set off a prior decree which he had obtained against the attorney's client [11]

17. Appeal. — An appeal does not lie against an order on a preliminary issue disposing of the claim to a legal set off, advanced by the defendant The reason is that under O 20 R 19 only one decree can in such a case be drawn up and, therefore, it cannot be said that there is a conclusive adjudication within the meaning of Section 2, clause 2 [1] An objection cannot be taken up in appeal, for the first time, that a plea of equitable set off cannot be entertained by the Court [2]

The valuation of a claim of set off is the amount claimed by the defendant and an appeal relating to a claim of set off will lie to the High Court where it exceeds Rs 5,000 [3] Where a claim of set off is disposed of without demanding court fees from the defendant and the lower Appellate Court decides that no court fee is necessary, such an omission is only a mere irregularity within the meaning of Section 99 of the Code and is not a ground for reversing the decision in second appeal [4]

18. Limitation. — See Note 6, *ante*

O. 8 R. 7

R. 7. [New.] Where the defendant relies upon several distinct grounds of defence or set-off founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly.

Defence or set-off founded on separate grounds

[R. S. C, O 20 R. 7. See O. 7 R. 8]

O. 8 R. 8

R. 8. [New.] Any ground of defence which has arisen after the institution of the suit or the presentation of a written statement claiming a set-off may be raised by the defendant or plaintiff, as the case may be, in his written statement.

New ground of defence

[R. S. C., O. 24 Rr. 1 and 2. See R. 9, *infra*]

1. Court can take notice of subsequent events. — A Court can take cognizance of events which happen during the pendency of the litigation as a defence to the action [1] Though a Court of appeal will not ordinarily take notice of any facts

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11 (17) AIR 1917 Cal 241 (242 243) 43 Cal 932
[*See also* (79) 4 Cal 742 (744)
(32) AIR 1932 Bom 519 (522) [illegible]

Note 17

1 (17) AIR 1917 Lah 261 (265) 1917 Pun Re No [illegible]

2. (31) AIR 1931 Cal 358 (3[illegible])

3 (71) 3 N W P H C R 114 (116)
(88) 10 All 587 (594)

4 (13) 19 Ind Cas 918 (919) (Cal) (FB)

Order 8 Rule 8 — Note 1

1 (28) AIR 1928 Bom 427 (430) 52 Bom 8[illegible]
(21) AIR 1921 Bom 310 (314) 45 Bom 245
(Defendant can plead in his written statement an adjustment of the claim made after suit)
[But see (11) 10 Ind Cas 19 ([illegible]0) (Cal)]

O. 8 R. 8 Note 1 which may have arisen subsequent to the judgment of the lower Court, it will do so in exceptional cases where, by so doing, it can shorten litigation and best attain the ends of justice[2] See also O 7 R 7, Note 4.

It has been held that there can be no limitation against a plea in defence[3]

O. 8 R. 9

R. 9. [S. 112.] No pleading subsequent to the written statement of a defendant other than by way of defence to a set-off shall be presented except by the leave of the Court and upon such terms as the Court thinks fit, but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same

Subsequent pleadings.

[1877, S 112; 1859, S. 122. See O. 6 R. 7.]

1. Subsequent pleadings. — This rule requires the leave of the Court before any party can present a further pleading after the written statement has been filed.[1] Even in the case of a minor defendant, he is not entitled, on attaining majority, to put in an additional written statement without leave of the Court[2] As to when a party will be allowed to file a subsequent pleading and when not, see the undermentioned cases[3] If the pleadings of either party are too vague, the Court may require such party to file a further and fuller statement under this rule[4] It has been held by the High Court of Bombay in the undermentioned case[5] that where the defendant does not make a *counter claim or plead a set off, the plaintiff cannot be called upon to put in a written* statement in answer to the defendant's allegations It is submitted that this decision is not correct[6] An additional written statement filed long after the fixed date cannot be removed from the record unless the opposite party takes immediate steps for its removal[7]

The additional written statement should not set up a new case or state facts inconsistent with the original written statement See Notes to O 6 R 7

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2. ('07) 6 Cal L Jour 74 (78)
3 ('29) AIR 1929 All 77 (78)

Order 8 Rule 9—Note 1

1. ('25) AIR 1925 Bom 390 (392 396)
('15) AIR 1915 Mad 984 (988)
2. ('35) AIR 1935 Mad 117 (117)
('37) AIR 1937 Pat 625 (626)
3. (1900) 24 Bom 403 (406) (Defendant was ignorant of true facts and was therefore allowed to file a subsequent pleading)
('74) 22 Suth W R 377 (377) (Subsequent statement as explaining plaint—No prejudice to other party—Allowed)
('69) 3 Beng L R App 11 (12) (Defendant allowed on condition of costs of the application of the other side being paid)
('18) AIR 1918 Pat 230 (231) (Delay of more than a year—Refused)
('03) 27 Bom 485 (491) 30 Ind App 127 (PC) (After close of plaintiff s case not allowed)
('80) 4 Bom 576 (578) (Cannot be allowed after the hearing is begun)
Bourke P O 153 (Not allowed—No sufficient cause)
('15) AIR 1915 Lah 449 (450) (Pleading piecemeal should be avoided as far as possible)
4 ('90) 17 Cal 840 (848)
('69) 11 Suth W R 71 (72) (Additional written statement merely giving the names of two villages admittedly belonging to the suit property)
('66) 5 Suth W R 50 (51) (Can only be called for by Court of original jurisdiction)
5 ('29) AIR 1929 Bom 418 (418)
6 [*See also* ('25) AIR 1925 Bom 390 (392) (The observations of Marten, J, suggest that Court can call upon a plaintiff to file a written statement)
7. ('85) 9 Bom 373 (381, 382)

R. 10. [S. 113.] Where any party from whom a written statement is so required fails to present the same within the time fixed by the Court, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit.

Procedure when party fails to present written statement called for by Court.

[1877, Ss. 113, 370; 1859, S. 106.]

Synopsis

1 Scope. | **2. Appeal**

Other Topics (miscellaneous)

'Pronounce judgment' See Note 1
Written statement not filed—Court's power to decree suit See Note 1

1. Scope. — It has been held by the High Court of Rangoon that the power given to the Court by this rule to pronounce judgment refers to a written statement which has been *demanded by the Court under Rule 9* [1] But according to Mr Justice Kyling of the High Court of Madras,[2] — and the Chief Court of Oudh[3] also seems to take the same view — this rule relates back to Rule 1, as well as to Rule 9, and therefore applies to written statements required by the Court *under Rule 1* as well Mr Justice Seshagiri Ayyar took a contrary view

This rule applies only to a *specific* requirement by the Court to the filing of a written statement and not to *general direction* in the summons that such a statement may be filed [4] The High Court of Bombay has held in the undermentioned case[5] that a Court has no power to call upon a plaintiff to put in a written statement except in answer to a set off, and to dismiss the suit on his failure to do so It has been already submitted in Notes to Rule 9 that this view is not correct A conditional order, as for instance, an order directing a statement, *if any,* to be filed[6] or an order merely permitting a statement to be filed[7] will not entail the penalty imposed by this rule. Where a party files a written statement expressing his inability to supply the *particulars* asked for by the Court, it is not a failure to present a written statement within the meaning of this rule [8]

The Court cannot strike out a defence for failure of the defendant to present a further written statement called for by it [9] A judgment pronounced under this rule must satisfy the requirements of 'judgment' as defined in Section 2 sub section 9 and, therefore, the Court should go into the case and pronounce a decision upon the facts so far as they are before it [10] A plaintiff is not entitled to obtain a decree before the date on which the summons is returnable, even though the summons directs that the written statement should be filed on or before a day before such returnable date [11]

Order 8 Rule 10 — Note 1
1. ('28) AIR 1928 Rang 261 (262) 6 Rang 466
2 ('18) AIR 1918 Mad 1163 (1164)
(**But see** (1865) 2 Mad H C R 311 (312) (Dissented from in AIR 1918 Mad 1163))
3. ('25) AIR 1925 Oudh 567 (568)
('12) 15 Ind Cas 212 (212) 15 Oudh Cas 78
4. ('25) AIR 1925 Oudh 567 (569)
5 ('29) AIR 1929 Bom 413 (413)
6 ('27) AIR 1927 Mad 1007 (1008)
7. ('67) 1867 Bom P J 31
8. ('06) 16 Mad L Jour 30 (31 32)

O. 8 R. 10 Notes 1–2

The Bombay High Court has in the undermentioned case[12] expressed the view that where a defendant is ordered to file a written statement within a certain time and he fails to do so, it is not justifiable to pass an order that the suit should proceed *ex parte* against him According to the above decision, the failure of the defendant to file a written statement as required by the Court means only that he admits the allegations in the plaint, and he is entitled to appear and submit any argument open to him on the plaint, for instance, that the plaint discloses no cause of action or that the claim is time barred

2. Appeal. — An order *pronouncing* judgment against a party under this rule is appealable as an order under O 43 R 1 (b)[1] But an order *refusing to pronounce* a judgment under this rule is not appealable[2]

Local Amendments

ALLAHABAD

Add the following Rules

O 8 R 11 (Allahabad)

"11 Every party, whether original, added or substituted, who appears in any suit or other proceeding shall on or before the date fixed in the summons or notice served on him as the date of hearing file in Court a proceeding stating his address for service written in English in block letters and if he fails to do so he shall be liable to have his defence if any, struck out and to be placed in the same position as if he had not defended In this respect the Court may act *suo motu* or on the application of any party for an order to such effect and the Court may make such order as it thinks just

O 8 R 12 (Allahabad)

12 Rules 20, 22, 23, 24 and 25 of Order 7 shall apply, so far as may be, to addresses for service filed under the preceding rule"

BOMBAY

The following shall be *added* as Rules 11 and 12

O 8 R. 11 (Bombay)

Parties to file addresses

"11 Every party, whether original, added or substituted, who appears in any suit or other proceeding shall on or before the date fixed in the summons or notice served on him as the date of hearing, file in Court a memorandum in writing stating his address for service, and if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended In this respect the Court may act *suo motu* or on the application of any party for an order to such effect, and the Court may make such order as it thinks fit

Provided that this rule shall not apply to a defendant who has not filed a written statement but who is examined by the Court under Section 7 of the Dekkhan Agriculturists Relief Act 1879 or otherwise, or in any case where the Court permits the address for service to be given by a party on a date later than that specified in this rule

O. 8 R. 12 (Bombay)

Applicability of Rr 20 and 22 26 of O 7 to addresses for service

12 Rules 20 22 23, 24 25 and 26 of Order 7 shall apply, so far as may be, to addresses for service filed under the last preceding rule"

LAHORE

Add the following Rules

O 8 R. 11 (Lahore)

"11 Every party, whether original added or substituted, who appears in any suit or other proceeding shall on or before the date fixed in the summons notice or

12 ('38) AIR 1938 Bom 470 (471)

Note 2

1 ('25) AIR 1925 Oudh 567 (567) (Where Court ought to have proceeded under O 9 R 6 instead of this rule an application under O 9 R 13 will lie)

2

other process served on him as the date of hearing, file in Court a proceeding stating his address for service, and, if he fails to do so, he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended In this respect the Court may act *suo motu* or on the application of any party for an order to such effect and the Court may make such order as it thinks just **O. 8 R. 11 (Lahore)**

12 Rules 20, 22, 23, 24 and 25 of Order 7 shall apply, so far as may be, to addresses for service filed under the preceding rule " **O 8 R 12 (Lahore)**

NOTE *Lahore Rule 11.*—This rule applies to defendants who are corporations as well as to other defendants [1] The rule is mandatory so far as the filing of the proceeding stating the addresses for service is concerned, but the matter is left to the discretion of the Court and it is not bound to strike off the defence of the defaulting party in every case [2]

NAGPUR

Add the following as Rules 11 to 13 —

Registered address

"11 Every defendant in a suit or opposite party in any proceedings, shall on the first day of his appearance in Court, file an address for service on him of any subsequent process The address shall be within the local limits of the civil district in which the suit or petition is filed or of the civil district in which the party ordinarily resides, if within the limits of the Central Provinces and Berar. This address shall be called the "registered address" and it shall hold good throughout interlocutory proceedings and appeals and also for a further period of two years from the date of final decision and for all purposes including those of execution **O 8 R. 11 (Nagpur)**

Consequence of non filing of registered address

12 (1) If the defendant or the opposite party fails to file a registered address as required by Rule 11, he shall be liable, at the discretion of the Court, to have his defence struck out and to be placed in the same position as if he had made no defence **O 8 R. 12 (Nagpur)**

An order under this rule may be passed by the Court *suo motu* or on the application of any party

(2) Where the Court has struck out the defence under sub rule (1) and has adjourned the hearing of the suit or the proceeding and where the defendant or the opposite party at or before such hearing appears and assigns sufficient cause for his failure to file the registered address he may upon such terms as the Court directs as to costs or otherwise be heard in answer to the suit or the proceeding as if the defence had not been struck out

(3) Where the Court has struck out the defence under sub rule (1) and has consequently passed a decree or order, the defendant or the opposite party, as the case may be, may apply to the Court by which the decree or order was passed for an order to set aside the decree or order, and if he files a registered address and satisfies the Court that he was prevented by any sufficient cause from filing the address, the Court shall make an order setting aside the decree or order as against him upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit or proceeding

Provided that where the decree is of such a nature that it cannot be set aside

Orc[illegible]
1 (29) AIR [illegible]
2 (29) AIR [illegible]
[*See also* [illegible]

O. 8 R. 12 (Nagpur) as against such defendant or opposite party only it may be set aside as against all or any of the other defendants or opposite parties

O. 8 R. 13 (Nagpur) 13 Rules 20, 22 and 23 of Order 7 shall apply, so far as may be, to addresses for service filed under Rule 11."

N.-W.F.P.

Add the following Rules :

O. 8 R. 11 (N.-W.F.P.) "11 Every party, whether original, added or substituted, who intends to appear and defend any suit or original petition shall, on or before the date fixed in the summons or notice served on him as the date of hearing, file in Court a proceeding stating his address *for service*, and *if he fails to do* so, he shall be liable to have his defence, if any, struck out and be placed in the same position as if he had not defended In this respect the Court may act *suo motu* or on the application of any party for an order to such effect, and the Court may make such order as it thinks just.

O. 8 R. 12 (N.-W.F.P.) 12 Rules 20 and 22 of Order 7 shall apply, so far as may be, to addresses for service, filed under the preceding rule "

OUDH

Add the following Rules

O 8 R. 11 (Oudh) "11 Every defendant in a suit or opposite party in any proceeding shall, on the first day of his appearance in Court, file an address (to be called the "registered address) for service on him of any subsequent notice, summons or other process, and, if he fails to do so, shall be liable, at the discretion of the Court, to have his defence, or reply, if any, struck out, and to be placed in the same position as if he had made no defence or reply

An order under this rule may be passed by the Court, *suo motu* or on the application of any party

O. 8 R 12 (Oudh) 12 Rules 21, 23 and 25 to 27 of Order 7 shall apply, so far as may be, to addresses for service filed under the preceding rule, and Rule 24 shall, in the same manner, apply, but as if the words at the beginning, "In all cases to which Rule 23 does not apply ' were omitted

O 8 R. 13 (Oudh) 13 Nothing in Rules 11 and 12 shall apply to the notice prescribed by Order 21 Rule 22 "

PATNA

Add the following Rules

O. 8 R. 11 (Patna) "11 Every party, whether original, added or substituted, who appears in any suit or other proceedings shall, at the time of entering appearance to the summons, notice or other process served on him, file in Court a statement stating his address for service and if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended In this respect the Court may act *suo motu* or on the application of any party for an order to such effect and the Court may make such order as it thinks just

O. 8 R. 12 (Patna) 12 Rules 20 and 22 of Order 7 shall apply, so far as may be, to addresses for service filed under the preceding rule "

SIND

Add the following Rules

O. 8 R. 11 (Sind) 11. *Parties to file address* —Every party whether original, added or substituted, who appears in any suit or other proceeding shall, on or before the date fixed in the summons or notice served on him, as the date of hearing, file in Court, a memorandum in writing stating his address for service and if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had

not defended In this respect the Court may act *suo motu* or on the application of any party for an order to such effect, and the Court may make such order as it thinks just **O. 8 R. 11 (Sind)**

Provided that this rule shall not apply to a defendant who has filed a written statement, but who is examined by the Court under Section 7 of the Dekkhan Agriculturists' Relief Act, 1879, or otherwise

12 *Applicability of Rules 20 and 22 26 of Order 7 to addresses for service* — Rules 20, 22, 23, 24, 25 and 26 of Order 7 shall apply, so far as may be, to addresses for service filed under the last preceding rule **O. 8 R. 12 (Sind)**

NOTE — Order 7 Rule 26 is now deleted by the Sind Court

ORDER IX.

GENERAL

Synopsis

1. Applicability of Order 9 to execution proceedings — There is nothing in Order 21, which deals with execution of decrees and orders, specifically empowering the Court to apply Order 9, to execution proceedings Hence, the provisions of Order 9 can apply, if at all, only by virtue of Section 141 In *Thakur Prasad* v *Fakirullah*,[1] the Judicial Committee of the Privy Council held that the proceedings referred to in Section 647 of the Code of 1882 (now Section 141) included *original matters* such as proceedings in probates, guardianships, and so forth and did not include executions Notwithstanding this decision of the Privy Council, it was still held in some cases[2] that Section 141 could be applied to make Order 9 apply to execution proceedings The consensus of authorities in the several High Courts may, however, now be fairly taken to be that Order 9 does not apply to execution proceedings [3] Thus, it has been **Order 9 General**

Order 9, General—Note 1

[illegible]

('33) AIR 1933 Mad 418 (422) 56 Mad 490 (FB)
('33) AIR 1933 Lah 99 (101) 13 Lah 761 (Execution application can however be restored under inherent powers of the Court)
('29) AIR 1929 Bom 217 (219) (O 9 R 8 does

[illegible]

Order 9 General Notes 1-2

held not to apply to proceedings under O 21 R 2,[4] or O 21 R 89,[5] or O 21, R 90,[6] or O 21 Rr 97 to 101[7] For a full discussion, see Section 141 *ante* When an execution application is dismissed for default the party can file a fresh application[8] and in a proper case can invoke the inherent powers of the Court for a re hearing[9] Under the new Rule 15 added by the Madras High Court Rules 6 13 and 14 of this Order have been declared to be applicable to those proceedings in execution falling within Section 47 of the Code in which notice to the opposite party is required to be given See Rule 15 added by the Madras High Court *infra*

See also Order 9 Rule 9 Note 6

2 Applicability of Order 9 to applications under Order 9 itself. — Where an application under R 4 or R 9 or R 13 of this Order is itself dismissed for default does a fresh application to restore that application lie? There is a conflict of opinion on this point It has been held by the High Courts of Lahore[1] Madras[2] and Rangoon[3]

(26) AIR 1926 Mad 41 (415)
(25) AIR 1925 Mad 11 (12)
(18) AIR 1918 Mad 1011 (1012)
(18) AIR 1918 Pat 67 (68) 4 Pat L Jour 330
(22) AIR 1922 Nag 20 (2) 18 Nag L R 152
( ) AIR 19 Oudh 5 (55) 28 Oudh Cas 158
(28) AIR 1928 Oudh 478 (478) (Where a subsequent application for execution was barred Court under S 151 restored the application to its file)
(1 AIR 19 Pat 331 (33)
(31) AIR 1931 Sind (25 Sind L R 475 (FB) (But inherent power *held* to exist to set aside ex parte orders passed in execution proceedings)
[*See* (15) AIR 1915 Cal 53 (540)
(37) AIR 1937 Sind 273 (278) 31 Sind L R 180 (Application under O 34 R 5 is not execution proceeding—O 9 Rr 2 and 4 apply to such application)]
[*See also* (15) AIR 1915 Mad 811 (812) 38 Mad 19]
[**But see** (4) AIR 1924 Mad 715 (715) 47 Mad 1 (C of 1 n petit o)]

4 (20) AIR 1920 Cal 514 (515)
[*See also* (31) AIR 1931 Lah 505 (505) (Con ed l an l a s ed)]

5 (26) AIR 1926 Bom 377 (378) 50 Bom 457 (Application under O 21 R 89 is not an original proceeding)

6 (21) AIR 1921 Pat 293 (294) (Inherent power to set aside ex parte order recognised)
(27) AIR 1927 Cal 938 (939)
(26) AIR 1926 Lah 109 (109)
(19) AIR 1919 Pat 192 (193) 4 Pat L Jour 135 (F B)
(31) AIR 1931 All 594 (595)
(38) AIR 1938 Mad 495 (495) (Court has inherent power to dismiss for default application under O 21 R 90)

7. (26) AIR 1926 Mad 412 (414 415)
(19) AIR 1919 Pat 540 (541) (Order under O 21 Rr 100 and 101 is not a suit Hence O 9 R 4 inapplicable)
('14) AIR 1914 Cal 126 (127) 41 Cal 1 (Application under O *21 R 100—O 9 R 13 not applied*)
[**But see** (23) AIR 1923 Pat 239 (241) 2 Pat 372 (Application under O 21 R 100 is an original matter in the nature of suit—O 9 R 9 *held* applicable)
(18) AIR 1918 Pat 486 (486) 3 Pat L Jour 250 (Application under O 21 R 100 — Rehearing under O 9 can be obtained)]

8 (23) AIR 1923 All 460 (460) 45 All 148
(18) AIR 1918 Pat 67 (68) 4 Pat L Jour 330
(22) AIR 1922 Oudh 201 (202)
(17) AIR 1917 Cal 31 (32 33) (*Obiter*)
[*See also* (20) AIR 1920 Cal 458 (459)]

9 (28) AIR 1928 Cal 179 (179 180) (Where Code does not provide a remedy nor does it prohibit the granting of it S 151 is applicable)
(33) AIR 1933 Lah 99 (101) 13 Lah 761
(33) AIR 1933 Nag 176 (176) 29 Nag L R 176 (Objection was restored under inherent powers)
(21) AIR 1921 Sind 55 (56 57) 17 Sind L R 105 (Application under O 21 R 90)
(14) AIR 1914 Sind 61 (62) 8 Sind L R 327 (Execution application adjourned to 6th January was by mistake called on the 5th—Inherent power of restoration to be exercised)
(29) AIR 1929 All 485 (487)
(24) AIR 1924 Lah 350 (350 351)
(28) AIR 1928 All 301 (301) (Mistaken order of dismissal for default can be rescinded)
(27) AIR 1927 Cal 420 (420)
(21) AIR 1921 Lah 67 (68) 2 Lah 66
(23) AIR 1923 Nag 18 (19 20)
(39) *AIR 1939 Lah 223 (223) (Court has inherent* powers under S 151 to restore application in execution dismissed for default)

Note 2

1 (19) AIR 1919 Lah 155 (156) (7 Nag L R 89 Followed)
(20) AIR 1920 Lah 304 (304) 1 Lah 339 (Application for restoration of dismissed application was described as one for review)
(27) AIR 1927 Lah 71 (71) (A second application for restoration is competent)
(27) AIR 1927 Lah 904 (905) (The application for setting aside the dismissal of application under O 9 R 13 is not to be treated as *original* application for setting aside the ex parte decree)
(29) AIR 1929 Lah 678 (678)

2 (*26) AIR 1926 Mad 325 (326)*
(26) AIR 1926 Mad 654 (654)

3 (26) AIR 1926 Rang 74 (75) 3 Rang 534 [*See also* (33) AIR 1933 Rang 406 (407) (The point was left undecided however, it was held

the Judicial Commissioner's Court of Peshawar[4] and the Chief Court of Oudh[5] that such an application can be filed, the reason being that the proceedings contemplated under Order 9 are in the nature of an original suit and that by virtue of Section 141, Order 9 applies to them[6] On the other hand, the High Courts of Bombay,[7] Calcutta[8] and Patna[9] have held that a *second application* to restore a prior application dismissed for default does not lie But the High Court of Allahabad,[10] and the High Courts of Calcutta and Madras in some cases[11] have struck a *via media* and held that the application for restoration can itself be treated as a *second application* for restoring the suit provided there is no bar by limitation In some cases the same High Courts have held that in a proper case the Court can also restore a prior application dismissed for default under its *inherent* power[12] See also the undermentioned case[13]

It has been held by the Nagpur Judicial Commissioner's Court that an application for the restoration of a suit which application itself has been dismissed for default can be restored under the inherent power of the Court but not under O 9 R 9 read with Section 141[14] The reason given is that O 9 R 9 creates a substantive right of applying to restore a suit dismissed for default and this right cannot be conferred by Section 141

But no appeal lies under O 43 R 1 from an order refusing to restore an application for restoration of suit dismissed for default[15]

3. Applicability of Order 9 to proceedings under local and special Acts. — It is a general principle that once a matter comes before a regular Civil Court its further course will be governed by the provisions of the Code (See Section 141 *infra*) Hence, the provisions of this Order apply to an application to the Court under Section 84 of the Madras Hindu Religious Endowments Act of 1927 and the dismissal of such application for default can be set aside under this Order[1]

4. Applicability of Order 9 to miscellaneous proceedings. — See Section 141 and the Notes thereto and Order 9 Rule 9, Note 6

5. Failure of party to appear at adjourned hearing. — See O 17 R 2

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that the Court had inherent power to deal with application for setting aside order of dismissal)]

4. ('34) AIR 1934 Pesh 13 (14)

5 ('23) AIR 1923 Oudh 146 (146)
[*See* ('37) AIR 1937 Oudh 344 (346) 13 Luck 246 (An application to set aside the dismissal

6 ('26) AIR 1926 Mad 325 (326)

7. ('23) AIR 1923 Bom 386 (386)

8 ('29) AIR 1929 Cal 17 (18)

9. ('22) AIR 1922 Pat 121 (121) 4 Pat L Jour 287

10 ('24) AIR 1924 All 503 (504) 46 All 319

11 ('27) AIR 1927 Cal 534 (536) 54 Cal 405 (But if the application is not within time, then S 151, C P C, may be invoked)
('17) AIR 1917 Cal 518 (518) 44 Cal 950 (Second application is competent)
('14) AIR 1914 Mad 438 (438)
[*See* ('23) AIR 1923 Cal 552 (552) (Successive applications for restoration are competent)]

12 *('25) AIR 1925 All 773 (774 775) 47 All 878*
('29) AIR 1929 All 624 (624)
('17) AIR 1917 All 125 (126 127)
('27) AIR 1927 Cal 534 (536) 54 Cal 405

13 ('36) AIR 1936 All 737 (738) (Order 9 R 2 does not in terms apply to an application for restoration of suit dismissed for default)

14 ('32) AIR 1932 Nag 101 (102) 28 Nag L R 63 *(FB) (Overruling AIR 1923 Nag 293 10 I C 705* must also be deemed as overruled by this decision)

[illegible] Jour 720

1. ('37) AIR 1937 Mad 653 (653) ILR (1938) Mad 216

O. 9 R. 1 APPEARANCE OF PARTIES AND CONSEQUENCE OF NON APPEARANCE

Parties to appear on day fixed in summons for defendant to appear and answer.

R. 1. [S 96] On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court-house in person or by their respective pleaders, and the suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court

[1877, S 96; 1859, S 109]

1 Applicability of the Rule — This rule and Rule 2 of this Order apply to the Arakkan Hills [1]

O. 9 R. 2

Dismissal of suit where summons not served in consequence of plaintiff s failure to pay costs

R. 2. [S 97] Where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the court-fee or postal charges (if any) chargeable for such service, the Court may make an order that the suit be dismissed

Provided that no such order shall be made although the summons has not been served upon the defendant, if on the day fixed for him to appear and answer he attends in person or by agent when he is allowed to appear by agent

[1877, S 97; 1861, S 5]

Local Amendment

ALLAHABAD

After the words for such service *insert* the words ' or that the plaintiff has failed to comply with the rules for filing the copy of the plaint for service on the defendant

Synopsis

1 Scope of the Rule
2 " Defendant
3 Failure to pay court fee or postal charges when entails dismissal
4 Plaintiff s remedy after dismissal
5 Appeal
6 Revision

Other Topics (miscellaneous)

On the day fixed See Note 3 Prov so See Note 3

1 Scope of the Rule — The rule applies only to cases of plaintiff s failure to *pay process fee or postal charges* for service of summons on the defendant Consequently, the Court cannot dismiss the suit under this rule for failure on the part of the plaintiff to furnish the *correct address* of the defendant [1] The Allahabad High

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Order 9 Rule 1 — Note 1

1 See The Arakkan Hills Civil Justice Regulation (VIII of 1874) and the Arakkan Hills District Laws Regulation 1916 (1 of 1916) Sch 1

Order 9 Rule 2 — Note 1

1 (2) AIR 1927 Lah 170 (170) (Nor for the failure of the plaintiff to accompany process-server)

Court has held in the undermentioned case[2] that where the plaintiff failed to pay the process fee and the Court ordered him to pay a certain sum as damages and he failed to pay that also, and the Court dismissed the suit, such dismissal of the suit was under this rule

The failure contemplated is not merely an omission to pay the requisite charges but also to pay the same *within the time fixed* [3]

Where a suit is dismissed for default and an application for its restoration is dismissed for failure to pay the process fees, it has been held that the order dismissing the application falls under Rule 9 *infra* and not under this rule [4]

This rule applies to an application under O 34 R 5 by virtue of Section 141 and such an application can be dismissed for non payment of process fees [5]

2. "Defendant." — The word *'defendant'* does not include the guardian *ad litem* of a minor defendant as he is not a defendant in the legal sense of the term and the mere fact that no process fee is paid for issuing notice to such a guardian is no ground for dismissing the suit under this rule,[1] especially where there are other major defendants in the suit [2] Where the summons has been served upon a wrong person instead of on the real defendant, and he appears and denies his liability, the proper order to pass is to dismiss the suit with costs [3]

3. Failure to pay court-fee or postal charges — When entails dismissal. — O 48 R 1, sub rule 2 requires that the Court shall fix a time for payment of the process fee And unless it so fixes a time for the deposit of the process fee[1] and gives the party reasonable time and opportunity to comply with its orders,[2] it cannot dismiss the suit But mere ignorance on the part of the plaintiff s agent as to the proper Court in which the process fees ought to be deposited is no ground for not dismissing the suit [3]

There is a conflict of opinion as to whether the failure on the part of the plaintiff to pay process fees for a *newly added defendant* will entail the dismissal of the whole suit The High Court of Bombay has held that the whole suit ought to be dismissed even against the original defendant unless he waives his objection thereto [4] But according to the Allahabad[5] and Patna[6] High Courts the dismissal should be only as against that *particular* defendant According to the proviso, if notwithstanding the plaintiff s default in paying the process fees the defendant appears the Court cannot

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(31) AIR 1931 Lah 655 (655) (O 9 R 5 applies to such a case)
2. ('27) AIR 1927 All 461 (464)
3. ('11) 11 Ind Cas 906 (907) 7 Nag L R 114
4
5. (37) AIR 1937 Sind 278 (278) 31 Sind L R 160

Note 2

1 (11) 11 Ind Cas 317 (318) 1912 Pun Re No 35
2 ('30) AIR 1930 Pat 820 (821) (The suit must be proceeded with against the major defendants) [See (37) AIR 1937 Oudh 502 (503) (The fact that the plaintiff through his negligence had failed to get a minor defendant properly served and to get a guardian appointed for him does not justify the dismissal of the suit under O 9 R 2 C P C , as against the other defendants who had been duly served)]
3 (80) 4 Bom 619 (623)

Note 3

1 (24) AIR 1924 Nag 298 (299)
(69) 11 Suth W R 290 (290) (Process fee for summoning witnesses)
[*See also* (33) AIR 1933 Pat 582 (583) (Non payment of process fee required for fresh summons with the application is no ground for ... ays
2 ...
4 ... ant
was allowed by Court)
5. (80) 2 All 318 (319)
6 (21) AIR 1921 Pat 422 (422)

O. 9 R. 2 Notes 3-6

dismiss the suit[7] It follows that the Court cannot dismiss the suit on a day previous to the date fixed in the summons for the appearance of the defendant[8]

Where the plaintiff is prepared to pay the process fees but it is the Court which refuses to take it because according to its view the process fee is being deposited late, this rule does not strictly apply[9]

A Court has no power to require the plaintiff to pay process fee before fixing the date for the appearance of the defendant, and where the Court does so, the failure of the plaintiff to comply with its order does not entail the dismissal of the suit under this rule[10]

4. Plaintiff's remedy after dismissal. — The plaintiff can apply under Rule 4 to set aside the order of dismissal or may bring a fresh suit[1]

5. Appeal. — The order of dismissal is not a decree within Section 2 (2) and no appeal lies therefrom[1] The undermentioned decisions to the contrary[2] under the old Code are no longer good law

6. Revision. — Where under O 5 R 10 as amended in the Punjab the plaintiff has an option to have the summons served in the ordinary way *or* by registered post and the Court ordered the plaintiff to pay both process fees and postal charges, the order is illegal and the suit cannot be dismissed for failure of the plaintiff to pay the postal charges The High Court will in such a case, revise the order of dismissal[1] Similarly, where the process fee was paid in sufficient time though not within the date fixed by the Court and the suit was dismissed, the High Court will interfere in revision[2] For other instances of interference by the High Court, see the undermentioned cases[3]

O. 9 R. 3

Where neither party appears, suit to be dismissed

R. 3. [S. 98.] Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed

[1877, Ss 98, 99; 1859, S. 110]

Synopsis

1 Where neither party appears
2 " Appearance " See O 9 R 9 and O 3 R 1
3 "When the suit is called on for hearing "
4 "The Court may make an order that the suit be dismissed "
5 Dismissal pending arbitration proceedings
5a Dismissal of suit for default after preliminary decree See Note 3
6 Appeal and review

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7. ('19) AIR 1919 Pat 372 (373)
('91) 15 Bom 160 (162 163)
8. ('80) 2 All 318 (320)
9. ('36) AIR 1936 All 787 (789)
10. ('39) AIR 1939 Pat 160 (160)

Note 4

1. ('83) 9 Cal 163 (165)

Note 5

1 ('16) AIR 1916 All 326 (376) 38 All 357
('83) 9 Cal 627 (628)
[*See* ('11) 9 Ind Cas 484 (485) (All) (No appeal lies from order of Appellate Court restoring a suit dismissed for want of payment of process fee)]

2. ('67) 7 Suth W R 338 (339)
(1865) 3 Suth W R Mis 23 (Appeal)

Note 6

1 ('27) AIR 1927 Lah 157 (158)
[illegible]

[illegible]

1. Where neither party appears. — A dismissal under this rule is justified only where neither party appears Thus, if the plaintiff[1] or his agent[2] or his pleader duly instructed[3] is present, the fact that *no evidence is adduced* will not enable the Court to order a dismissal under this rule If, however, both the parties are absent,[4] the mere presence of the pleaders *without instructions* is not an appearance and a dismissal under this rule is justified [5]

Where the plaintiff and *some* of the defendants do not appear but the other defendants appear and the suit is dismissed, the dismissal, *in so far as it is against the absent defendants*, is under this rule, while, as against the defendant or defendants who appeared, it is under Rule 8 [6]

Where an application was filed by the respondent in an appeal praying that the appellant should be called upon to give security for the costs of the appeal and, on the day fixed for the hearing of the application, both parties were absent in consequence of which the application was rejected, it was held that the dismissal must be taken to be one under this rule read with Section 141 [7]

2. "Appearance." — See Order 9 Rule 9 and Order 3 Rule 1

3. "When the suit is called on for hearing." — The hearing referred to is obviously the *first hearing* after the issue of the summons to the defendant,[1] and not necessarily a hearing of evidence [2] But when read with O 17 R 2, *infra*, this rule may be applied to cases where the parties are absent at the *adjourned* hearings [3] The rule may be applied where the parties are absent at a hearing after remand [4]

But before there can be a dismissal under this rule it is essential that the suit should have been posted to a *specified day* for *hearing* and that the parties have notice thereof The word 'hearing refers to hearing of the case by the *Court* and does not include the disposal of a routine matter which is within the powers of an officer of the Court and need not come before the Court at all [5] It has also been held that where the date has been fixed by the clerk of the Court and not by the Judge, parties are not bound to attend on such date and failure to attend on such date will not justify dismissal of the suit for default of appearance [6] It is not proper to dismiss a suit on a date

('32) AIR 1932 Oudh 106 (107) (Dismissal of a small cause suit under this rule—Revision lies under S 25 Provincial Small Cause Courts Act)

Order 9 Rule 3 — Note 1

1 —

2. ('22) AIR 1922 Pat 504 (507) (Authorised agent with witness present in Court—Dismissal for non appearance of pleader is illegal)

3. (20) AIR 1920 Pat 600 (601) 4 Pat L Jour 277 (Pleader present and asked for adjournment —No indication in the order dismissing the suit if the pleader was not ready to continue the suit on refusal of adjournment)
(11) 9 Ind Cas 842 (844) (Cal)

4. (34) AIR 1934 Pat 18 (19) (Non appearance of parties on day fixed — Case governed by R 3 and not by R 8)

5. (11) 9 Ind Cas 842 (844) (Cal)
(38) AIR 1938 Cal [illegible]

[*See* (17) AIR 1917 Mad 196 (197) (Dismissal was on the adjourned hearing)]

6 (20) AIR 1920 Bom 54 (55) 44 Bom 767
(26) AIR 1926 All 169 (170) 48 All 97 (Fresh suit is therefore not barred against absent defendants)
('14) AIR 1914 Nag 20 (20) 10 Nag L R 39

7. ('85) 7 All 542 (544)

Note 3

1. (19) AIR 1919 Sind 89 (91) 13 Sind L R 149
(22) AIR 1922 Pat 252 (254) 6 Pat L Jour 650 (The word hearing is used in different rules with a view to state different purposes for which a date for hearing is fixed)

2. (19) AIR 1919 Sind 89 (91) 13 Sind L R 149

3. (33) AIR 1933 Nag 234 (235 236) 29 Nag L R 326 (Although the party has closed his case, it is his duty to appear at the adjourned hearing)

4 (70) 14 Suth W R 81 (82)

5 (38) AIR 1938 Rang 360 (362)

6 (34) AIR 1934 Lah 984 (984) (33 Pun L R 604 Followed)

O. 9 R. 3
Notes 3-4

of which the parties had no previous notice[7] or at a place not notified[8] or on a day fixed for considering only an application for amendment of the issues[9] Similarly, when a day is fixed merely for the appearance of the guardian *ad litem* of a minor defendant[10] or for the attendance of the plaintiff only,[11] a dismissal of the suit on that day under this rule is not justified A day fixed for judgment is not a day fixed for the hearing of the suit[12] Where on a day fixed for the hearing of a preliminary issue, the onus of proof of which lies on the defendant, both the parties are absent, the Court ought not to dismiss the suit for default but should decide that issue against the defendant, especially in a case where a portion of the claim is admitted[13] A date fixed solely as the last day for filing a list of witnesses is not a date fixed for 'hearing' and failure to file the list of witnesses within such date cannot entail dismissal of suit under this rule or Rule 8 *infra*[14]

After a preliminary decree has been passed, the suit cannot be dismissed for default of appearance the reason is that on the passing of the decree the parties acquire rights or incur liabilities which become fixed unless and until the decree is varied or set aside[15] But although an order dismissing the suit for default of appearance after a preliminary decree has been passed is illegal unless such order is revoked or set aside, it cannot be *ignored*[16]

4. "The Court may make an order that the suit be dismissed." — Under the old Code the expression used was "the suit shall be dismissed' and the Judge was

7 (01) 14 C P L R 134 (134) (Such dismissal is illegal)
[*See also* ('35) AIR 1935 Lah 163 (164) (Mere [illegible]

veyed to the counsel of the parties or to the parties by the counsel concerned—For absence of parties on such date there is sufficient cause within the meaning of R 4 *infra*)

9. ('21) AIR 1921 Pat 96 (97) 6 Pat L Jour 331 (Only the application can be dismissed)
('34) AIR 1934 Lah 237 (237, 238) (AIR 1921 Pat 96, Followed)
[*See* (27) AIR 1927 Sind 228 (229) (Date fixed for hearing an application in the suit—That application and not the suit, can be dismissed)]

10. ('23) 73 Ind Cas 559 (560) (Pat)

11. (25) AIR 1925 Lah 96 (96)
('31) AIR 1931 Lah 69 (70)
('21) AIR 1921 Lah 320 (321) (Where no date [illegible]

12. ('01) 1901 Pun Re No 82, p 267 (Non appearance of parties on that day—No ground for dismissal of suit)
[*See* (27) AIR 1927 Lah 888 (888) (Do)]

13. (29) AIR 1929 Lah 830 (831)
[*See also* ('14) AIR 1914 Mad 381 (382) (Parties [illegible]

miss under this rule)]

14. ('38) AIR 1938 Rang 360 (362) (The utmost result of the failure of a party to give a list of witnesses within the time fixed would be that [illegible]

missal of a suit)

15. ('24) AIR 1924 P C 198 (200) 4 Pat 61 51 Ind App 321 (P C)
('32) AIR 1932 Mad 519 (522)
('33) AIR 1933 Oudh 229 (230) 8 Luck 496
('36) *AIR 1936 Lah 875 (876)*
(38) AIR 1938 Pesh 27 (27) (The suit should be adjourned *sine die* and made revivable on payment of costs)
[illegible]

bound to dismiss the suit unless, for reasons to be recorded, he otherwise directed.[1] But under the present rule *a discretion* is given to the Court in the matter of dismissing the suit[2]

The Court has no power to *strike a case off its file* but can only make an order dismissing the suit[3] Where, however, the parties state that the case is settled and at their request the case is struck off, it is not a dismissal for default under this rule[4]

5. Dismissal pending arbitration proceedings. — When a suit is referred to arbitration and is pending before the arbitrator, the Court has no power to dismiss the suit for default under this rule unless an express order superseding the reference to arbitration has first been passed[1]

5a. Dismissal of suit for default after preliminary decree. — See Note 3.

6. Appeal and review. — A dismissal under this rule is not a decree within Section 2 (2) and, therefore, no appeal lies[1] The use of the word "order" makes it clear beyond doubt that the dismissal is not a decree

It has been held in the undermentioned cases[2] that such an order is not open to review.

R. 4. [S. 99.] Where a suit is dismissed under rule 2 or rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit; or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his not paying the court-fee and postal charges (if any) required within the time fixed before the issue of the summons, or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.

Plaintiff may bring fresh suit or Court may restore suit to file.

[1877, Ss. 98, 99; 1859, S. 110.]

Local Amendment

BOMBAY

Rule 4 shall be numbered Rule 4 (1) and the following sub rule (2) shall be *added* to it, namely :

"(2) The provisions of Section 5 of the Indian Limitation Act, 1908, shall apply to applications under this Rule"

Note 4

1. ('10) 8 Ind Cas 156 (157) (Mad)
('93) 23 Bom 657 (658) (Temporary appointment of the pleader as a Subordinate Judge was good reason for not dismissing the suit under Section 98)
2 ('36) AIR 1936 Pat 437 (438)
3 ('87) 10 Mad 270 (271)
4. ('17) AIR 1917 Mad 495 (496, 497) (Striking off amounts to a withdrawal by the plaintiff) [*See* ('68) 9 Suth W R 283 (284) (The court has discretion, to restore to its files any case which it has itself removed therefrom undetermined)]

Note 5

1 ('99) 1899 Pun Re No 10 p 52

Note 6

1. ('02) 29 Cal 60 (62) (Dismissal under O 9 R 8) [illegible]

2 [illegible] plaintiff had allowed his rights under O 9 R 4 to be barred)
('99) 26 Cal 598 (600, 601). (*Obiter*)

O. 9 R 4
Note 1

Synopsis

1. Scope of the Rule — Where a suit is dismissed under Rule 2 or Rule 3, or under O 17 R 2 read with these rules a *fresh suit* is not barred [1] It may be brought notwithstanding the fact that no application for restoration has been made under this rule or even after an application under this rule has proved unsuccessful [2] The two remedies are not mutually exclusive [3] But the period covered by the restoration proceedings under this rule cannot be excluded under Section 14 of the Limitation Act for the purpose of the suit [4]

It is only the Court which passes the order of dismissal that can set it aside under this rule [5] Unlike Rules 7 9 or 13 the present rule does not authorise the Court to impose any terms as to costs [6] The effect of a restoration of the suit under this rule is to bring the suit back as regards parties to the same position in which it was at the time of dismissal [7] The question whether ancillary orders which must be taken to fall along with the dismissal of the suit are restored when the suit is restored should however be decided with reference to the intention of the officer who passed the order restoring the suit and the terms of the order of restoration If he intended to restore the suit and all the ancillary matters (such as injunction orders etc) connected with it they are all restored If he did not so intend they are not restored As a matter of general rule the intention would be to restore the suit and all incidental matters [8] Where there are more plaintiffs than one the suit can be restored on the application

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Order 9 Rule 4 — Note 1

1 (17) [illegible]

(79) 2 All 318 (320)
(29) AIR 1929 All 131 (131) 50 All 837 (Suit dismissed under O 9 R 3)
(75) 24 Suth W R 114 (115)
([illegible]

[illegible] not maintainable)]

2 (21) 63 Ind Cas 239 (239) (All)
(26) AIR 1926 All 678 (678)
([illegible]

(37) AIR 1937 Pat 9 (11) 15 Pat 716 (In the absence of some such provision as that with which O 9 R 9 commences a dismissal under O 9 R 3 would still not operate to preclude the plaintiff from suing again even if O 9 R 4 did not expressly save his right of suit Rule 4 in effect does not create but declares the right of bringing a fresh suit while at the same time permitting the plaintiff in the alternative to proceed with his original suit — Per Rowland J)

3 (37) AIR 1937 Pat 9 (11) 15 Pat 716
(37) AIR 1937 Oudh 262 (262) 13 Luck 108

4 (29) AIR 1929 Nag 219 (221) 25 Nag LR 99

5 (20) AIR 1920 Lah 418 (419)

6 (01) 26 Bom 201 (202)

7 (24) AIR 1924 Cal 814 (815) (After the res[illegible]

improper)

8 (34) AIR 1934 Mad 49 (51) 57 Mad 308

of *any one* of them[9] Where a suit brought by a shebait in the name of an idol is dismissed for default under O 9 R 3, an application for restoration under this rule can be made by another shebait who is the shebait at the time of the application[10]

2. "Sufficient cause." — An order under this rule without giving the applicant an opportunity to show sufficient cause is *ultra vires*[1] As to what is sufficient cause is a matter of discretion and no hard and fast rule can be laid down[2] Where the plaintiff is prevented from attending Court due to unavoidable causes, *e g*, picketing by volunteers of Gandhiji, it was held that there was sufficient cause for non appearance[3] Similarly, where the plaintiff had been taken ill and his counsel was only a few minutes late, it was held that the suit should be restored to file[4] A *bona fide* mistake which is not unreasonable is a sufficient cause to order restoration[5] But the mere fact that the summons has been returned unserved on the defendant is no ground for setting aside the order of dismissal[6] See also Notes under Rule 9

If sufficient cause is shown for non appearance, the Court is bound to restore the suit, it has no choice in the matter[7] See also the undermentioned case[8]

3. Application under Rule 4 dismissed for default, if can be restored. — See Order 9 General, Note 2

4. Applicability of the Rule to execution proceedings. — See Order 9, General, Note 1

5. Applicability of the Rule to applications in forma pauperis. — It has been held by the High Court of Rangoon, applying the provisions of Section 141 of the Code, that where at the hearing of an application to sue in *forma pauperis*, neither party appears and the application is dismissed a fresh application to sue in *forma pauperis* is not barred under the provisions of this rule[1] But if the dismissal

9. ('24) AIR 1924 Cal 814 (815)

10 ('38) AIR 1938 Cal 547 (548) (The real plaintiff in the suit must be held to be the idol and not the shebait who was suing in his name)

Note 2

1 ('89) 1889 Bom P J 216 (216)

2 (1865) 1865 Bourke (O C) 115 (Illness of the plaintiff supported by a medical certificate is sufficient cause)

('27) AIR 1927 Lah 911 (912) (Plaintiff s statement on oath that process fee was paid but apparently mislaid in Court is sufficient)

('01) 3 Bom L R 130 (131) (The application for restoration need not be accompanied by an affidavit)

('26) AIR 1926 Lah 631 (631) (Absence not being intentional is a sufficient cause for restoration of a suit)

('30) AIR 1930 Lah 70 (71) (Do)

('85) 7 All 542 (545) (Delay of a few minutes ought to be excused)

3 ('31) AIR 1931 Pat 67 (68)

4 ('34) AIR 1934 Lah 34 (34)

5 ('66) 3 Bom H C R O C 60 (62)

('29) AIR 1929 Lah 882 (882) (Mistake on the [illegible] the Court in [illegible] keas to date

(1864) 2 Hyde 216 (216) (Absence owing to an understanding between the parties for an adjournment)

('35) AIR 1935 Lah 163 (164) (Appellate Judge noting in order that parties are to appear before lower Court on certain date—No proof that either pleaders or parties were informed of it—For parties absence on such date there is sufficient cause)

('36) 165 Ind Cas 563 (564) (Lah) (Transfer of case to another Court without information to parties—Case decided in absence of party — Application for restoration should be allowed)

6 ('26) AIR 1926 Cal 112 (112)

7 ('33) AIR 1933 Nag 39 (40) 28 Nag L R 295

8 ('39) AIR 1939 Lah 592 (592) 41 Pun L R 571 (571) (In the matter [illegible]

[illegible] imperative or there is contumacious obstruction or deliberate delay with a view deliberately to lengthen proceedings The dismissal of suits without considering whether payment of costs will not meet the situation so far as the opposite side if any is concerned must be deprecated)

Note 5

1 ('26) AIR 1926 Rang 200 (201) 4 Rang 215

('24) AIR 1924 Rang 161 (161)

O. 9 R. 4
Notes 5–10

instead of being one under Rule 3 is one under Rule 8, a fresh application will be barred [2]

6. Applicability of the Rule to insolvency proceedings — It was held in the undermentioned cases[1] that where an insolvency petition was dismissed on the analogy of Rule 2 for non payment of process fee, a fresh application *for insolvency* is not barred, by virtue of the provisions of this rule

6a. Applicability of the Rule to miscellaneous applications — An application for a final decree in a mortgage suit is not an application in execution and by virtue of Section 141, this rule will apply to such applications also Where an application for a final decree has been dismissed for non payment of *batta* the applicant can file a fresh application for the same [1] When an application for amendment of a decree is dismissed for non payment of *batta*, a fresh application for amendment can be made [2] Where an application for adjudication as an insolvent is dismissed on account of the default of both the parties, an application can be made to restore the previous application [3]

7. Notice to defendant. — Notice to defendant is not necessary for restoration under this rule [1] Where however the suit is restored and a date is fixed for the hearing of the case, the defendant is, as of right entitled to a notice of such date [2]

8. Appeal. — No appeal lies from any order passed under this rule [1]

9. Revision. — The High Court of Lahore has held in the undermentioned case[1] that an order rejecting an application under this rule is not open to revision under Section 115, Civil Procedure Code, but that the High Court can interfere under its inherent powers

10. Limitation. — Under Article 163 of the Limitation Act 1908, the period of limitation prescribed for an application under this rule is thirty days from the date of dismissal Time cannot be extended under Section 5 of the Limitation Act in the absence of any express provision made by the High Court under its rule making powers [1] Similarly where an application under this rule is time barred, the bar of limitation cannot be evaded by purporting to prefer an application under O 47 R 1 [2]

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2 (25) AIR 1925 Mad 986 (988)

Note 6

1 [illegible]

1 [illegible]
2 [illegible]
3 [illegible]

Note 7

1 [illegible]

1 (17) AIR 1917 Pat 593 (593)
('18) AIR 1918 All 176 (177)
(18) AIR 1918 Cal 164 (164)
(19) AIR 1919 Cal 125 (125) (In this case there is both an appeal and a rule)
(10) 6 Ind Cas 464 (464) (All)
(87) 10 Mad 270 (271)
(11) 9 Ind Cas 238 (238) (Lah)

Note 9

1 [illegible]

Note 10

1 (29) AIR 1929 All 197 (128) 51 All 487
(28) AIR 1928 Mad 556 (557)
See also sub rule (2) asked by the Bombay High Court
2 (33) AIR 1933 Pat 557 (558)

R. 5. [S. 99A.] [a]*(1) Where, after a summons has been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails, for a period of three months from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons, the Court shall make an order that the suit be dismissed as against such defendant, unless the plaintiff has within the said period satisfied the Court that —* **O. 9 R. 5**

Dismissal of suit where plaintiff, after summons returned unserved, fails for three months to apply for fresh summons

(a) he has failed after using his best endeavours to discover the residence of the defendant who has not been served, or

(b) such defendant is avoiding service of process, or

(c) there is any other sufficient cause for extending the time,

in which case the Court may extend the time for making such application for such period as it thinks fit

(2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit.

a Substituted by the Code of Civil Procedure (Amendment) Act XXIV of 1920 Section 2 for the original sub rule (1)

Synopsis

1 Legislative changes after 1908
2 "Period of three months" computation of
3 Fresh summons when granted
4 Failure to take fresh summons does not discharge the defendant from any liability
5 Appeal

Other Topics (miscellaneous)

Fresh suit See Note 4
Order not decree See Note 5
Order under this rule — Whether res judicata See Note 4

1 Legislative changes after 1908 — Sub rule (1) has been newly substituted for the old sub rule by the Amending Act, XXIV of 1920 thus effecting the following important changes —

(1) The period during which the plaintiff may remain without applying for fresh summons is reduced from one year to *three months*

(2) The words "*shall* make an order" have been used in the place of the words "*may* make an order"

(3) Provision has been made in sub clause (c) for extension of time for making the application referred to

2 "Period of three months," computation of — Under the old Code the period fixed was one year[1] and it was calculated not from the filing of the plaint but

Order 9 Rule 5 — Note 2

1 (10) 5 I[illegible] 63 ([illegible]) (Cal) (But Court was not bound to wait for the whole period as the Rule is only an enabling provision)

O. 9 R. 5
Notes 2-5

from the return of the summons unserved[*] The question also arose whether the period was to be calculated from the date of the return of the serving officer or from the date of the return of the officer whose duty it was to certify to the Court the return of the serving officer It was held in the undermentioned case[3] that the period was to be calculated from the date of the return made by the latter officer Effect has been given to that decision in the present rule A dismissal of a suit under this rule before the expiry of the period of three months is premature and irregular[4]

3. Fresh summons, when granted — The plaintiff must apply for fresh summons within the prescribed period i e three months from the date of the return of non service on the defendant[1] If he wants an extension of time he has to apply to the Court within three months and satisfy the Court as to any of the circumstances mentioned in sub clauses (a) (b) and (c)[2] See also the undermentioned case[3]

4 Failure to take fresh summons does not discharge the defendant from any liability. — Failure on the part of the plaintiff to take fresh summons and the consequent dismissal of the suit does not take away the liability of the defendant and does not operate as *res judicata* in a fresh suit against him[1] Nor can a co defendant plead that he is only a surety and that as the other defendant who is the principal debtor is not served he is not liable[2] Where however, the records of a suit were consigned to the record room owing to the non service of summons on one of the defendants a subsequent suit against the same defendant on the same cause of action was held to be barred on the ground that the suit must be deemed to be still pending[3]

5 Appeal — The words shall make an *order* that the suit be dismissed in the place of 'may dismiss the suit occurring in the old Code make it perfectly clear that the dismissal under this rule is not appealable as a *decree* This rule does not apply to appeals as Order 41 contains specific rules covering corresponding cases that arise in appeal[1]

O 9 R. 6

R. 6. [S 100] *(1)* Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then—

Procedure when only plaintiff appears

When summons duly served

(a) if it is proved that the summons was *duly served, the Court* may proceed *ex parte;*

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2 (05) 7 Bom L R 928 (929)
3 (89) 13 Bom 500 (502)

service)

Note 4
1 (06) 28 All 749 (751 752)

Upp

3 (17) AIR 1917 Lah 211 (211)

Note 5
1 (27) AIR 1927 Bom 68 (69 70) 50 Bom 815 (Per Fawcett J)

O. 9 R. 6
Notes 1-2

When summons not duly served

(b) if it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant,

When summons served, but not in due time

(c) if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant

(2) Where it is owing to the plaintiff's default that the summons was not duly served or was not served in sufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement

[1877, Ss 100, 101; 1859, Ss 111, 112, 113]

Synopsis

1 *Scope of the Rule*
2 Ex parte decree
3 Remedies in the case of an ex parte decree
4 *Subsequent appearance of defendant pending suit* See Rule 7
5 Second summons — Clause (b)
6 Sufficient time — Clause (c)

Other Topics (miscellaneous)

Adjourned hearing—Applicability of rule to See Note 1
Appeal See Note 3
Order 9 Rule 6 and O 17 R 2 See Note 1

1. Scope of the Rule — This rule contemplates the hearing of the suit on the day fixed in the summons, whereas O 17 R 2 contemplates the hearing of the suit on some later date to which the hearing may be adjourned [1] Thus, if the defendant had already appeared in answer to the summons but fails to appear at the adjourned hearing the case falls under O 17 R 2 [2] though the procedure contemplated in either case is the same [3] When an appearance under Order 9 is in question the word ' hearing means the *first day of the hearing* [4]

The fact that the summons may have directed the defendant to file a written statement does not authorise the Court to proceed under O 8 R 10 if the defendant does not appear, the proper procedure is that prescribed under this rule [5]

2. Ex parte decree — The plaintiff is not entitled to have the suit declared *ex parte* before the returnable date fixed in the summons [1] Before proceeding *ex parte* the Court must be satisfied that there is due service of summons on the defendant [2]

Order 9 Rule 6 — Note 1

1 (22) AIR 1922 Pat 485 (487, 488) 1 Pat 188
(37) AIR 1937 All 347 (348)
2 ('14) AIR 1914 Cal 860 (861) 41 Cal 956
(78) 2 All 67 (70 71) 5 Ind App 283 (P C)
(31) AIR 1931 All 703 (704)
3 (22) AIR 1922 Pat 485 (487) 1 Pat 188
4 (27) AIR 1927 Mad 799 (800)
(85) 7 All 538 (540)
(37) AIR 1937 All 347 (348)
5 (25) AIR 1925 Oudh 567 (569)

Note 2

1 (08) 32 Bom 534 (539)
2 (1900) 23 All 99 (100)
(69) 12 Suth W R 210 (211 212)
(80) 5 Cal 353 (355)

O. 9 R. 6
Notes 2-6

An *ex parte* proceeding ought not to be taken on the basis of service effected by registered post[3] The *onus* of proving due service is, of course, on the plaintiff in the first instance[4]

The Code does not prescribe any procedure to be followed in the case of an *ex parte* suit The practice is that no issues are framed, though the plaintiff is called upon to prove his case[5] The plaintiff is bound to prove his case to the satisfaction of the Court and his burden is not lightened because the defendant is absent[6] Except in suits relating to negotiable instruments, as under O 37 R 2, evidence should be adduced by the plaintiff[7] and a *prima facie case* made out[8] The Court is bound to consider the interests of the absent defendant[9] and not to rely on evidence otherwise unreliable simply because the case is *ex parte*[10]

3. Remedies in the case of an ex parte decree. — A defendant against whom an *ex parte* decree has been passed can —

(1) apply under Rule 13, *infra*, to set aside the *ex parte* decree, or
(2) appeal from the decree under Section 96, or
(3) apply for a review under O 47 R 1[1]

As to when a suit can be brought to set aside an *ex parte* decree, see Note 12 to Rule 13 As to the limitation for applications under Rule 13, see Note 28 thereto

4. Subsequent appearance of defendant pending suit. — See Rule 7.

5. Second summons — Clause (b). — If it is not proved that there was due service, the Court is bound to order fresh summons for the defendant If the non service or failure to effect due service is due to plaintiff's *default* the Court is bound to order him to pay the costs of the postponement under sub-rule 2[1]

6. Sufficient time — Clause (c). — The words *'duly served'* mean served in sufficient time to enable the defendant to appear in person or by a pleader[1] and the Court is bound under sub-clause (c) to direct fresh summons if he is not served in sufficient time

If the defendant though not served in sufficient time nevertheless appears and asks for time, the Court is not justified in refusing it and proceeding *ex parte* By his appearing he should not be placed in a worse position than he would be in if he had not appeared at all[2]

('90) 1890 Bom P J 136 (136) (Ex parte decision against a defendant, who has never been served with notice of suit, is bad)
3 (26) AIR 1926 Lah 579 (580)
4. ('25) AIR 1925 Cal 801 (802) 52 Cal 453
(1900) 23 All 99 (100)
5 (23) AIR 1923 Nag 83 (84) (But Court

Cal 1001
8. ('71) 15 Suth W R 503 (504)
('26) AIR 1926 Oudh 192 (193)
('66) 1866 Pun Re No 85, p 90

9 ('24) AIR 1924 Cal 647 (648)
10 (17) AIR 1917 Oudh 194 (196)

Note 3

1. (74) 22 Suth W R 213 (214) (Can apply for a review)

(Do)

Note 6

1. (1900 02) 1 Low Bur Rul 226 (227, 228)
(70) 7 Bom H C R A C 138 (139)
2. (72) 18 Suth W R 141 (142)

Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non appearance.

R. 7. [S. 101.] Where the Court has adjourned the hearing of the suit *ex parte,* and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.

[1877, Ss. 100, 101; 1859, S. 111.]

Synopsis

1. Scope of the Rule. | 2. "Assigns good cause."

1. Scope of the Rule. — The underlying principle of this rule is that until a suit is actually called and so long as an *ex parte* decree is not passed, the defendant is entitled to come in and defend the suit [1] The Courts should be liberal in construing this rule and should not take a stringent view of the defendant's absence [2]

The rejection of an application under this rule is no bar to an application under Rule 13 after the passing of an *ex parte* decree [3]

2. "Assigns good cause." — If the defendant wants to set aside the order placing him *ex parte* and be relegated to the stage at which the suit was, when he absented himself, then he has to assign good cause for his previous absence But if he merely wants to take part in the proceedings *at the stage* at which it is when he appears, it is not necessary to get the previous order placing him *ex parte* set aside The reason is that the rule is not intended to be penal and by the very fact of his appearance the proceedings cease to be *ex parte* thenceforth [1]

Though the rule gives a discretion to the Court to impose terms, failure to do so is not an irregular or improper exercise of discretion such as to justify interference in revision [2]

Order 9 Rule 7 — Note 1

1. ('22) AIR 1922 Bom 345 (345)
('72) 9 Beng L R App 15 (16)
('22) AIR 1922 All 110 (111)
[*See* ('24) AIR 1924 Cal 806 (808)]
[*See also* ('81) 5 Bom 184 (188)]
2. ('31) AIR 1931 Oudh 159 (160)
3. ('98) 21 Mad 324 (325)
('96) 10 C P L R 45 (46)
('82) 8 Cal 272 (274)

Note 2

1. [illegible]

[illegible]

defendant appearing and not asking for re-hearing of prior proceedings—Court has no jurisdiction to order costs against him)]
[*See also* ('39) AIR 1939 Mad 385 (385) (Though it is the practice in the mofussil to pass an order [illegible]

[illegible] to the suit It is only when a decree has been [illegible]

[illegible] who appears at the adjourned hearing, any [illegible]

[illegible] defendant an opportunity to file a written statement at that stage — Mere fact that on new statement additional issues may have to be framed does not amount to re-opening anything [illegible]

2. [illegible]

O. 9 R. 8

R. 8. [S. 102.] Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

Procedure where defendant only appears.

[1877, Ss. 102, 103; 1859, S. 114.]

Synopsis

1. Scope of the Rule. — This rule deals with the procedure to be followed when the plaintiff does not appear and the defendant alone appears In such a case, the only thing that the defendant is entitled to claim is to have the plaintiff's suit dismissed He is not entitled to call evidence to disprove charges of fraud, etc, made against him in the plaint [1]

The Court has no power to dismiss a suit for default under this rule where the plaintiff *dies* Such an order of dismissal is a nullity, the reason being that the rules applicable to a defaulter cannot be applied to a dead man [2] Similarly, a dismissal under this rule is not proper if the plaintiff has been adjudicated *insolvent* before the hearing, as there is none on the record who is bound to appear, the Court should, in such a case act under Order 22 Rule 8 [3]

Where a reference to arbitration in a suit provided that the arbitrator should hear evidence and determine the case and that if one of the parties failed to appear, he should have power to proceed *ex parte*, the arbitrator cannot, on failure of one of the parties to appear, act under the provisions of this rule [4]

2. Appearance. — See Notes under the same heading in Rule 9, *infra*

3. "When a suit is called on for hearing."—The hearing of the suit may be either on the day named in the summons or on a subsequent day to which the hearing

Order 9 Rule 8 — Note 1

1. ('12) 17 Ind Cas 87 (87) 40 Cal 119
2. ('13) 19 Ind Cas 596 (527) 35 All 331 40 Ind App 151 16 Oudh Cas 194 (PC)
('19) AIR 1919 Lah 447 (447) 1918 Pun Re No 96
('24) AIR 1924 Oudh 114 (114) (Order passed under this rule after plaintiff's death is a nullity)
('30) AIR 1930 Oudh 3 (5) 5 Luck 241.
('35) AIR 1935 Nag 189 (190) 31 Nag L R 374
3. ('27) AIR 1927 Cal 76 (77, 78) 53 Cal 844
4. ('18) AIR 1918 Cal 247 (247) (He should hear the other party before making award)

be adjourned[1] The date fixed for the settlement of issues is as much a day fixed the hearing as any other date fixed[2]

A dismissal of a suit at an *adjourned hearing* for default of plaintiff's earance is under the provisions of O 17 R 2 read with this rule[3] As will be n from the provisions of Order 17 *infra*, a dismissal under Rule 2 of that Order be set aside under the provisions of Order 9 and the suit restored,[4] while, if the missal is under Rule 3 of that Order the remedy of the party aggrieved is only by of appeal or review and not by an application for restoration under O 9 R 9[5]

A Court will not be justified in dismissing a suit under this rule where the lence on record is sufficient to decree the claim of the plaintiff,[6] or where the lence has been completely recorded and nothing remains to be done except to hear iments,[7] or where the suit was adjourned in the course of arguments,[8] or for nouncing judgment[9] Similarly, where part of the plaintiff s claim was fully deter- ied by a preliminary order and the rest of the claim was abandoned, the Court is justified in dismissing the suit for default[10] A failure to amend the plaint as per er of Court and to pay costs of the adjournment does not justify a dismissal of the for default after the evidence is finished[11]

It is not proper for the Court to dismiss the suit on a day not fixed for the ring of the suit[12] as, for example, when the day was fixed for the appointment of uardian *ad litem* of a minor defendant,[13] or on a day which is not duly notified to

Note 3

68) 4 Mad H C R 56 (59)
('18) AIR 1918 Pat 62 (62)
) AIR 1925 Oudh 682 (682)
) AIR 1922 Mad 416 (416)
('22) AIR 1922 All 68 (68)
) AIR 1934 Mad 199 (199)
) 20 Bom 736 (744)
) 1880 Pun Re No 41, page 88
) 12 Mad L Jour 473 (474)
) AIR 1925 Oudh 433 (434)
) 6 Ind Cas 233 (234 235) 34 Mad 97.
) 5 Low Bur Rul 75 (76)
) AIR 1917 All 136 (136 137)
) 7 Mad 41 (42)
) AIR 1923 Pat 530 (531)
) 1 Sind L R 224 (225)
) 34 Cal 235 (236 237, 239)
) AIR 1918 Cal 330 (331)
) AIR 1932 Lah 477 (478) (Default on date xed for hearing of the objections to award)
) 116 Ind Cas 752 (752) (All)
(37) AIR 1937 Rang 437 (438)
See also (39) AIR 1939 Nag 218 (213) I L R (1939) Nag 574 (If an order is made under O 17 R 2 read with O 9 R 8 then it is as though it were an order under O 9 R 8 and is not appealable at all)]
(76) 1 Mad 257 (258)
5) AIR 1915 Mad 16 (17)
See (26) AIR 1926 All 729 (730)]
(05) 7 Bom L R 261 (262)
(09) 3 Ind Cas 683 (684) 5 Low Bur Rul 75
7 (81) 3 All 292 (294) (Order appealable)
8. ('31) AIR 1931 Bom 111 (113)
9 (11) 11 Ind Cas 842 (842 843) (Lah)
10 (10) 6 Ind Cas 592 (593 594) 37 Cal 426 37 Ind App 80 (P C)
11. (26) AIR 1926 Lah 571 (571)
12. (29) AIR 1929 Lah 374 (375)
(70) 14 Suth W R 401 (402) (Suit remanded—A day was fixed which was not notified to the parties—Dismissal of the suit on such a day was held to be improper)
(36) AIR 1936 Lah 759 (760) (Date fixed merely for filing objections against the report of the commissioner is not date fixed for hearing)
(38) AIR 1938 Rang 360 (362) (Date fixed for filing list of witnesses is not date fixed for hearing)
(37) AIR 1937 Lah 118 (118) (Day fixed for payment of costs of adjournment by defendant to plaintiff—Not date fixed for hearing)
(36) AIR 1936 Lah 280 (281) (An order dismissing the suit of the plaintiff for default on a date fixed for the submission of the report of the commissioner as to the market value of the property in suit for purposes of Court fees is without jurisdiction as such date is not the date of the hearing within the meaning of O 9 R 8)
(35) AIR 1935 Pesh 186 (188)
13 (11) 10 Ind Cas 313 (314) 33 All 560
(24) AIR 1924 Pat 714 (715)
(22) AIR 1922 Pat 252 (254 255) 6 Pat L Jour 650
(23) 73 Ind Cas 559 (560) (Pat)

O. 9 R. 8
Notes 3–5

the parties,[14] or on holidays[15] The word 'hearing' does not mean only the recording of evidence It means the hearing of the suit before the *Court* and does not include the disposal of a routine matter which is within the powers of an officer of the Court and need not come before the Court at all[16] The Court should not hastily dismiss a suit for non appearance when the suit is pending reference to arbitration and when the arbitrator had applied for extension of time to make the award[17] Where a commissioner has been appointed and he has not made his report, the suit cannot be heard until the commissioner has finished his work and there can be no dismissal for default[18] After a *decree has once been made*, a suit cannot be dismissed for default[19] Thus, there can be no dismissal under this rule after a preliminary decree for partition, and if an order is so made, it is passed without jurisdiction[20] The Court should in such cases adjourn the suit *sine die* with liberty to the plaintiff to apply to restore the suit to the list on payment of costs[21] Where on an amendment of the plaint being allowed, the plaintiff is directed to give the value of the property (relief as to which has been allowed to be added by amendment) and to put in deficit court fee, the proper order to pass on non compliance is an order *rejecting the plaint* and not one dismissing the suit for default[22]

4. More plaintiffs than one. — This rule is meant to provide for a case where *a single* plaintiff does not appear or, where there are several plaintiffs, and *all* of them do not appear[1] Cases, where *some only* of several plaintiffs do not appear, are provided for in Rule 10, *infra*

5. More defendants than one. — Under this rule there can be a partial or total dismissal for default[1] As has been seen in the Notes to Rule 3 *supra*, so far as the

14 ('26) 96 Ind Cas 245 (245) (Lah)
('34) AIR 1934 Lah 91 (91) (Transferee Court issuing notice to plaintiff and his counsel to appear on certain day—Notice on plaintiff not served—Notice on counsel served but he refused to accept notice—Trial Court holding service on counsel good and dismissing suit — Procedure *held* to be unfair)
('13) 18 Ind Cas 280 (281) (Lah) (Case heard in camp and not at headquarters—No notice to parties)
('66) 2 Bom H C R 381 (382)
('23) AIR 1923 Lah 431 (432)
[*See* ('23) AIR 1923 All 79 (80) (Notice of hearing date not given to defendant—Ex parte decree must be set aside)]

15 [illegible]

16 [illegible]

17 [illegible]

('32) AIR 1932 Mad 519 (522) (Do)

20 [illegible]

[illegible] missal of suit for failure to appear on date fixed for filing objections to report of commissioner [illegible]

Note 4

1 [illegible]

Note 5

1. ('25) AIR 1925 All 425 (426)

defendant or defendants who appear are concerned, the order of dismissal will be one under this rule and will bar a fresh suit against them With regard to the defendants who are absent, the dismissal will be under Rule 3 and a fresh suit is not barred [2] Even if the defendant appears and applies for time, the dismissal would fall only under this rule and not under Rule 3 [3]

6. "Shall make an order that the suit be dismissed."— These words were substituted under the present Code to make it clear that the dismissal is not a decree but only an *order* which is not appealable [1] The earlier decisions[2] which held that the dismissal under this rule was a decree are now no longer law

The Court has no option under this rule but to dismiss the suit[3] and is not justified in enquiring into the merits of the case[4] or receive evidence or record any statement from the defendant [5] While dismissing under this rule, the Court has no jurisdiction to add any proviso in the order, as for example, that the order shall not prejudice the interest of the minor plaintiff [6] Striking off the suit is not a proper mode of dismissing a suit under this rule [7]

A filed a suit against *B* for recovery of a certain amount of money which had been paid under protest, and also for damages for wrongful attachment The Court framed a preliminary issue on the question whether the suit, so far as the return of the money was concerned, disclosed a cause of action, and after hearing arguments dismissed that part of the claim with costs and directed the suit to proceed as regards the claim for damages No decree was drawn up in respect of the portion dismissed When the *suit came on for hearing the plaintiff was absent and the Court dismissed the whole* suit for default under this rule It was held by the Privy Council[8] that the dismissal for default under this rule was wrong so far as the recovery of money was concerned, inasmuch as a final decision had been passed thereon on the merits, and that, therefore, an appeal lay so far as such portion was concerned

7. Unless the defendant admits. — When the defendant admits the claim of the plaintiff either in whole or in part, the Court cannot dismiss the suit but must pass a decree for the amount admitted [1]

Where, however, the admission of the defendant is not in reality an admission of the claim of the plaintiff, *e g*, where the plaintiff claims to pre empt on a payment of Rs 1500 and the defendant admits the right of the plaintiff to pre empt but states

2 ('26) AIR 1926 All 169 (170) 48 All 97
3 ('28) AIR 1928 Pat 335 (336) 7 Pat 338

Note 6

1. ('13) 20 Ind Cas 1 (2) (Cal)
('25) AIR 1925 Oudh 485 (485) 28 Oudh Cas 124
Even in the following cases decided prior to
('91) 1 Mad L Jour 395 (387)
[*See* ('73) 21 Suth W R 124 (124)]
3. ('39) AIR 1939 Nag 213 (214) I L R (1939) Nag 574
4. ('21) AIR 1921 Pat 325 (326)
('15) AIR 1915 All 139 (140) 37 All 460
5 ('13) 20 Ind Cas 1 (1) (Cal)
('20) AIR 1920 All 193 (193)
('12) 17 Ind Cas 87 (87) 40 Cal 119
[*See* ('75) 24 Suth W R 141 (141)]
6 ('21) AIR 1921 Pat 103 (103) 6 Pat L Jour 317)
7. ('72) 17 Suth W R 219 (220)
8 ('23) AIR 1923 P C 114 (116) 50 Ind App 102 4 Lah 284 (P C) (*Vide* quotation from the judgment of Lord Moulton in second appeal before the Board between the same parties)

Note 7

1. ('21) AIR 1921 Sind 50 (51) 15 Sind L R 172
('25) AIR 1925 Pat 712 (713)
[*See also* ('09) 3 Ind Cas 912 (913) 33 Bom 475]

O. 9 R. 8
Notes 7-9

that the price is Rs 12,000, the Court cannot pass a decree in favour of the plaintiff under this rule for pre emption on payment of Rs 12 000 but must, on default by the plaintiff, dismiss the suit [2]

The word 'claim is not necessarily synonymous with the amount sued for It may refer to the right claimed irrespective of the amount stated in the relief column [3] A decree passed on the admission of the defendant is appealable [4]

8. Effect of dismissal under this Rule. — Unlike the dismissal of a suit under Rule 3 a dismissal under this rule precludes a fresh *suit* on the same cause of action [1] But two other remedies are open to the plaintiff —

(1) to apply under Rule 9 for restoration of the suit or

(2) to apply for a review of the order [2]

It is not necessary that the plaintiff should apply under Rule 9 before applying for a review[3] and there is nothing in the Code to limit the parties to one particular remedy But a review will not lie except on the grounds mentioned in O 47 R 1 It has been held by the High Court of Bombay in the undermentioned case[4] that where a suit is dismissed under O 9 R 8 there could be no such grounds for review as those mentioned in O 47 R 1 inasmuch as the fact that the applicant was absent when the suit was called on for hearing was neither a discovery of any new and important matter, nor an error apparent on the face of the record nor a ground analogous to any of those specified in the rule There is a conflict of opinion as to whether a plaintiff who has failed to make an application within thirty days under O 9 R 9 can be allowed to prefer an application for review The High Courts of Patna[5] and Lahore[6] have held that he cannot be allowed to do so, on the ground that the law of limitation should not be allowed to be evaded in that way The High Courts of Madras[7] and Calcutta,[8] on the other hand, have held that such an application would lie and that the fact that the plaintiff will get a longer period of limitation by the adoption of a particular remedy is no ground for refusing him relief.

It has been held by the Lahore High Court[9] that a Court has inherent power to restore a suit which has been dismissed in default owing to a mistake of the Court itself

9. Revision. — Where the Court refuses to act under this rule in a case to which the rule applies[1] or acts under this rule illegally or with material irregularity,[2] a revision will lie

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2. ('21) 60 Ind Cas 724 (724) (Lah)
3. ('17) AIR 1917 Mad 732 (734)
4. ('12) 15 Ind Cas 601 (602) (Cal)

Note 8

1 ('25) AIR 1925 Mad 986 (988)
('16) AIR 1916 Cal 791 (791, 792)
2. ('25) AIR 1925 Lah 517 (518)
('28) AIR 1928 Rang 177 (178) 6 Rang 254
('75) 7 N W P H C R 126 (130)
3. ('99) 26 Cal 598 (601)
('19) AIR 1919 Mad 844 (844)
4. ('25) AIR 1925 Bom 521 (522) 49 Bom 833
[See however ('23) AIR 1923 Bom 395 (395)]
5. ('17) AIR 1917 Pat 673 (673, 674) 1 Pat L Jour 547.
[illegible] AIR 1938 Pat 557 (558)
[illegible] 1920 Pat 491 (491).
6. [illegible] AIR 1925 Lah 517 (518). (Application for [illegible] of suit made but dismissed as barred by limitation—Subsequent application for review of judgment *held* not competent)
('97) 1897 Pun Re No 15, p 51
7. ('19) AIR 1919 Mad 844 (844) (Following 26 Cal 598)
8. ('99) 26 Cal 598 (601)
9. ('30) AIR 1930 Lah 759 (760) (AIR 1928 Lah 534 and 6 I C 208, Followed)

Note 9

1. ('19) AIR 1919 Pat 372 (373) (Process fee not paid but plaintiff appearing and applying for time to file written statement—Plaintiff absent —Court dismissing suit under O 9 R 2 instead of under O 9 R 8—This amounts to refusal to exercise jurisdiction)
2. ('21) AIR 1921 Lah 139 (140) (Dismissal of suit for default—Order mentioning that plaintiff was present but that he subsequently went away —Order *held* improper)

R. 9. [S 103] *(1)* Where a suit[6] is wholly or partly dismissed under rule 8, the plaintiff[7] shall be precluded from bringing a fresh suit[5] in respect of the same cause of action But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause[8] for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit **O. 9 R**

Decree against plaintiff by default bars fresh suit

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.

[1877, Ss 103, 108, 109, 588; 1859, S 119 See O 22 R 9]

Local Amendments

BOMBAY

Add the following as sub rule (3)

'(3) The provisions of Section 5 of the Indian Limitation Act 1908 shall apply to applications under this rule

CALCUTTA

Re number sub rule (2) as sub rule (3) and *insert* after the words notice of the application the words ' with a copy thereof (or concise statements as the case may be)

Insert the following as sub rule (2)

The plaintiff shall for service on the opposite parties present along with his application under this rule either —

(i) as many copies thereof on plain paper as there are opposite parties or

(ii) if the Court by reason of the length of the application or the number of opposite parties or for any other sufficient reason grants permission in this behalf a like number of concise statements

LAHORE

Add the following proviso to sub rule (1)

Provided that the plaintiff shall not be precluded from bringing another suit for redemption of a mortgage although a former suit may have been dismissed for default

N W F P

Same proviso as that added by the Lahore High Court is added

Synopsis

1 Scope of the Rule
2 Appearance, meaning of
3 Appearance in person See O 3 R 1 Note 4
4 Appearance by pleader See O 3 R 1 Note 6
5 Bar of fresh suit
6 Suit ' meaning of
7 Minor plaintiff
8 ' Sufficient cause '
9 Restoration of suit in favour of one of several plaintiffs—Whether can operate in favour of all
10 Inherent power of Court to order restoration See Note 2 to Section 151
10a Conditional order of restoration
11 Limitation
12 Appeal
13 Revision

O. 9 R. 9
Notes 1-2

Other Topics (miscellaneous)

1. Scope of the Rule. — The remedy provided for by this rule is not open to a plaintiff whose suit has been dismissed for any reason, other than default of appearance under Rule 8[1] Hence no application lies under this rule where the dismissal is under O 17 R 3[2] or O 11 R 21,[3] or where the dismissal is due to a failure on the part of the plaintiff to adduce evidence[4] or where the plaint is rejected under O 7 R 11 for failure to pay deficient court fees[5] The rule applies only to suits and not to appeals[6] It applies also to suits under Section 9 of the Specific Relief Act, 1877 which are dismissed for default That Section bars only a review and not an application for rehearing[7] As to the restoration of appeals dismissed for default of appearance of the appellants, see Order 41 Rule 19

The Court cannot *suo motu* order a restoration without an application on the part of the plaintiff[8] The word ' plaintiff" has been held to include his legal representatives who can also therefore apply under this rule[9] No fresh *vakalatnama* is necessary for an application under this rule[10]

The effect of restoration under O 9 R 9 is to bring the suit, as regards parties, to the exact position in which it was at the time of dismissal[11]

See also Note 6, *infra*

2 "Appearance," meaning of. — The term "appearance has nowhere been defined in the Code and it must be understood in reference to the particular subject matter to which it relates[1] Appearance in Order 9 means either —

(a) by the party in person or

(b) by a pleader either himself duly instructed and able to answer all material questions relating to the suit or accompanied by some other person able to do so[2]

For a full discussion see Order 3 Rule 1, *ante*

Order 9 Rule 9 — Note 1

1 (15) AIR 1915 All 196 (196)
(21) AIR 1921 Mad 417 (418) (Default under O 10 R 4 not covered by Order 9)
[**See contra** (32) AIR 1932 All 595 (596) (Default under O 10 R 4 is covered by Order 9)]
2 (69) 4 Mad H C R 56 (59)
(35) AIR 1935 All 210 (212)
3 (25) AIR 1925 Rang 218 (218) 3 Rang 13 (Appeal or review the proper remedy)
4 (33) AIR 1933 All 539 (540)
(17) AIR 1917 Pat 684 (698)
(73) 5 N W P H C R 74 (76)
5 (29) AIR 1929 Mad 344 (345) (Plaintiff absent on the day fixed for payment of additional court fees—Dismissal of the suit *held* to be under O 7 R 11 and not under O 9 R 8)
[*See* (23) AIR 1923 Pat 354 (354) 2 Pat 504 (Point conceded)
(32) AIR 1932 Pat 11 (12) (Plaint in former suit rejected under O 7 R 11—Fresh suit filed on the same cause of action — District Judge holding second suit barred under this rule—*Held* by High Court that this rule did not apply)]
6 (1864) 1864 Suth W R Misc 21 (21)
7 (82) 4 Mad 217 (218)
8 (25) AIR 1925 Oudh 105 (106) (Plaintiff applied for restoration as against one out of two defendants — *The Court also restored* the suit against the other defendant and that too beyond the period of limitation—*Held* order of restoration *as against the other defendant* was *ultra vires*)
(22) AIR 1922 Oudh 160 (160) 25 Oudh Cas 67.
9. (03) 6 Oudh Cas 31 (36 38)
(*See* (91) 1891 Pun Re No 117 p 537 (Plaintiff s suit dismissed for default under O 9 R 8 —Plaintiff s representatives cannot bring a fresh suit)]
10 (90) 1890 Bom P J 121 (124) (Plaintiff himself need not make the application—Application by pleader is competent)
11 (24) AIR 1924 Cal 814 (815)
(19) AIR 1919 Cal 10 (12)

Note 2

1 (07) 34 Cal 403 (415) (F B)
2 (99) 23 Bom 414 (421 422) (Besides these two modes of appearance there is a third mode of

3. Appearance in person. — See Order 3 Rule 1 Note 4.

4. Appearance by pleader. — See Order 3 Rule 1 Note 6

5. Bar of fresh suit. — Where a suit is dismissed for default, it cannot be said to have been *heard* and decided on the merits and therefore cannot operate as *res judicata*[1] But the plaintiff is, under the specific provisions of this rule, barred from bringing a fresh suit on the *same cause of action*[2] and the fact that the *mode of relief* claimed in the subsequent suit is different will not be a ground for not applying the bar under this rule[3] Thus, a suit on the basis of entries in the plaintiff's account book, in respect of the same sum of money for which a prior suit on a promissory note given therefor had been dismissed for default, will be barred under this rule[4] Similarly, where a suit filed by the voluntary liquidator of a company against an alleged share holder for the recovery of a sum of money due to the company is dismissed for default under this rule, a subsequent application by the official liquidator to have the name of the defendant placed in the list of contributories in respect of the same claim is barred[5]

Where the cause of action in the subsequent suit is *different* from that in the first suit, this rule will not apply[6] Thus, a suit for partition dismissed for default under this rule does not bar a subsequent suit for partition The reason is that the right to enforce partition is a *continuous* right which is a legal incident of a joint tenancy and which enures so long as the joint tenancy continues[7] See Note 36 to

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appearance viz appearance by a party's recognized agent)
('28) AIR 1928 Mad 831 (834) (Mere attendance of pleader is no appearance)

Note 5

1. ('10) 5 Ind Cas 298 (300) (Cal)
('14) AIR 1914 All 222 (223)
('82) 6 Bom 482 (486)
('35) AIR 1935 Cal 212 (216, 217) 62 Cal 15 (Where the suit is dismissed for want of prosecution under the provisions of Ch 10 R 36 of Calcutta High Court Rules and Orders (Original Side) the plaintiff is not debarred from bringing a fresh suit)
See also Note 106 to S 11
[*See also* ('91) 13 All 53 (54, 55 62) 17 Ind App 150 (P C) (Previous suit dismissed for want of evidence)]

2. ('16) AIR 1916 Cal 791 (791) (A Court while dismissing a suit for non prosecution under O 9 R 8 imposed a condition that such dismissal will not be a bar to any fresh suit—*Held* fresh suit barred under this rule in spite of the condition)
('83) 9 Cal 426 (429)
('01) 25 Bom 82 (84, 85)
('16) AIR 1916 Lah 278 (273, 274) 1916 Pun Re No 66
('29) AIR 1929 Pat 685 (689, 691) 9 Pat 447 (Suit for declaration of title dismissed for default —Subsequent suit for possession on the same facts barred)
('30) AIR 1930 Nag 145 (146) (Where a plaintiff's suit alleging that defendant had forcibly and illegally taken possession of certain land and tank, that defendant's possession constituted a trespass and praying that the defendant be ejected from the land and tank is dismissed under O 9 R 8 a subsequent suit alleging forcible and wrongful possession and praying for possession of same land is barred because the cause of action is the same and not a continuing one)

3 ('28) AIR 1928 Rang 73 (74) 5 Rang 785
('26) AIR 1926 Lah 562 (563)
('88) 15 Cal 422 (430 431) 15 Ind App 66 (PC) (In the first suit sub proprietary right claimed while in the second suit superior proprietary right was claimed)

4. ('20) AIR 1920 All 340 (341) 42 All 193

5 ('20) AIR 1920 Lah 43 (44) 1 Lah 237 (Such application partakes of the nature of suit)

6. ('20) AIR 1920 Cal 407 (408)
('33) AIR 1933 Lah 365 (368) 14 Lah 465
('15) AIR 1915 All 395 (395, 396)
('23) AIR 1923 All 409 (410) 45 All 81
('20) AIR 1920 Mad 710 (711 712) (First suit for declaration—Second suit for partition and separate possession)
('17) AIR 1917 Cal 11 (11)
('14) AIR 1914 All 222 (223)
('27) AIR 1927 Pat 375 (376) 7 Pat 28 (Fresh suit for enhancement of rent of the same tenure *held* not barred)
('25) AIR 1925 Nag 366 (368) (Even one different fact makes causes of action different)
('86) 10 Bom 28 (30) (This rule should be strictly construed)

7. ('06) 28 All 627 (629)
('26) AIR 1926 Mad 1018 (1018) 49 Mad 932

O. 9 R. 9
Notes 5-6

Section 11, *ante* As regards suits for redemption it was held by the Privy Council in *Shanker Baksh* v *Daya Shanker*[8] that where a first suit for redemption was dismissed for default under this rule, a second suit for redemption will be barred as being based on the same cause of action The Allahabad[9] and Bombay[10] High Courts have, however, distinguished the said decision of the Privy Council on the ground that their Lordships did not consider the effect of Section 60 of the Transfer of Property Act and that the effect of that Section is not to bar a second suit for redemption

The rule does not apply unless the plaintiff in the prior suit is the plaintiff in the subsequent suit[11] Thus a dismissal for default of a suit by a Hindu widow in respect of her deceased husband s estate is no bar to a fresh suit by the reversioner in respect of the same matter[12] The rule only precludes a fresh *suit* it does not preclude a plea raised by a defendant in a suit[13] The bar of a fresh suit under this rule applies only where the suit has been dismissed for default under Rule 8 and not otherwise[14]

6 "Suit," meaning of. — According to the High Courts of Allahabad[1] and Calcutta[2] the rule is plainly intended to apply only to *suits* and not to *applications,* such as applications for probate See also the undermentioned decision[3] But the High Court of Madras[4] has held that the present rule applies to those applications which, under Section 83 of the Probate and Administration Act *are treated as suits* So also, it has been held by the High Court of Madras that this rule read along with Section 141 applies to an application for leave to sue as pauper, and where such application is dismissed for default of appearance it can be restored under this rule[5] It has further *been held by that Court that where an application for restoration of a petition is* maintainable by virtue of Section 141 of the Code, the Court cannot decline to consider the application on its merits on the ground that the applicant has another remedy open to him[6] The Lahore High Court has also held that an application for probate

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('35) AIR 1935 Mad 458 (459)
[*See* ('28) AIR 1928 Rang 73 (74 75) 5 Rang 785
('01) 10 Cal W N 839 (840) (Application for execution of preliminary decree for partition dismissed for default—This rule inapplicable)]

8 ('89) 15 Cal 429 (431) 15 Ind App 66 (PC)
[*See also* ('07) 1907 Pun Re No 48 p 179
('05) 1905 Pun Re No 32 p 141]

9 ('03) 2 Ind Cas 630 (631 632) (All)

10 ('28) AIR 1928 Bom 66 (67) 52 Bom 111 (Order 9 Rule 9 does not override provisions of S 60 T P Act)

11 ('10) 5 Ind Cas 698 (699) 33 Mad 31
('33) AIR 1933 Lah 365 (368) 14 Lah 485
(1900) 2 Bom L R 206 (210)
[*See* ('29) AIR 1929 All 861 (862) (Mortgagees fraudulently allowing suit to be dismissed for default—Attaching creditors purchasing mortgagee interest subsequently are not bound by dismissal)]

12 ('84) 1884 Pun Re No 80 p 216

13 ('38) 42 Cal W N 863 (871) (Suit on a first mortgage—Third mortgagee who was impleaded as one of the defendants claiming priority over second mortgagee under S 78 *of the* T P Act — Suit previously filed by third mortgagee to obtain a declaration of his priority dismissed for default —Third mortgagee not prevented from raising contention as to priority in this suit)

14 ('35) AIR 1935 Cal 764 (766) (Amendment of plaint allowed—Plaintiff directed to give value of property and put in deficit court fee — Non compliance with order — Suit dismissed for default on rejecting permission to withdraw under O 23 R 1—Proper order is rejection of plaint—Fresh suit is not barred by O 23 R 1, O 9 R 9, O 2 R 2)

Note 6

1 ('15) AIR 1915 All 172 (173) 37 All 380 (Sec *151 C P Code held applicable*)

2 ('10) 7 Ind Cas 126 (129) (Cal)
('26) AIR 1926 Cal 1057 (1057) 53 Cal 678

3 ('37) AIR 1937 Sind 273 (278) 31 Sind L R 180 (The words the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action in O 9 R 9 are not applicable to an application under O 34 R 5 and an application is not barred because a previous one has been dismissed for default under O 9 R 9 Per Davis J C *Obiter*)

4 ('19) AIR 1919 Mad 112 (112)

5 ('39) AIR 1939 Mad 681 (681) (AIR 1933 Mad 5 Followed)
[*See also* ('37) AIR 1937 Mad 653 (653) I L R (1938) Mad 216 (Order 9 applies to an application made for setting aside the dismissal of a petition made under S 84 of the Madras Hindu Religious Endowments Act)]

6. ('39) AIR 1939 Mad 681 (681)

dismissed for default of appearance can be restored under this rule[7] But the same High Court has held that an application under Section 292 of the Succession Act of 1925 is in the nature of an execution proceeding and that, therefore, Section 141 does not make this rule applicable to such an application So, it has been held by that Court that where such an application is dismissed for default, a fresh application can be made[8]

In the undermentioned case,[9] it was held by the Oudh Chief Court that an application under Section 47 of the Code stands on the same footing as a suit and that where such an application is dismissed for default of appearance, a fresh application on the same allegations is not maintainable

The bar under this rule does not apply to a fresh application for adjudication as insolvent after the dismissal of a prior application for default[10] An order of annulment passed under Section 43, sub-section 1 of the Provincial Insolvency Act of 1920 *cannot be set aside by virtue of the provisions of Order 9*[11] *The reason is that* Section 10, clause (2) of the Provincial Insolvency Act itself provides for a remedy in such cases

The rule does not apply to applications under Section 158 of the Bengal Tenancy Act[12]

See also Note 5 to Section 2, sub clause (2), Note 21 to Section 11, and Order 9, "General"

7. Minor plaintiff. — A suit by a minor is liable to be dismissed for default of appearance on the part of the next friend[1] and the provisions of this rule cannot be nullified because the plaintiff happens to be a minor[2] But where the next friend is guilty of *gross negligence* in the conduct of the suit, the minor can bring a fresh suit, notwithstanding this rule, either himself after attaining majority or through another next friend[3] He can also apply under this rule for setting aside the order of dismissal[4] See also Note 8 *infra* under the sub-heading "Absence of next friend of minor plaintiff"

8. "Sufficient cause." — The only ground for restoring a suit under this rule is the existence of a sufficient cause for the non appearance of the party at the time *the suit was called on for hearing*[1] *The term "sufficient cause" has not been defined*

7 ('36) AIR 1936 Lah 863 (864) (17 All 106 AIR 1919 Mad 112 and 20 I C 281, Relied on, AIR 1936 Lah 712, Affirmed)

8. ('35) AIR 1935 Lah 145 (145)

9. ('37) AIR 1937 Oudh 337 (338) 13 Luck 309 (The combined effect of Ss 2(2) and 47, C P C, is that an application under S 47 stands on the footing of a suit and the determination of such an application is tantamount to a decree)

10. ('27) *AIR 1927 Mad 579 (580)*

11. ('26) AIR 1926 Mad 942 (943) 49 Mad 935

12. ('23) AIR 1923 Pat 381 (382, 384) 2 Pat 192 (The rule applies only to suits)

Note 7

1 ('10) 8 Ind Cas 547 (547) (Lah)

2. ('21) AIR 1921 Sind 200 (202) 17 Sind L R 41 (Fresh suit through different next friend *held* barred)

3. ('95) 22 Cal 8 (14)

4. ('15) AIR 1915 Mad 52 (52)
('25) AIR 1925 Mad 774 (775)

Note 8

1. ('10) 4 Low Bur Rul 221 (222)
('33) AIR 1933 Lah 169 (171) (If there is no sufficient cause, suit cannot be restored as a matter of grace)
('33) AIR 1933 Pesh 59 (60) (Suit cannot be restored under inherent powers in the absence of sufficient cause)
('27) 106 Ind Cas 821 (821, 822) (Lah) (The applicant must however be given opportunity to *adduce evidence in support of his allegations*)
('35) AIR 1935 Pesh 145 (146)
('38) AIR 1938 Cal 74 (75) I L R (1938) 1 Cal 213 (In an application for restoration under O 9 R 9, the plaintiff must show some fact which was either not known to the Court when it dismissed the suit or at least at that stage lacked satisfactory proof)
[*See* ('76) 1876 Pun Re No 113, p 235 (It is enough if he shows sufficient cause for his absence)
('29) 117 Ind Cas 382 (382) (Lah) (Application *to restore case dismissed for default—Applicant* is bound to explain counsel's absence)]

O 9 R 9 Note 8

anywhere " It is a question of fact depending upon the circumstances of each case[3] and is not subject to any hard and fast rule except that the Court must exercise a judicial discretion in the matter[4] In the undermentioned case[5] the Rangoon High Court held that under this rule if sufficient cause is shown the Court is bound to restore the suit while if sufficient cause is not shown the matter is in the discretion of the Court It is submitted with respect that the view that the Court has power to restore a suit even where it holds that sufficient cause has not been shown is open to question

Absence of party — A generous construction should be placed on the enactment to restore a suit dismissed for default[6] and a party should not be deprived of a hearing unless there has been something equivalent to misconduct or gross negligence on his part[7] The test to be applied as a general rule is to see whether the party applying honestly intended to be present at the hearing of the suit and did his best to do so[8] The High Court of Allahabad has in the undermentioned case[9] held that even though the plaintiff was negligent enough to start for the last train and missed it the suit ought to be restored observing that negligence is human and not irreparable and can be amply compensated by costs The following grounds have been held to amount to sufficient cause for the absence of the party —

(1) A *bona fide* mistake which is not unreasonable or for which the party is not responsible[10] Thus where the bench clerk gave a wrong date of hearing[11] or

2 (27) AIR 1927 Lah 622 (6 4)
3 D

cause)
(12) 13 Ind Cas 468 (468) (Lah) (Petit on dis m ssed n the early part of the day owing to the temporary absence of the party or pleader

cient cause)
(27) AIR 1927 Lah 40 (41) (Late arrival of train is sufficient cause)
(35) AIR 1935 Sind 198 (200)
[*See* (92) 1892 Bom P J 104 (104) (Misappre

1924 Bom 39? that when a party arrives late on the same day the su t must as a rule of practice be restored on payment of costs — To the same effect is AIR 19 3 Bom 490)
(38) AIR 1938 Bom 199 (?04) (S B) (To restore a proceed ng is a matter of di cretion — It is

unde irable for Court to act on precedents in such a matter)
5 (36) AIR 1936 Rang 335 (336)
6 (06) 30 Mad 274 (276)
(15) AIR 1915 Mad 16 (17)
(05) 1905 Pun Re No 72 p ?83
(17) AIR 1917 All 290 (290)
7 (?3) AIR 1923 Mad 63 (64) 46 Mad 60

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as de)
(33) AIR 1933 Cal 73 (74) (Plaint ff s strenuous attempt to get witnesses to Court is sufficient cause)

hearing not given to party or his counsel)
(1865) 3 Bom H C R 60 (62)
11 (24) AIR 1924 Rang 2?1 (27?)
(?7) AIR 19 7 Rang 46 (47) 4 Rang 403

where the suit was dismissed on a date not fixed for hearing,[12] or where the day fixed for hearing was a holiday,[13] or where the suit was transferred without notice to the parties,[14] or where no proper notice of hearing was served on the party,[15] or where the suit was called on after 5 P M on the day of hearing [16] or where the absence was due to some confusion regarding the observance of a local holiday,[17] the suit was ordered to be restored

(2) Where the plaintiff was prevented from appearing owing to a breach in the railway line [18]

(3) Where the plaintiff was prevented from appearing owing to illness [19]

(4) Where the agent of the plaintiff left the Court after attending to some cases of the plaintiff under the *bona fide* belief that the plaintiff had no more cases that day [20]

(5) Where the plaintiff was present but went away to answer imperative calls of nature [21]

(6) Where the party is prevented from appearing owing to the fraud of the opposite party [22]

(7) Where in a land acquisition case the Collector who was a party admitted receipt of notice of the proceeding but did not attend owing to pressure of work [23]

See also the undermentioned cases [24]

The following have been held not to amount to sufficient cause within the meaning of this rule —

(1) Where the non appearance is wilful and deliberate [25]

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12 ('69) 12 Suth W R 428 (429)
('30) AIR 1930 Cal 251 (251)
13 ('15) AIR 1915 Lah 476 (477)
14 ('34) AIR 1934 Lah 91 (91) (Notice of trans [illegible]

with reference to O 41 R 19)
('26) AIR 1926 Mad 1210 (1211) (Case pertaining to appeal)
('17) AIR 1917 Lah 393 (400) (Notice not duly [illegible]

[illegible] these hours—Case disposed of in absence of defendant after Court hours—Application for restoration should be granted)
17 ('23) AIR 1923 All 549 (550)
18 ('23) AIR 1923 Mad 63 (64) 46 Mad 60
[*See* ('80) 8 Bom 28 (31) (Sudden closing of telegraph communication—Inability to communicate with pleader)]
19 [illegible]

cause—It is not for the Court to argue that there was no hurry for the operation and that the petitioner could have waited for a week more)
('09) 5 Ind Cas 23 (26) 33 Mad 241
[*See also* ('34) AIR 1934 All 163 (164) 56 All 578]
20 ('29) AIR 1929 Rang 224 (224)
21. ('26) 96 Ind Cas 402 (403) (Lah)
22 ('72) 18 Suth W R 457 (457)
23 ('27) AIR 1927 Rang 150 (153) 5 Rang 80
24 ('36) AIR 1936 Rang 204 (206) (Non appearance on account of missing the train is due to sufficient cause)
('38) AIR 1938 Cal 789 (790) (Three suits filed by petitioners—Petitioner taking all necessary [illegible]

unable to attend—Court refusing adjournment and dismissing suit for default—Application by petitioners under O 9 R 9 also rejected—*Held* that lower Court had exercised its jurisdiction wrongly in dismissing petitioner's application under O 9 R 9 and in affirming decision dismissing suit for default)
('38) AIR 1938 Lah 295 (295) (Break down of lorry [illegible]

25 ('05) 1905 Pun Re No 45 page 164
('21) AIR 1921 Mad 617 (618)

O. 9 R. 9
Note 8

(2) Where the party deliberately takes the risk of not obtaining a carriage in time[26] or fails to be in time to catch the train [27]

(3) Where he leaves the Court house to attend to his other business without instructing his pleader[28] or thinking that a part-heard case will take some more time [29]

(4) Illness of a near relation of the party [30]

See also the undermentioned decision [31]

Absence of next friend of minor plaintiff —It has been held in the undermentioned cases of the High Court of Madras[32] that if the next friend is absent at the trial, *through whatever cause it may be*, then that *fact alone* is a sufficient reason for setting aside an order of dismissal passed against the minor plaintiff. This view has, however, been held in a later case[33] as being too wide and that unless any concrete fact is alleged from which an inference can fairly be drawn that the failure of the next friend to appear has in any way prejudiced the interest of the minor, the Court is not bound to restore the suit The Oudh Chief Court[34] has also held that the fact of the minority of a plaintiff is not *by itself* a sufficient cause for setting aside any order of dismissal that may have been passed owing to the absence of the next friend irrespective of the reasons for such absence.

See also Note 20 to Order 9 Rule 13.

Absence of pleader — *In the case of absence of the pleader* it should be considered whether there was a *bona fide* and reasonable attempt on the part of the vakil to put in appearance, and due regard must be had to the exigencies of his professional duties [35] Thus, where the pleader was sitting in the adjoining court room and did not hear the suit being called but soon after dismissal appeared and applied for restoration,[36] or where the pleader was sitting in the bar room and by the time he could come up the case was called and dismissed,[37] or when the suit was called for hearing the party or his agent went to fetch his pleader who was engaged in a different

('90) 1890 Pun Re No 71, page 194
26 ('21) AIR 1921 Sind 55 (57) 17 Sind L R 105
27 ('13) 19 Ind Cas 234 (234) (Cal)
28. ('15) AIR 1915 Cal 539 (541)
29 ('89) 13 Bom 12 (14)
30 ('98) 2 Cal W N 490 (491)
[*See* ('24) AIR 1924 Pat 271 (272) 2 Pat 784]
[**But see** ('21) AIR 1921 All 264 (265) (Respondent a lady—Her agent failing to attend Court due to illness of daughters—*Held* sufficient cause)]
31 ('35) AIR 1935 Sind 198 (200) (Party arriving late in Court and finding suit dismissed—Whether suit should be restored on payment of costs depends on facts and circumstances — Party appearing late—No application for restoration filed on same day—Application filed seven days hence—*Held* that in all the circumstances of the case suit should not be restored)
32. ('34) AIR 1934 Mad 616 (617)
('35) AIR 1935 Mad 196 (197)
33. ('35) 68 Mad L Jour (Notes of Recent Cases) 16
[*See also* ('35) AIR 1935 Mad 565 (567) 58 Mad 929 (The principle that where a suit on behalf of a minor has been dismissed owing to the absence of the next friend or that where a suit has been decreed *ex parte* against a minor in the absence of his guardian ad litem, the suit must be restored as a matter of course on application does not apply to cases where the absence of the next friend or guardian has not been due to *bona fide* negligence but has been due to a manoeuvre to gain some advantage in the litigation)]
34. ('39) 1939 O W N 787 (790 791) (The question of what is sufficient cause within the meaning of O 9 R 9 has to be decided with reference to various circumstances and the fact of the minority of the plaintiff is only one of such circumstances to be taken note of)
35 ('29) AIR 1929 Lah 96 (100) 10 Lah 570
('31) AIR 1934 Pesh 13 (14) (Application dismissed for default owing to prior evidence case on cause list being postponed at the end of the day—Application should be restored)
('38) AIR 1938 Nag 370 (371) (Clerk left in court-room to watch and inform pleader who was waiting in bar room — Clerk failing to do so —*Held* sufficient cause for restoring suit)
36 ('27) AIR 1927 Sind 228 (229)
[*See also* ('37) AIR 1937 Lah 118 (119) (Dismissal for default—Restoration—Date fixed for payment of adjournment costs — Party ill and his pleader though present in Court failing to hear case being called—Suit dismissed for default —Case not one to which O 9 R 8 applied as the day was not fixed for hearing—Case was one which ought to be restored)]
37. ('24) AIR 1924 Oudh 405 (406)

Court and the Court in the meantime dismissed the suit[38] it was held that there was sufficient cause for non appearance Similarly, when the pleader could not attend owing to illness and had no time to make fresh arrangements[39] or where the pleader who had left the headquarters had entrusted the brief to another pleader who was also unavoidably absent,[40] it was held that there was sufficient cause for non appearance Where the absence of the vakil is due to a *bona fide* mistake *e g* where the vakil noted in his diary the date of hearing which was on the 23rd of March as 23rd of April,[41] or where by the mistake of the pleader the party did not get intimation in time[42] the suit was ordered to be restored to file But the mere absence of a party s pleader[43] or the fact that the pleader was engaged elsewhere[44] does not amount to sufficient cause The fact that in the District Court pleaders take up cases in different Courts and cannot be present at one and the same time in all the Courts[45] or a mere misjudgment on the part of the counsel who does not state that he was engaged elsewhere[46] or the mere fact that the agent or vakil was negligent[47] will not suffice It has been held by the Nagpur High Court[48] that if a party does all that he is required to do under the law to retain a pleader and the pleader fails to appear it must be held that there is sufficient cause for the non appearance of the party

The mere fact that a party is contemplating to file an appeal against the preliminary decree will be no sufficient ground for restoring the final decree passed *ex parte*[49]

9 Restoration of suit in favour of one of several plaintiffs — Whether can operate in favour of all — An order under this rule restoring a suit dismissed for default on the application of one of several plaintiffs may if the Court so directs operate in favour of all the plaintiffs though they have not applied for restoration[1]

10 Inherent power of Court to order restoration — See Note 2 to Section 151, *ante*

10a Conditional order of restoration — An order for restoration of a suit dismissed for default on condition of payment of costs to the opposite party within a time fixed by the order and directing that in case of default the application for restoration is to stand dismissed is legal and valid The effect of the order on default being made in the payment of the costs is that the application stands dismissed and

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38 (23) AIR 1923 All 189 (189)
(32) AIR 1932 All 450 (451)
(26) AIR 1926 Lah 650 (651)
(26) 93 Ind Cas 211 (211) (Mad)
(28) AIR 1928 Lah 454 (454)
39 (96) 1896 Bom P J 422 (423)
40 (07) 11 Cal W N 430 (432) (Proceedings under the Land Acquisition Act)
41 (29) AIR 1929 Lah 69 (69)
(1864) 2 Bom H C R 267 (269)
42 (23) AIR 1923 Mad 581 (581)
(37) 1937 Mad W N 976 (976) (Where the counsel for the defendant does not inform him of the posting of the suit to a particular date thinking that the posting was merely formal and not for trial it can fairly be said that the defendant was prevented by sufficient cause from appearing within the meaning of O 9 R 13)
[*See also* (33) AIR 1933 Lah 114 (115) (Case remanded to trial Court — Notice of date of hearing directed to be served both on defendant and on his counsel—Notice served on the latter and not on former—Counsel believing in good faith that defendant would personally be served and not informing defendant)]
43 (21) AIR 1921 Nag 8 (4)
44 (75) 24 Suth W R 141 (141)
(32) AIR 1932 Bom 634 (635) (*Held* in this case that it should however be restored on terms under Court s inherent powers)
(27) AIR 1927 Lah 791 (791)
45 (27) AIR 1927 Oudh 211 (211)
46 (27) AIR 1927 Lah 224 (224)
47 (29) AIR 1929 Lah 148 (149)
48 (38) AIR 1938 Nag 370 (371) (*Held* that neither party nor pleader is to be blamed for negligence of clerk of pleader)
(36) AIR 1936 Nag 85 (86)
49 (28) AIR 1928 All 197 (197)

Note 9

1 (19) AIR 1919 Oudh 4 (6) 53 Oudh Cas 18.

O. 9 R 9
Notes 10a–13

the Court is thereafter *functus officio* and cannot extend the time for payment of the costs[1] See also Notes to Section 148 *ante*

11 Limitation — An application for restoration under this rule should be made within 30 days of the order of dismissal for default (see Limitation Act Article 163) The Court has no power inherent or otherwise to extend the period of limitation prescribed therefor[1] and if the Court restores an application presented after time the High Court can interfere in revision as the order is one made without jurisdiction[2] Section 5 of the Limitation Act does not apply to this rule[3] unless the High Court has extended its application by a rule framed under Section 122 The Bombay High Court has added a proviso extending the application of Section 5 to this rule[4]

A mere notice that an application is going to be moved on a future date will not prevent the running of limitation[5]

12 Appeal — The *dismissal* of an application under this rule is appealable under O 43 R 1 clause (c)[1] but no appeal lies from an order *granting* an application[2] Nor can the propriety of such an order be questioned in the regular appeal preferred against the decree eventually passed as the order does not affect the merits of the case within the meaning of Section 105[3] But the dismissal of an application under this rule need not be on the *merits* and an appeal will lie also from an order dismissing such an application for non prosecution[4]

An order made by a Judge on the original side of the High Court rejecting an application for restoration is a judgment within the meaning of Clause 15 of the Letters Patent and is appealable[5] whereas an order granting an application has been held not to be a judgment within that Clause[6]

13 Revision — A revision lies to the High Court against an order granting an application under this rule[1] Thus where a trial Court found that the grounds alleged were not sufficient but ordered restoration as a matter of grace[2] or where the order is

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Note 10a

1 (36) AIR 1936 All 477 (478)

Note 11

1

[*See also* (3?) AIR 1936 Lah 495 (496)]

2 (31) AIR 1931 Cal 319 (320)

(

L Jour 376]

3 (02) 1902 Pun Re No 83 page 335

(25) AIR 1925 Bom 521 (521) 49 Bom 839

4 (29) AIR 1929 Bom 202 (203) 53 Bom 458

5 (03) 31 Cal 150 (154)

Note 12

tion is appealable und O 43 ...

Section 141)

(38) AIR 1938 Bom 199 (20?) (S B) (If the Court ...

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(80) 5 Cal 711 (712)

3 (97 1901) 2 Upp Bur Rul 237

4 (36) AIR 1936 All 737 (739)

5 (16) AIR 1916 Cal 361 (366) 43 Cal 8 7

6 (2?) AIR 1922 Cal 407 (407), 49 Cal 616

Note 13

1 (15) AIR 1915 All 289 (290)

(33) AIR 1933 Lah 169 (171) (It is not an interlocutory order)

(28) 107 Ind Cas 395 (396) (Lab) (Do)

(25) AIR 1925 Rang 218 (218) 3 Rang 63

[**But see** (33) AIR 1933 Oudh 331 (333) (The order can be questioned in appeal under Section 105)]

2 (25) AIR 1925 Mad 209 (210 211)

(1?) 14 Ind Cas 221 (224) (Oudh) (Also application presented out of time)

[**But see** (19) AIR 1919 Cal 979 (980)]

made without jurisdiction, or an erroneous refusal to exercise jurisdiction,[3] or the order is made summarily without recording evidence[4] or reasons,[5] it has been held that a revision lies The question what is sufficient cause is a matter in the Court's discretion and the High Court will not ordinarily interfere in revision with the exercise of such discretion [6] **O 9 R. 9 Note 13**

Where an application for restoration of a suit does not fall under this rule, an order refusing such application is open to revision by the High Court, the reason being that such an order is not appealable under O. 43 R 1, clause (c) [7]

R. 10. [S. 105.] Where there are more plaintiffs than one, and one or more of them appear, and the others do not appear, the Court may, at the instance of the plaintiff or plaintiffs appearing, permit the suit to proceed in the same way as if all the plaintiffs had appeared, or make such order as it thinks fit. **O. 9 R. 10**

Procedure in case of non-attendance of one or more of several plaintiffs.

[1877, S. 105; 1859, S. 116.]

Synopsis

1. Non-attendance of plaintiffs. | 2. Appeal.

1. Non-attendance of plaintiffs.—Under this rule the Court has a discretion to permit the suit to proceed in the same way as if *all* the plaintiffs have appeared [1] Where the dismissal is in contravention of this rule a revision lies [2]

2. Appeal. — On the date of hearing, one of the plaintiffs alone appeared and applied for an adjournment The Court rejected the application and dismissed the suit It was held that as one of the plaintiffs was present it cannot be said that the order of dismissal was one for default and that it amounted to a decree from which an appeal lay [1]

R. 11. [S. 106.] Where there are more defendants than one, and one or more of them appear, and the others do not appear, the suit shall proceed, and the Court shall, at the time of pronouncing judgment, make such order as it thinks fit with respect to the defendants who do not appear. **O. 9 R. 11**

Procedure in case of non-attendance of one or more of several defendants.

[1877, S. 106; 1859, S. 116.]

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3 ('18) AIR 1918 Pat 351 (352) 3 Pat L Jour 355 [illegible]
[*See* ('34) AIR 1934 Mad 669 (669)] [illegible]
4. ('18) AIR 1918 Cal 330 (331)
[illegible]
5 [illegible]
6 ('07) 30 Mad 274 (276)
('33) AIR 1933 All 118 (120)

[illegible]

1. ('21) AIR 1921 Cal 176 (177) : 48 Cal 57.
2. ('19) AIR 1919 Pat 36 (37) 4 Pat L Jour 152.

Note 2

1 ('18) AIR 1918 Pat 376 (376)

O. 9 R. 11
Note 1

1. Non-attendance of defendants. — The rule contemplates that a decree may be a contested one as against some of the defendants and *ex parte* as against the rest,[1] but the decree is liable to be set aside on an application by the *ex parte* defendant or defendants[2] The Court should, under this rule, pass such order as it thinks fit against the absent defendants Where no such order is passed against them but a decree is passed simply against some defendants, the decree is not *ex parte* against the absent defendants and cannot be re opened under Rule 13[3]

The Court should not pass a decree in an *ex parte* case, without any proof whatever by the plaintiff, it should consider the interests of the absent party[4]

O. 9 R. 12

Consequence of non-attendance, without sufficient cause shown, of party ordered to appear in person

R. 12. [S. 107.] Where a plaintiff or defendant, who has been ordered to appear in person, does not appear in person, or show sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the foregoing rules applicable to plaintiffs and defendants, respectively, who do not appear.

[1877, S. 107; 1859, S. 117. See Ss. 132, 133, O. 3 R. 1, O. 5, R. 3, O. 10 R. 4 and O. 29 R. 3.]

Synopsis

1. Scope of the Rule.
2. "Subject to all the provisions of the foregoing Rules"

Other Topics (miscellaneous)

Non appearance on adjourned date — Effect See Note 1

Sufficient cause for non appearance See Note 1

1. Scope of the Rule. — The words "under the provisions of Section 66 or Section 436' after the words "appear in person" which occurred in the old Code[1] have now been omitted The result is that the rule applies *to all cases* where the Court has ordered a person to appear, whether or not the Court is specifically empowered to do so[2] Where there is a failure to attend on the part of a party, the fact that his pleader is present[3] or the party ordered to appear happens to be the next friend of a minor plaintiff,[4] will not prevent the Court from acting under this rule But all the same, the dismissal for non attendance being a highly penal matter, it ought not to be inflicted on a party unless there is a distinct order to attend and upon proof that the party had deliberately disobeyed the same.[5] An opportunity should be given to prove the cause

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Order 9 Rule 11 — Note 1

1. ('07) 6 Cal L Jour 226 (231).
('19) AIR 1919 Cal 217 (218)
('69) 12 Suth W R 376 (377)
2. ('71) 15 Suth W R 210 (210)
3. ('69) 9 Suth W R 597 (597).
4. ('24) AIR 1924 Cal 617 (618)

Order 9 Rule 12 — Note 1

1. ('98) 6 C P L R 83 (83).
2. ('12) 17 Ind Cas 762 (762) (Mad).
('32) AIR 1932 All 595 (596) (Order to appear under O 10 R 4 — Dismissal for default of appearance on his failure to appear)
('28) AIR 1928 Oudh 262 (263)
3 ('18) AIR 1918 Mad 1256 (1257), 41 Mad 256
('32) AIR 1932 Mad 414 (414)
4 ('20) AIR 1920 Mad 213 (215)
[But see ('12) 17 Ind Cas 762 (762) (Mad)]
5 ('72) 17 Suth W R 141 (142).
('33) AIR 1933 Mad 821 (822)

of his non-appearance[6] Thus, when plaintiff was ordered to appear on a *particular day* and the case was not taken up that day, the Court ought not to dismiss the suit for failure of the plaintiff to appear on a subsequent day to which the case was adjourned[7] Where one of several plaintiffs fails to appear in obedience to the order of Court, the suit cannot be dismissed as against other co plaintiffs also[8] **O. 9 R. 12 Notes 1-2**

2. "Subject to all the provisions of the foregoing Rules." — These words indicate that the Court can act under the provisions of the foregoing rules, *i e*, dismiss the suit for default or proceed *ex parte* The very fact that the Court is empowered to proceed under the foregoing rules also indicates that the party aggrieved has the corresponding right of applying for restoration either under Rule 9 or Rule 13 as the case may be[1]

SETTING ASIDE DECREES EX PARTE

R. 13. [S. 108.] In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit: **O. 9 R. 13**

Setting aside decree ex parte against defendant

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also.

[1877, Ss. 108, 109, 588; 1859, S. 119.]

Local Amendments

ALLAHABAD

Add the following further proviso

"Provided also that no such decree shall be set aside merely on the ground of irregularity in the service of summons, if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim"

BOMBAY

Re number Rule 13 as Rule 13 (1) and *add* the following sub rule ·

(2) The provisions of Section 5 of the Indian Limitation Act, 1908, shall apply to applications made under this rule"

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6 ('17) AIR 1917 Oudh 127 (128)
7 ('17) AIR 1917 All 95 (96) 39 All 476
8 ('19) AIR 1919 Pat 86 (87) 4 Pat L Jour 152 (One of several plaintiffs ordered to appear in person — On his failure to so appear suit should be dismissed as against him only)
('26) AIR 1926 Lah 577 (578) (Newly added co-plaintiff failing to appear — Suit cannot be dismissed against the original plaintiff)

Note 2

1. ('32) AIR 1932 All 595 (596)

O. 9 R. 13

CALCUTTA

Re-number Rule 13 as Rule 13 (1) and *add* the following as sub rule (2)

"(2) The defendant shall, for service on the opposite party, present along with his application under this rule either —

(i) as many copies thereof on plain paper as there are opposite parties or

(ii) if the Court by reason of the length of the application or the number of the opposite parties or for any other sufficient reason grants permission in this behalf, a like number of concise statements"

MADRAS

(1) Re number Rule 13 as Rule 13 (1) and *insert* the following as proviso to sub rule (1)

"Provided further that no Court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons if it be satisfied that the defendant had notice of the date of hearing in sufficient time to appear and answer the plaintiff s claim"

(2) Add the following as sub rule (2) to Rule 13

"(2) The provisions of Section 5 of the Indian Limitation Act, 1908, shall apply to applications under sub rule (1)"

NAGPUR

(1) Add the following as an additional proviso

Provided also that no such decree shall be set aside merely on the ground of irregularity in service of summons, if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known of the date of hearing in sufficient time to enable him to appear and answer the plaintiff s claim

Explanation — Where a summons has been served under O 5 R 15, on an adult male member having an interest adverse to that of the defendant in the subject-matter of the suit, it shall not be deemed to have been duly served within the meaning of this rule"

(2) For the words "he was prevented by any sufficient cause from appearing," the words 'there was sufficient cause for his failure to appear" shall be *substituted*

(3) Existing Rule 13 shall be *re numbered* as Rule 13 (1) and the following shall be *inserted* as sub rule (2) namely

(2) the provisions of Section 5 of the Indian Limitation Act, IX of 1908, shall apply to applications under sub rule (1)"

N.-W F P.

Add the following as an additional proviso

"Provided further that no decree passed *ex parte* shall be set aside merely on the ground of an irregularity in the service of summons, if the Court is satisfied for reasons to be recorded that the defendant had knowledge of the date of hearing in sufficient time to appear on that date and answer the claim"

OUDH

Between the words "was not duly served or that" and the words "he was prevented by any sufficient cause," *insert* the words "notwithstanding due service of the summons," and *add* the following further proviso

"Provided also that no *ex parte* decree shall be set aside under this rule on the ground that the summons was not duly served, if the Court is satisfied that the defendant had information of the date of hearing sufficient to enable him to appear and answer the plaintiff's claim.

O. 9 R. 13 Note 1

Explanation — Where a summons had been served under O 5 R 15 on an adult male member having an interest adverse to that of the defendant in the subject matter of the suit it shall not be deemed to have been duly served within the meaning of this rule

RANGOON

(1) Add the following as second proviso

Provided also that no decree or order shall be set aside under this rule merely on the ground that there has been an irregularity in the service of the summons if the Court is satisfied that the defendant was aware of the date of hearing in sufficient time to enable him to appear and answer the plaintiff s claim

(2) Substitute decree or order *for* decree wherever this word occurs in Rule 13

SIND

Add the following further proviso

Provided also that a decree passed *ex parte* shall not in the absence of good cause be set aside on the ground merely of irregularity in the service of the summons unless upon the facts proved the Court is satisfied that the defendant did not have notice of the date of hearing in sufficient time to appear and answer the plaintiff s claim

Synopsis

1 Legislative changes
2 Scope of the Rule
3 Applicability to execution proceedings See Note 1 to O 9 General
4 Decree passed by the Presidency Court of Small Causes
5 Decree passed by the Provincial Court of Small Causes
6 When a decree can be said to be ex parte
7 Where a written statement is filed
8 Remedies in the case of an ex parte decree
9 Whether the remedies are concurrent
10 Hearing of application pending appeal
11 Hearing of application after disposal of appeal
12 Suit to set aside an ex parte decree — Ex parte decree obtained by fraud
13 Application to be made to the Court which passed the decree
14 Fresh vakalatnama if necessary
15 Who can apply to set aside
16 Application by the legal representative of the defendant
17 Grounds for setting aside an ex parte decree
18 Summons not duly served
19 Sufficient cause
20 Minor defendant
21 Decree having been satisfied
22 Upon such terms as to costs etc
23 Proviso to the Rule
24 Inherent power of Court to set aside an ex parte decree See Note 9 to Section 151
25 Effect of setting aside the ex parte decree
26 Ex parte decree against a firm
27 Dismissal of an application to set aside an ex parte decree if can be restored See Note 2 to O 9 General
28 Limitation
29 Appeal
30 Revision

Other Topics (miscellaneous)

Against him See Note 23
Applications under this rule how far proceedings in the suit See Note 2
Question as to service of summons on defendant decided—Fresh suit attacking it if barred See Note 12

1 Legislative changes —

The words as against him after the words shall make an order setting aside the decree have been newly added with a view to make it clear that the *ex parte* decree can only be set aside in favour of the defendant against whom it has been passed unless it be that the proviso applies [1]

The proviso to the rule is also new

Order 9 Rule 13 — Note 1

1 See the Statement of Objects and Reasons

O. 9 R. 13
Notes 2-4

2. Scope of the Rule. — The object of the rule is to ensure, within reasonable limits as to public convenience, that every defendant shall have a hearing[1] and to place the successful applicant in the same position in which he would have been if no decree had been passed against him[2] An application under this rule is not strictly speaking an application for a re hearing although it may result in it[3] The proceedings contemplated are not merely a branch of the suit which terminated when the *ex parte* decree was passed, the suit itself does not revive until after the proceedings in the application are terminated successfully[4] The rule applies to suits[5] and not to appeals[6] inasmuch as separate and corresponding provisions have been made in Order 41 therefor This rule applies to orders passed *ex parte* in insolvency proceedings under the Provincial Insolvency Act, V of 1920, by virtue of Section 5 of that Act[7] and also to decrees in arbitration proceedings under Schedule II of the Code[8]

An order setting aside an *ex parte* decree is a judgment within the meaning of Section 2 sub section 9 *ante* and cannot therefore "be altered or added to, save as provided by Section 152 or on review'[9] See Order 20 Rule 3

Although it is the practice of the mofussil Courts to pass an order declaring a defendant *ex parte* the Code does not in terms provide for an application to *set aside* such order It is only when a *decree* has been passed that an application to set aside such decree has been expressly provided for by the Code[10]

3. Applicability to execution proceedings. — See Note 1 to Order 9, General and also the undermentioned cases[1]

4. Decree passed by the Presidency Court of Small Causes. — Section 37 of the Presidency Small Cause Courts Act, XV of 1882, declaring the finality of small cause decrees does not apply to an *ex parte* decree and an application will consequently lie under this rule to set it aside[1] Where an application is made under this rule and is dismissed, an application cannot be made under Section 38 of that Act for a new trial[2] It was held in the case noted below[3] that under the rules framed by the Calcutta

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Note 2

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5 ... are

... therefore governed by ...

(27) AIR 1927 Mad 897 (898)
[*See also* (09) 7 Cal L Jour 268 (269)]
[**But see** (04) 8 Cal W N 468 (469 470) (*Ex parte* order of adjudication as insolvent can ...

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Note 3

1 (34) AIR 1934 Mad 699 (699) (*Held* not applicable)

Note 4

1 (92) 17 Bom 507 (509)
2 (05) 8 Cal L Jour 199 (201)
3. ('03) 30 Cal 588 (592)

O. 9 R. 13
Notes 2-4

2. Scope of the Rule. — The object of the rule is to ensure, within reasonable limits as to public convenience, that every defendant shall have a hearing,[1] and to place the successful applicant in the same position in which he would have been if no decree had been passed against him[2] An application under this rule is not strictly speaking an application for a re-hearing although it may result in it[3] The proceedings contemplated are not merely a branch of the suit which terminated when the *ex parte* decree was passed, the suit itself does not revive until after the proceedings in the application are terminated successfully[4] The rule applies to suits[5] and not to appeals[6] inasmuch as separate and corresponding provisions have been made in Order 41 therefor This rule applies to orders passed *ex parte* in insolvency proceedings under the Provincial Insolvency Act, V of 1920, by virtue of Section 5 of that Act[7] and also to decrees in arbitration proceedings under Schedule II of the Code[8]

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Although it is the practice of the mofussil Courts to pass an order declaring a defendant *ex parte* the Code does not in terms provide for an application to *set aside* such order It is only when a *decree* has been passed that an application to set aside such decree has been expressly provided for by the Code[10]

3. Applicability to execution proceedings. — See Note 1 to Order 9, General and also the undermentioned cases[1]

4. Decree passed by the Presidency Court of Small Causes. — Section 37 of the Presidency Small Cause Courts Act, XV of 1882, declaring the finality of small ... quently ... and is ... trial[2] ... ta

3 ('94) 19 Bom 208 (210)
4 ('27) AIR 1927 Lah 200 (207) 8 Lah 54
5. *Proceedings resulting in final decree are continuation of and part of suits governed by this rule Vide the followings cases*
('29) AIR 1929 All 279 (280) 51 All 634
('12) 13 Ind Cas 374 (374) (Cal)
('10) 5 Ind Cas 387 (388) (Cal) (Final decree for

by this rule Vide the following cases
('30) AIR 1930 All 841 (843) 52 All 839

('32) AIR 1932 Lah 522 (523). (Application is therefore governed by Art 164, Limitation Act)

9 ('33) AIR 1933 Oudh 385 (386)
10. ('39) AIR 1939 Mad 385 (385)

Note 3

1. ('34) AIR 1934 Mad 699 (699) (*Held* not applicable)

Note 4

1. ('92) 17 Bom 507 (509)
2. ('05) 8 Cal L Jour 199 (201)
3. ('03) 30 Cal 588 (592)

O. 9 R. 13
Notes 6–7

aggrieved party is also entitled in such a case to the remedy provided for by this rule.[5] A decree passed on default of appearance of the defendant at the hearing of a remanded suit is nevertheless an *ex parte* decree.[6] Similarly, a *final* decree passed in the absence of the defendant is an *ex parte* decree within the meaning of this rule.[7]

A decree cannot be *ex parte* when there is evidence already on record and the Court goes into the *merits* before decreeing the suit.[8] Thus, where both the parties have let in their evidence and nothing remains to be done except arguments the Court ought not to proceed to pass an *ex parte* decree.[9] Similarly, where the defendant who has been summoned as a witness by the plaintiff fails to appear the Court is not justified in passing an *ex parte* decree when the pleader for the defendant is ready to proceed with the case.[10] Where the defendant actually appears, a mere failure on his part to adduce *evidence* will not make the decree passed an *ex parte* decree.[11] A defendant's pleader on the day fixed for trial filed an additional written statement and applied for a fresh issue being framed. On such issue being framed, he applied for an adjournment and on adjournment being refused, reported no instructions and the trial proceeded. It was held that the acts of the pleader in filing the additional written statement and applying for the framing of a fresh issue were acts done by him in the conduct of the suit and towards the progress of the suit which had then been called on for hearing and that they constituted an appearance.[12]

Where a compromise decree is passed in a suit and a party applies to set it aside on the ground that the applicant was no party to the compromise and that he had given no authority to file the compromise, there is a conflict of opinion as to whether the application can be treated as one under this rule, for which see the undermentioned cases.[13]

The recitals on the record are not conclusive as to the character of the decree[14] and the defendant is entitled to show that the decree is as a matter of fact, *ex parte*.[15]

7. Where a written statement is filed. — Where the defendant has filed a written statement in the case but fails to appear when the suit is called on for hearing, the decree passed is nevertheless an *ex parte* decree and can be set aside under this rule.[1]

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(1865) 2 Suth W R 1 (1)

(69) 3 Beng L R App 121 (122)

[*See also* (75) 1 Bom 217 (218) (Issues framed in presence of defendant's pleader — Plaintiff's defendant and pleader present at hearing of suit and not prevented in any way from addressing Court—Decree is not *ex parte*)

12 (35) AIR 1935 Mad 210 (211) 58 Mad 817 (A party who has appeared by his pleader cannot be allowed to claim to be *ex parte* from the moment that his pleader when called upon to enter upon his defence or in anticipation of that stage of the trial has reported to the Court that he has no instructions)

1 (09) 4 Ind Cas 1167 (1167) 31 Mad 505

8. Remedies in the case of an ex parte decree. — A defendant against whom an *ex parte* decree has been passed has four courses open to him, *viz* —

(1) to apply under this rule to set aside the *ex parte* decree,[1] or
(2) to apply for a review,[2] or
(3) to appeal from the decree,[3] or
(4) to institute a suit on the ground of fraud [4]

See also Note 12 to Section 96

9. Whether the remedies are concurrent. — As to whether and how far the remedies 1 and 3 referred to in Note 8 above are *concurrent* see Note 12 to Section 96

The defendant may apply for a review without applying under this rule[1] or even after an application under this rule has been rejected [2] According to the High Courts of Calcutta[3] and Madras[4] the fact that an application for a review is made at a time when an application under this rule would be barred by limitation, is no ground for refusing a review But the High Court of Lahore[5] has held *contra*, namely that no review can be granted in such a case and that the defendant cannot be allowed to evade the law of limitation It is submitted that the former view is correct If the party is entitled to a review, he is equally entitled to apply for the same within the period of limitation prescribed *therefor* and not for any other application

10. Hearing of application pending appeal. — As has been seen in Note 12 to Section 96 *ante*, the mere filing of an appeal does not take away the jurisdiction of the trial Court to entertain an application under this rule In fact, such an application ought to be presented to the Court which passed the decree,[1] for, the decree continues to be the decree of the primary Court until it is reversed, confirmed or varied in appeal [2] The proceedings under this rule and in an appeal are entirely distinct in their scope and purpose and there is no possibility of any conflict between the judgments to be pronounced in the two proceedings [3]

Where a decree is *ex parte* against some defendants and contested against the rest, and the contesting defendants alone appeal without impleading the *ex parte* defendants as respondents, the application by the *ex parte* defendants ought to be

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('69) 1 N W P H C R 154 (154)
('71) 6 Beng L R 688 (690 691)
('25) AIR 1925 Oudh 717 (717 718)
[But see ('69) 11 Suth W R 5 (5)
('81) 3 Mad 264 (265)]

Note 8

4. ('09) 1 Ind Cas 86 (89) (Cal)

Note 9

1. ('12) 15 Ind Cas 554 (554) (Cal)
2. ('73) 20 Suth W R 284 (284) (Without an application being made for review, a Judge has no power to alter or amend his judgment *proprio motu*)
3. ('12) 16 Cal W N 643 (644)
4. ('20) AIR 1920 Mad 633 (634)
5. ('12) 13 Ind Cas 318 (319) (Lah)
('20) AIR 1920 Lah 261 (262)

Note 10

1. ('21) AIR 1921 Mad 568 (568, 569) 44 Mad 731.
('09) 32 Mad 416 (420) (FB)
('24) AIR 1924 Lah 224 (225) (An appeal from the *ex parte* decree does not affect the appeal from an order rejecting an application for setting aside the *ex parte* decree)
('09) 3 Ind Cas 468 (469) (Cal) (Mere filing an appeal does not preclude application under this rule)

O. 9 R. 8
Notes 7–9

that the price is Rs 12 000 the Court cannot pass a decree in favour of the plaintiff under this rule for pre emption on payment of Rs 12,000 but must, on default by the plaintiff, dismiss the suit [2]

The word *'claim' is not necessarily synonymous with the amount sued for* It may refer to the right claimed irrespective of the amount stated in the relief column [3] A decree passed on the admission of the defendant is appealable [4]

8. Effect of dismissal under this Rule. — Unlike the dismissal of a suit under Rule 3, a dismissal under this rule precludes a fresh *suit* on the same cause of action [1] But two other remedies are open to the plaintiff —

(1) to apply under Rule 9 for restoration of the suit, or

(2) to apply for a review of the order [2]

It is not necessary that the plaintiff should apply under Rule 9 before applying for a review[3] and there is nothing in the Code to limit the parties to one particular remedy But a review will not lie except on the grounds mentioned in O 47 R 1 It has been held by the High Court of Bombay in the undermentioned case[4] that where a suit is dismissed under O 9 R 8 *there could be no such grounds for review* as those mentioned in O 47 R 1 inasmuch as the fact that the applicant was absent when the suit was called on for hearing was neither a discovery of any new and important matter, nor an error apparent on the face of the record nor a ground analogous to any of those specified in the rule There is a conflict of opinion as to whether a plaintiff who has failed to make an application within thirty days under O 9 R 9 can be allowed to prefer an application for review The High Courts of Patna[5] and Lahore[6] have held that he cannot be allowed to do so, on the ground that the law of limitation should not be allowed to be evaded in that way The High Courts of Madras[7] and Calcutta [8] on the other hand, have held that such an application would lie and that the fact that the plaintiff will get a longer period of limitation by the adoption of a particular remedy is no ground for refusing him relief

It has been held by the Lahore High Court[9] that a Court has inherent power to restore a suit which has been dismissed in default owing to a mistake of the Court itself

9. Revision — Where the Court refuses to act under this rule in a case to which the rule applies[1] or acts under this rule illegally or with material irregularity,[2] a revision will lie

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2. ('21) 60 Ind Cas 724 (724) (Lah)
3. ('17) AIR 1917 Mad 732 (734)
4 ('12) 15 Ind Cas 601 (602) (Cal)

Note 8

1 ('25) AIR 1925 Mad 986 (988)
('16) AIR 1916 Cal 791 (791 79?)
2. ('25) AIR 1925 Lah 517 (518)
('28) AIR 1928 Rang 177 (178) 6 Rang 254
('75) 7 N W P H C R 126 (130)
3 [illegible]

4 [illegible]

5 ('17) AIR 1917 Pat 673 (673, 674) 1 Pat L Jour 547

[illegible] Cal 598)
8. ('99) 26 Cal 598 (601)
9. ('36) AIR 1936 Lah 759 (760) (AIR 1928 Lah 534 and 6 I C 203, Followed)

Note 9

1 ('19) AIR 1919 Pat 872 (873) (Process fee not paid but plaintiff *appearing* and *applying for* time to file written statement—Plaintiff absent —Court dismissing suit under O 9 R 2 instead of under O 9 R 8—This amounts to refusal to exercise jurisdiction)
2 ('21) AIR 1921 Lah 139 (140) (Dismissal of suit for default—Order mentioning that plaintiff was present but that he subsequently went away —Order *held* improper)

R. 9. [S. 103.] *(1)* Where a suit[6] is wholly or partly dismissed under rule 8, the plaintiff[7] shall be precluded from bringing a fresh suit[5] in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause[8] for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit. **O. 9 R. 9**

Decree against plaintiff by default bars fresh suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.

[1877, Ss. 103, 108, 109, 588; 1859, S. 119. See O. 22 R. 9.]

Local Amendments

BOMBAY

Add the following as sub rule (3)

"(3) The provisions of Section 5 of the Indian Limitation Act, 1908, shall apply to applications under this rule"

CALCUTTA

Re-number sub rule (2) as sub rule (3) and *insert* after the words "notice of the application' the words "with a copy thereof (or concise statements as the case may be)"

Insert the following as sub rule (2)

"The plaintiff shall, for service on the opposite parties, present along with his application under this rule either —

(i) as many copies thereof on plain paper as there are opposite parties, or,

(ii) if the Court by reason of the length of the application or the number of opposite parties or for any other sufficient reason grants permission in this behalf, a like number of concise statements"

LAHORE

Add the following proviso to sub rule (1):

Provided that the plaintiff shall not be precluded from bringing another suit for redemption of a mortgage, although a former suit may have been dismissed for default

N.-W.F.P.

Same proviso as that added by the Lahore High Court is added

Synopsis

1. Scope of the Rule.
2. "Appearance," meaning of.
   3. Appearance in person. See O. 3 R. 1, Note 4
   4. Appearance by pleader. See O. 3 R. 1, Note 6
5. Bar of fresh suit.
   6. "Suit," meaning of.
   7. Minor plaintiff.
8. "Sufficient cause."
9. Restoration of suit in favour of one of several plaintiffs—Whether can operate in favour of all.
10. Inherent power of Court to order restoration. See Note 2 to Section 151.
10a. Conditional order of restoration.
11. Limitation.
12. Appeal
13. Revision.

O. 9 R. 9
Notes 1-2

Other Topics (miscellaneous)

Applicability to other proceedings See Notes 6 and 8
Letters Patent Appeal See Note 1?
Rule applicable only when dismissal under R 8 See Note 1
Same cause of action See Note 5

1. Scope of the Rule. — The remedy provided for by this rule is not open to a plaintiff whose suit has been dismissed for any reason other than default of appearance under Rule 8[1] Hence no application lies under this rule where the dismissal is under O 17 R 3[2] or O 11 R 21,[3] or where the dismissal is due to a failure on the part of the plaintiff to adduce evidence,[4] or where the plaint is rejected under O 7 R 11 for failure to pay deficient court fees[5] The rule applies only to suits and not to appeals[6] It applies also to suits under Section 9 of the Specific Relief Act, 1877, which are dismissed for default That Section bars only a review and not an application for rehearing[7] As to the restoration of appeals dismissed for default of appearance of the appellants, see Order 41 Rule 19

The Court cannot *suo motu* order a restoration without an application on the part of the plaintiff[8] The word plaintiff' has been held to include his legal representatives who can also therefore apply under this rule[9] No fresh *vakalatnama* is necessary for an application under this rule[10]

The effect of restoration under O 9 R 9 is to bring the suit as regards parties, to the exact position in which it was at the time of dismissal[11]

See also Note 6, *infra*

2 "Appearance," meaning of. — The term "appearance has nowhere been defined in the Code and it must be understood in reference to the particular subject matter to which it relates[1] Appearance in Order 9 means either —

(a) by the party in person or
(b) by a pleader either himself duly instructed and able to answer all material questions relating to the suit or accompanied by some other person able to do so[2]

For a full discussion see Order 3 Rule 1, *ante*

Order 9 Rule 9 — Note 1

1 [illegible] ([illegible] under [illegible] Default [illegible]

2 [illegible] ('35) AIR 1935 All 210 (214)

3 ('25) AIR 1925 Rang 218 (218) 3 Rang 63 [illegible]) [illegible] untiff absent [illegible] suit rejected under O 7 R 11—Fresh suit filed on the same cause of action — District Judge holding second suit barred under this rule—*Held* by High Court that this rule did not apply)

6 ('1864) 1864 Suth W R Misc 21 (21)

7 ('82) 4 Mad 217 (218)

8 ('25) AIR 1925 Oudh 105 (106) (Plaintiff applied for restoration as against one out of two defendants — The Court also restored the suit against the other defendant and that too beyond the period of limitation—*Held* order of restoration as against the other defendant was *ultra vires*)
('32) AIR 1932 Oudh 160 (160) 25 Oudh Cas 67.

9 [illegible] suit)

10 ('90) 1890 Bom P J 124 (124) (Plaintiff himself need not make the application—Application by pleader is competent)

11 ('24) AIR 1924 Cal 814 (815)
('19) AIR 1919 Cal 40 (1?)

Note 2

1 ('07) 34 Cal 403 (413) (F B)

2 ('99) 23 Bom 414 (421 422) (Besides these two modes of appearance there is a third mode of

3. Appearance in person. — See Order 3 Rule 1 Note 4.

4. Appearance by pleader. — See Order 3 Rule 1 Note 6

5. Bar of fresh suit. — Where a suit is dismissed for default, it cannot be said to have been *heard* and decided on the merits and therefore cannot operate as *res judicata*[1] But the plaintiff is, under the specific provisions of this rule, barred from bringing a fresh suit on the *same cause of action*,[2] and the fact that the *mode of relief* claimed in the subsequent suit is different will not be a ground for not applying the bar under this rule[3] Thus, a suit on the basis of entries in the plaintiff's account book, in respect of the same sum of money for which a prior suit on a promissory note given therefor had been dismissed for default, will be barred under this rule[4] Similarly, where a suit filed by the voluntary liquidator of a company against an alleged share holder for the recovery of a sum of money due to the company is dismissed for default under this rule, a subsequent application by the official liquidator to have the name of the defendant placed in the list of contributories in respect of the same claim is barred[5]

Where the cause of action in the subsequent suit is *different* from that in the first suit, this rule will not apply.[6] Thus, a suit for partition dismissed for default under this rule does not bar a subsequent suit for partition The reason is that the right to enforce partition is a *continuous* right which is a legal incident of a joint tenancy and which enures so long as the joint tenancy continues[7] See Note 36 to

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appearance viz appearance by a party's recognized agent)
('28) AIR 1928 Mad 831 (834) (Mere attendance of pleader is no appearance")

Note 5

1. ('10) 5 Ind Cas 298 (300) (Cal)
('14) AIR 1914 All 222 (223)
('82) 6 Bom 482 (486)
('35) AIR 1935 Cal 212 (216, 217) 62 Cal 15 (Where the suit is dismissed for want of prosecution under the provisions of Ch 10, R 36 of Calcutta High Court Rules and Orders (Original Side) the plaintiff is not debarred from bringing a fresh suit)
See also Note 106 to S 11
[*See also* ('91) 13 All 53 (54 55, 62) 17 Ind App *150 (P C) (Previous suit dismissed for want of* evidence)]

2 ('16) AIR 1916 Cal 791 (791) (A Court while dismissing a suit for non prosecution under O 9 R 8 imposed a condition that such dismissal will not be a bar to any fresh suit—*Held* fresh suit barred under this rule in spite of the condition)
('83) 9 Cal 426 (429)
('01) 25 Bom 82 (84, 85)
('16) AIR 1916 Lah 273 (273, 274) 1916 Pun Re No 66
('29) AIR 1929 Pat 685 (689, 691) 9 Pat 447 (Suit for declaration of title dismissed for default —Subsequent suit for possession on the same facts barred)
('39) AIR 1939 Nag 145 (146) (Where a plaintiff's suit alleging that defendant had forcibly and illegally taken possession of certain land and tank, that defendant's possession constituted a trespass and praying that the defendant be ejected from the land and tank is dismissed under O 9 R 8, a subsequent suit alleging forcible and wrongful possession and praying for possession of same land is barred because the cause of action is the same and not a continuing one)

3 ('28) AIR 1928 Rang 73 (74) 5 Rang 785
('26) AIR 1926 Lah 562 (563)
('88) 15 Cal 422 (430 431) 15 Ind App 66 (PC) (In the first suit sub proprietary right claimed while in the second suit superior proprietary right was claimed)

4. ('20) AIR 1920 All 340 (341) 42 All 193

5 ('20) AIR 1920 Lah 43 (44) 1 Lah 237 (Such application partakes of the nature of suit)

6. ('20) AIR 1920 Cal 407 (408)
('33) AIR 1933 Lah 365 (368) 14 Lah 485

rate possession)
('17) AIR 1917 Cal 11 (11)
('14) AIR 1914 All 223 (223)
('27) AIR 1927 Pat 375 (376) 7 Pat 29 (Fresh suit for enhancement of rent of the same tenure *held* not barred)
('25) AIR 1925 Nag 866 (869) (Even one different fact makes causes of action different)
('86) 10 Bom 28 (30) (This rule should be strictly construed)

7. ('0) 28 All 627 (629)
('26) AIR 1926 Mad 1018 (1015) 49 Mad 93

O. 9 R. 9
Notes 5-6

Section 11, *ante* As regards suits for redemption, it was held by the Privy Council in *Shanker Baksh* v *Daya Shanker*[8] that where a first suit for redemption was dismissed for default under this rule, a second suit for redemption will be barred as being based on the same cause of action The Allahabad[9] and Bombay[10] High Courts have, however, distinguished the said decision of the Privy Council on the ground that their Lordships did not consider the effect of Section 60 of the Transfer of Property Act and that the effect of that Section is not to bar a second suit for redemption

The rule does not apply unless the plaintiff in the prior suit is the plaintiff in the subsequent suit[11] Thus a dismissal for default of a suit by a Hindu widow in respect of her deceased husband's estate is no bar to a fresh suit by the reversioner in respect of the same matter[12] The rule only precludes a fresh *suit*, it does not preclude a plea raised by a defendant in a suit[13] The bar of a fresh suit under this rule applies only where the suit has been dismissed for default under Rule 8 and not otherwise[1]

6. "Suit," meaning of. — According to the High Courts of Allahabad[1] and Calcutta[2] the rule is plainly intended to apply only to *suits* and not to *petitions* such as applications for probate See also the undermentioned decisions But the High Court of Madras[4] has held that the present rule applies to those [illegible] which under Section 83 of the Probate and Administration Act, are *treat*[illegible] So also it has been held by the High Court of Madras that this rule read [illegible] tion 141 applies to an application for leave to sue as pauper, and where [illegible] [illegible]cation is dismissed for default of appearance, it can be restored under this [illegible] has further been held by that Court that where an application for rest[illegible] petition is maintainable by virtue of Section 141 of the Code the Court [illegible] to consider the application on its merits on the ground that the applic[illegible] ther remedy open to him[6] The Lahore High Court has also held that [illegible] n for probate

('35) AIR 1935 Mad 458 (459)
(*See* ('28) AIR 1928 Rang 73 (74 75) 5 Rang 785
('07) 10 Cal W N 839 (840) (Application for execution of preliminary decree for partition dis[illegible]

8 [illegible]

9. ('09) 2 Ind Cas 630 (631 632) (All)
10 ('28) AIR 1928 Bom 67 (67) 52 Bom [illegible]

of plaint all[illegible] of property [illegible] compli[illegible] fault on [illegible] O 23 R 1 Fresh suit [illegible] O 2 R [illegible]

1. ('1[illegible]) [illegible] 151 [illegible]

[illegible] ted to give value [illegible] ourt fee — Non [illegible] dismissed for default [illegible] to withdraw under [illegible] is rejection of plaint — [illegible] by O 23 R 1, O 9 R 9

Note 6

1 ('13) 37 All 380 (Sec. [illegible] applicable)

dismissed for default of appearance can be restored under this rule[7] But the same High Court has held that an application under Section 292 of the Succession Act of 1925 is in the nature of an execution proceeding and that, therefore, Section 141 does not make this rule applicable to such an application So, it has been held by that Court that where such an application is dismissed for default, a fresh application can be made[8]

In the undermentioned case,[9] it was held by the Oudh Chief Court that an application under Section 47 of the Code stands on the same footing as a suit and that where such an application is dismissed for default of appearance, a fresh application on the same allegations is not maintainable

The bar under this rule does not apply to a fresh application for adjudication as insolvent after the dismissal of a prior application for default[10] An order of annulment passed under Section 43, sub section 1 of the Provincial Insolvency Act of 1920 cannot be set aside by virtue of the provisions of Order 9[11] The reason is that Section 10, clause (2) of the Provincial Insolvency Act itself provides for a remedy in such cases

The rule does not apply to applications under Section 158 of the Bengal Tenancy Act[12]

See also Note 5 to Section 2, sub clause (2), Note 21 to Section 11, and Order 9, "General"

7. Minor plaintiff. — A suit by a minor is liable to be dismissed for default of appearance on the part of the next friend[1] and the provisions of this rule cannot be nullified because the plaintiff happens to be a minor[2] But where the next friend is guilty of *gross negligence* in the conduct of the suit, the minor can bring a fresh suit, notwithstanding this rule, either himself after attaining majority or through another next friend[3] He can also apply under this rule for setting aside the order of dismissal[4] See also Note 8 *infra* under the sub-heading "Absence of next friend of minor plaintiff."

8. "Sufficient cause." — The only ground for restoring a suit under this rule is the existence of a sufficient cause for the non appearance of the party at the time the suit was called on for hearing[1] The term "sufficient cause" has not been defined

7. ('36) AIR 1936 Lah 863 (864) (17 All 106, AIR 1919 Mad 112 and 20 I C 281, Relied on, AIR 1936 Lah 712, Affirmed)

8 ('35) AIR 1935 Lah 145 (145)

9. ('37) AIR 1937 Oudh 337 (338) 13 Luck 309 (The combined effect of Ss 2(2) and 47, C P C, is that an application under S 47 stands on the footing of a suit and the determination of such an application is tantamount to a decree)

10. ('27) AIR 1927 Mad 579 (580)

11 ('26) AIR 1926 Mad 942 (943) 49 Mad 935

12 ('23) AIR 1923 Pat 381 (382, 384) 2 Pat 192 (The rule applies only to suits)

Note 7

1 ('10) 8 Ind Cas 547 (547) (Lah)

2. ('21) AIR 1921 Sind 200 (202) 17 Sind L R 41 (Fresh suit through different next friend *held* barred)

3. ('95) 22 Cal 8 (14)

4. ('15) AIR 1915 Mad 52 (52)
('25) AIR 1925 Mad 774 (775)

Note 8

1. ('10) 4 Low Bur Rul 221 (222)
('33) AIR 1933 Lah 169 (171) (If there is no sufficient cause suit cannot be restored as a matter of grace)
('33) AIR 1933 Pesh 53 (60) (Suit cannot be restored under inherent powers in the absence of sufficient cause)
('27) 106 Ind Cas 821 (821, 822) (Lah) (The applicant must however be given opportunity to adduce evidence in support of his allegations)
('35) AIR 1935 Pesh 145 (146)
('38) AIR 1938 Cal 74 (75) I L R (1938) 1 Cal 213 (In an application for restoration under O 9 R 9, the plaintiff must show some fact which was either not known to the Court when it dismissed the suit, or at least at that stage lacked satisfactory proof)
[*See* ('76) 1876 Pun Re No 113, p 235 (It is enough if he shows sufficient cause for his absence)
('29) 117 Ind Cas 352 (352) (Lah) (Application to restore case dismissed for default—Applicant is bound to explain counsel's absence)]

O. 9 R. 9
Note 8

anywhere[2] It is a question of fact depending upon the circumstances of each case[3] and is not subject to any hard and fast rule except that the Court must exercise a judicial discretion in the matter[4] In the undermentioned case,[5] the Rangoon High Court held that under this rule if "sufficient cause" is shown, the Court is bound to restore the suit, while if "sufficient cause" is not shown the matter is in the discretion of the Court It is submitted with respect that the view that the Court has power to restore a suit even where it holds that sufficient cause has not been shown is open to question

Absence of party — A generous construction should be placed on the enactment to restore a suit dismissed for default[6] and a party should not be deprived of a hearing unless there has been something equivalent to misconduct or gross negligence on his part[7] The test to be applied as a general rule is to see whether the party applying, honestly intended to be present at the hearing of the suit and did his best to do so[8] The High Court of Allahabad has, in the undermentioned case,[9] held that even though the plaintiff was negligent enough to start for the last train and missed it, the suit ought to be restored observing that negligence is human and not irreparable and can be amply compensated by costs The following grounds have been held to amount to sufficient cause for the absence of the party —

(1) A *bona fide* mistake which is not unreasonable or for which the party is not responsible[10] Thus where the bench clerk gave a wrong date of hearing,[11] or

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2 ('27) AIR 1927 Lah 622 (624)

3 ('27) AIR 1927 Lah 622 (624)
('34) AIR 1934 Nag 183 (186) 31 Nag L R 32
('79) 1879 Pun Re No 96 p 11
('22) AIR 1922 Pat 485 (488) 1 Pat 188 (Suit to remove the defendant from mahantship — *Court* appointing receiver but refusing to direct him to furnish defendant with funds—*Held* sufficient cause)
('12) 13 Ind Cas 468 (468) (Lah) (Petition dismissed in the early part of the day owing to the temporary absence of the party or pleader—Absence explained — Suit must be restored)
('30) AIR 1930 Lah 943 (943) (Suit dismissed in the early part of the day — Party *pardanashin* lady — Her counsel engaged elsewhere — Court ought to restore suit)
('29) AIR 1929 All 590 (599) 51 All 908 (Plaintiff appearing on same day and satisfying Court for his non appearance is a sufficient cause)
('28) AIR 1928 Nag 75 (76) (Default in appearance owing to party's missing the train is sufficient cause)
('27) AIR 1927 Lah 40 (41) (Late arrival of train is sufficient cause)
('35) AIR 1935 Sind 198 (200)
[*See* ('92) 1892 Bom P J 104 (104) (Misapprehension as to date of hearing—Sufficient cause)]

4 ('29) AIR 1929 Lah 96 (99, 100) 10 Lah 570
('24) AIR 1924 Oudh 389 (390) 27 Oudh Cas 103 (Court should not surrender its discretion to the dictation of parties)
('29) AIR 1929 Bom 250 (250) (Dissenting from the view expressed in AIR 1925 Bom 423 and AIR 1924 Bom 392 that when a party arrives late on the same day the suit must as a rule of practice, be restored on payment of costs — To the same effect is AIR 1923 Bom 480)
('38) AIR 1938 Bom 199 (204) (S B) (To restore a proceeding is a matter of discretion — It is undesirable for Court to act on precedents in such a matter)

5 ('36) AIR 1936 Rang 335 (336)

6 ('06) 30 Mad 274 (276)
('15) AIR 1915 Mad 16 (17)
('05) 1905 Pun Re No 72 p 283
('17) AIR 1917 All 290 (290)

7 ('23) AIR 1923 Mad 63 (64) 46 Mad 60
('38) AIR 1938 Bom 199 (202) (S B)
('36) AIR 1936 Rang 335 (336)
[*See* ('31) AIR 1931 Nag 101 (102) (Case adjourned for plaintiff's reply — Reply filed and also application for amendment—Court requiring further statements — Pleader unable to make them — Court holding plaintiff as absent and dismissing suit — Order of dismissal *held ultra vires* and was sufficient cause for restoring case)]

8 ('23) AIR 1923 Mad 63 (64) 46 Mad 60 (The fact that by some human possibility the defendant could have been present in time does not affect his right to have the *ex parte* decree set aside)
('33) AIR 1933 Cal 73 (74) (Plaintiff's strenuous attempt to get witnesses to Court is sufficient cause)
('36) AIR 1936 Rang 335 (336)
('38) AIR 1938 Bom 199 (201, 202) (S B)
('36) AIR 1936 Rang 204 (206) (Non appearance on account of missing of train)
[*See* ('34) AIR 1934 Lah 416 (416) (Puncture of tyre on the way to Court is sufficient cause)]

9 ('25) AIR 1925 All 601 (601)
[*See also* ('36) AIR 1936 Rang 204 (206)]

10 ('96) 23 Cal 991 (995)
('33) AIR 1933 All 276 (276) (Date of adjourned hearing not given to party or his counsel)
(1865) 3 Bom H C R 60 (62)

11 ('24) AIR 1924 Rang 271 (272)
('27) AIR 1927 Rang 46 (47) 4 Rang 408

where the suit was dismissed on a date not fixed for hearing [12] or where the day fixed for hearing was a holiday,[13] or where the suit was transferred without notice to the parties [14] or where no proper notice of hearing was served on the party,[15] or where the suit was called on after 5 P M on the day of hearing [16] or where the absence was due to some confusion regarding the observance of a local holiday,[17] the suit was ordered to be restored

(2) Where the plaintiff was prevented from appearing owing to a breach in the railway line [18]

(3) Where the plaintiff was prevented from appearing owing to illness [19]

(4) Where the agent of the plaintiff left the Court after attending to some cases of the plaintiff under the *bona fide* belief that the plaintiff had no more cases that day [20]

(5) Where the plaintiff was present but went away to answer imperative calls of nature [21]

(6) Where the party is prevented from appearing owing to the fraud of the opposite party [22]

(7) Where in a land acquisition case the Collector who was a party admitted receipt of notice of the proceeding but did not attend owing to pressure of work [23]

See also the undermentioned cases [24]

The following have been held not to amount to sufficient cause within the meaning of this rule —

(1) Where the non appearance is wilful and deliberate [25]

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12 (69) 12 Suth W R 428 (429)
(30) AIR 1930 Cal 251 (251)
13 (15) AIR 1915 Lah 476 (477)
14 (34) AIR 1934 Lah 91 (91) (Notice of transfer served on counsel but he declining to appear for him any longer)
(33) AIR 1933 Lah 558 (559) 14 Lah 240
(23) AIR 1923 Lah 444 (445)
[*See also* (33) AIR 1933 Lah 114 (115)]
15 (27) AIR 1927 Lah 365 (365) (Case decided with reference to O 41 R 19)
(26) AIR 1926 Mad 1210 (1211) (Case pertaining to appeal)
(17) AIR 1917 Lah 399 (400) (Notice not duly served—Knowledge as to date of hearing of appeal cannot be presumed)
[illegible]
lef n lant after Court hours—Application for restoration should be granted)
17 (23) AIR 1923 All 549 (570)
18 (23) AIR 1923 Mad 63 (64) 46 Mad 60
[See (80) 8 Bom 98 (31) (Sudden closing of [illegible] to com [illegible]
[illegible] not in fit condition to attend Court on account of operation having been performed on him is sufficient cause—It is not for the Court to argue that there was no hurry for the operation and that the petitioner could have waited for a week more)
(09) 5 Ind Cas 23 (26) 33 Mad 241
[*See also* (34) AIR 1934 All 163 (164) 56 All 578]
20 (29) AIR 1929 Rang 224 (224)
21 (26) 96 Ind Cas 402 (403) (Lah)
22 (72) 18 Suth W R 457 (457)
23 (27) AIR 1927 Rang 150 (153) 5 Rang 80
24 (36) AIR 1936 Rang 204 (206) (Non appearance on account of missing the train is due to sufficient cause)
(38) AIR 1938 Cal 789 (790) (Three suits filed by petitioners—Petitioner taking all necessary [illegible]
25 (05) 190 Pun Re No 4[illegible] page 164
(21) AIR 1921 Mad 617 (619)

O. 9 R. 9
Notes 10a–13

the Court is thereafter *functus officio* and cannot extend the time for payment of the costs[1] See also Notes to Section 148, *ante*

11. Limitation. — An application for restoration under this rule should be made within 30 days of the order of dismissal for default (see Limitation Act, Article 163) The Court has no power, inherent or otherwise, to extend the period of limitation prescribed therefor,[1] and if the Court restores an application presented after time the High Court can interfere in revision as the order is one made without jurisdiction[2] Section 5 of the Limitation Act does not apply to this rule[3] unless the High Court has extended its application by a rule framed under Section 122 The Bombay High Court has added a proviso extending the application of Section 5 to this rule[4]

A mere notice that an application is going to be moved on a future date will not prevent the running of limitation[5]

12. Appeal. — The *dismissal* of an application under this rule is appealable under O 43 R 1 clause (c),[1] but no appeal lies from an order *granting* an application[2] Nor can the propriety of such an order be questioned in the regular appeal preferred against the decree eventually passed, as the order does not affect the merits of the case within the meaning of Section 105[3] But the dismissal of an application under this rule need not be on the *merits* and an appeal will lie also from an order dismissing such an application for non prosecution[4]

An order made by a Judge on the original side of the High Court rejecting an application for restoration is a "judgment" within the meaning of Clause 15 of the Letters Patent, and is appealable,[5] whereas an order granting an application has been held not to be a "judgment" within that Clause[6]

13. Revision. — A revision lies to the High Court against an order granting an application under this rule[1] Thus, where a trial Court found that the grounds alleged were not sufficient but ordered restoration as a matter of grace,[2] or where the order is

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Note 10a

1 ('36) AIR 1936 All 477 (478)

Note 11

1 ('02) 1902 Pun Re No 83 page 335
[illegible] P 183

2 [illegible]
('20) AIR 1920 Pat 491 (491) (Exercising powers [illegible]

3. ('02) 1902 Pun Re No 83 page 335
('25) AIR 1925 Bom 521 (521) 49 Bom 839
4. ('29) AIR 1929 Bom 262 (263) 53 Bom 458
5. ('03) 31 Cal 150 (154)

Note 12

1 [illegible]

Section 141)
('38) AIR 1938 Bom 199 (202) (SB) (If the Court [illegible]

3 ('97-1901) 2 Upp Bur Rul 237
4 ('36) AIR 1936 All 737 (739)
5 ('16) AIR 1916 Cal 361 (366) 43 Cal 857
6. ('22) AIR 1922 Cal 407 (407), 49 Cal 616

Note 13

1. ('15) AIR 1915 All 289 (290)
('33) AIR 1933 Lah 169 (171) (It is not an inter[illegible]

[illegible] (The order can be questioned in appeal under Section 105.)

[illegible]

[But see ('19) AIR 1919 Cal 979 (980)]

O 9 R. 9 Note 13

made without jurisdiction, or an erroneous refusal to exercise jurisdiction,[3] or the order is made summarily without recording evidence[4] or reasons,[5] it has been held that a revision lies The question what is sufficient cause is a matter in the Court's discretion and the High Court will not ordinarily interfere in revision with the exercise of such discretion [6]

Where an application for restoration of a suit does not fall under this rule, an order refusing such application is open to revision by the High Court, the reason being that such an order is not appealable under O. 43 R 1, clause (c) [7]

O. 9 R. 10

R. 10. [S 105.] Where there are more plaintiffs than one, and one or more of them appear, and the others do not appear, the Court may, at the instance of the plaintiff or plaintiffs appearing, permit the suit to proceed in the same way as if all the plaintiffs had appeared, or make such order as it thinks fit.

Procedure in case of non-attendance of one or more of several plaintiffs.

[1877, S. 105; 1859, S. 116.]

Synopsis

1. Non-attendance of plaintiffs. | 2. Appeal

1. Non-attendance of plaintiffs.—Under this rule the Court has a discretion to permit the suit to proceed in the same way as if *all* the plaintiffs have appeared [1] Where the dismissal is in contravention of this rule a revision lies [2]

2. Appeal. — On the date of hearing, one of the plaintiffs alone appeared and applied for an adjournment The Court rejected the application and dismissed the suit It was held that as one of the plaintiffs was present it cannot be said that the order of dismissal was one for default and that it amounted to a decree from which an appeal lay [1]

O. 9 R. 11

R. 11. [S. 106.] Where there are more defendants than one, and one or more of them appear, and the others do not appear, the suit shall proceed, and the Court shall, at the time of pronouncing judgment, make such order as it thinks fit with respect to the defendants who do not appear.

Procedure in case of non-attendance of one or more of several defendants

[1877, S. 106; 1859, S. 116.]

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3 ('18) AIR 1918 Pat 351 (352) 3 Pat L Jour 355
[*See* ('31) AIR 1934 Mad 669 (669)]
4 ('18) AIR 1918 Cal 330 (331)
('23) AIR 1923 Mad 177 (178)
5 ('31) AIR 1931 All 452 (452) (No proof or finding as to sufficient cause)
[*See also* ('13) 53 Ind Cas 69 (70) (U P B R)]
6 ('07) 30 Mad 274 (276)
('33) AIR 1933 All 118 (120)

[illegible]

Order 9 Rule 10 — Note 1
1. ('21) AIR 1921 Cal 176 (177) 48 Cal 57
2. ('19) AIR 1919 Pat 36 (37) 4 Pat L Jour 152

Note 2
1 ('18) AIR 1918 Pat 376 (376)

O. 9 R. 11 Note 1

1. Non-attendance of defendants. — The rule contemplates that a decree may be a contested one as against some of the defendants and *ex parte* as against the rest [1] but the decree is liable to be set aside on an application by the *ex parte* defendant or defendants [2] The Court should, under this rule, pass such order as it thinks fit against the absent defendants Where no such order is passed against them but a decree is passed simply against some defendants, the decree is not *ex parte* against the absent defendants and cannot be re opened under Rule 13 [3]

The Court should not pass a decree in an *ex parte* case, without any proof whatever by the plaintiff, it should consider the interests of the absent party [4]

O. 9 R. 12

R. 12. [S. 107.] Where a plaintiff or defendant, who has been ordered to appear in person, does not appear in person, or show sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the foregoing rules applicable to plaintiffs and defendants, respectively, who do not appear.

Consequence of non-attendance, without sufficient cause shown, of party ordered to appear in person

[1877, S 107; 1859, S 117 See Ss 132, 133, O. 3 R. 1, O. 5, R. 3, O. 10 R. 4 and O 29 R. 3.]

Synopsis

1. Scope of the Rule. — The words "under the provisions of Section 66 or Section 436 after the words "appear in person' which occurred in the old Code[1] have now been omitted The result is that the rule applies *to all cases* where the Court has ordered a person to appear whether or not the Court is specifically empowered to do so [2] Where there is a failure to attend on the part of a party, the fact that his pleader is present[3] or the party ordered to appear happens to be the next friend of a minor plaintiff,[4] will not prevent the Court from acting under this rule But all the same, the dismissal for non attendance being a highly penal matter, it ought not to be inflicted on a party unless there is a distinct order to attend and upon proof that the party had deliberately disobeyed the same [5] An opportunity should be given to prove the cause

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Order 9 Rule 11 — Note 1

1. (07) 6 Cal L Jour 226 (231)
(19) AIR 1919 Cal 217 (218)
(69) 12 Suth W R 376 (377)
2 (71) 15 Suth W R 210 (210)
3. (69) 9 Suth W R 597 (597).
4. (24) AIR 1924 Cal 647 (648)

Order 9 Rule 12 — Note 1

1. ('98) 6 C P L R 83 (83).
2 ('12) 17 Ind Cas 762 (762) (Mad).
(32) AIR 1932 All 595 (596) (Order to appear under O 10 R 4 — Dismissal for default of appearance on his failure to appear)
(28) AIR 1928 Oudh 262 (263)
256
5 (72) 17 Suth W R 141 (14?)
(33) AIR 1933 Mad 821 (822)

of his non-appearance[6] Thus, when plaintiff was ordered to appear on a *particular day* and the case was not taken up that day, the Court ought not to dismiss the suit for failure of the plaintiff to appear on a subsequent day to which the case was adjourned[7] Where one of several plaintiffs fails to appear in obedience to the order of Court, the suit cannot be dismissed as against other co plaintiffs also[8] **O. 9 R. 12 Notes 1-2**

2. "Subject to all the provisions of the foregoing Rules." — These words indicate that the Court can act under the provisions of the foregoing rules, *i e*, dismiss the suit for default or proceed *ex parte* The very fact that the Court is empowered to proceed under the foregoing rules also indicates that the party aggrieved has the corresponding right of applying for restoration either under Rule 9 or Rule 13 as the case may be[1]

SETTING ASIDE DECREES EX PARTE

O. 9 R. 13

R. 13. [S. 108.] In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Setting aside decree ex parte against defendant

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also.

[1877, Ss. 108, 109, 588; 1859, S. 119.]

Local Amendments

ALLAHABAD

Add the following further proviso

"Provided also that no such decree shall be set aside merely on the ground of irregularity in the service of summons, if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim"

BOMBAY

Re number Rule 13 as Rule 13 (1) and *add* the following sub rule·

"(2) The provisions of Section 5 of the Indian Limitation Act, 1908, shall apply to applications made under this rule"

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(26) AIR 1936 Lah 577 (578) (Newly added co-plaintiff failing to appear — Suit cannot be dismissed against the original plaintiff)

Note 2

1. ('32) AIR 1932 All 595 (596)

O. 9 R. 13

CALCUTTA

Re number Rule 13 as Rule 13 (1) and *add* the following as sub rule (2)

"(2) The defendant shall, for service on the opposite party, present along with his application under this rule either —

(i) as many copies thereof on plain paper as there are opposite parties or

(ii) if the Court by reason of the length of the application or the number of the opposite parties or for any other sufficient reason grants permission in this behalf, a like number of concise statements '

MADRAS

(1) Re number Rule 13 as Rule 13 (1) and *insert* the following as proviso to sub rule (1)

'Provided further that no Court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons if it be satisfied that the defendant had notice of the date of hearing in sufficient time to appear and answer the plaintiff s claim "

(2) Add the following as sub rule (2) to Rule 13

(2) The provisions of Section 5 of the Indian Limitation Act, 1908 shall apply to applications under sub rule (1) '

NAGPUR

(1) Add the following as an additional proviso

"Provided also that no such decree shall be set aside merely on the ground of irregularity in service of summons, if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known of the date of hearing in sufficient time to enable him to appear and answer the plaintiff s claim

Explanation — Where a summons has been served under O 5 R 15, on an adult male member having an interest adverse to that of the defendant in the subject matter of the suit, it shall not be deemed to have been duly served within the meaning of this rule "

(2) For the words ' he was prevented by any sufficient cause from appearing, the words there was sufficient cause for his failure to appear shall be *substituted*

(3) Existing Rule 13 shall be *re numbered* as Rule 13 (1) and the following shall be *inserted* as sub rule (2) namely

(2) the provisions of Section 5 of the Indian Limitation Act, IX of 1908, shall apply to applications under sub rule (1) '

N-W F P

Add the following as an additional proviso

"Provided further that no decree passed *ex parte* shall be set aside merely on the ground of an irregularity in the service of summons, if the Court is satisfied for reasons to be recorded that the defendant had knowledge of the date of hearing in sufficient time to appear on that date and answer the claim '

OUDH

Between the words "was not duly served or that ' and the words ' he was prevented by any sufficient cause," *insert* the words "notwithstanding due service of the summons, ' and *add* the following further proviso

"Provided also that no *ex parte* decree shall be set aside under this rule on the ground that the summons was not duly served, if the Court is satisfied that the defendant had information of the date of hearing sufficient to enable him to appear and answer the plaintiff s claim.

O. 9 R. 13 Note 1

Explanation — Where a summons had been served under O 5 R 15 on an adult male member having an interest adverse to that of the defendant in the subject matter of the suit it shall not be deemed to have been duly served within the meaning of this rule

RANGOON

(1) Add the following as second proviso

Provided also that no decree or order shall be set aside under this rule merely on the ground that there has been an irregularity in the service of the summons if the Court is satisfied that the defendant was aware of the date of hearing in sufficient time to enable him to appear and answer the plaintiff s claim

(2) Substitute decree or order *for* decree wherever this word occurs in Rule 13

SIND

Add the following further proviso

Provided also that a decree passed *ex parte* shall not in the absence of good cause be set aside on the ground merely of irregularity in the service of the summons unless upon the facts proved the Court is satisfied that the defendant did not have notice of the date of hearing in sufficient time to appear and answer the plaintiff s claim

Synopsis

1 Legislative changes
2 Scope of the Rule
3 Applicability to execution proceedings See Note 1 to O 9 General
4 Decree passed by the Presidency Court of Small Causes
5 Decree passed by the Provincial Court of Small Causes
6 When a decree can be said to be ex parte
7 Where a written statement is filed
8 Remedies in the case of an ex parte decree
9 Whether the remedies are concurrent
10 Hearing of application pending appeal
11 Hearing of application after disposal of appeal
12 Suit to set aside an ex parte decree — Ex parte decree obtained by fraud
13 Application to be made to the Court which passed the decree
14 Fresh vakalatnama if necessary
15 Who can apply to set aside
16 Application by the legal representative of the defendant
17 Grounds for setting aside an ex parte decree
18 Summons not duly served
19 Sufficient cause
20 Minor defendant
21 Decree having been satisfied
22 ' Upon such terms as to costs etc
23 Proviso to the Rule
24 Inherent power of Court to set aside an ex parte decree See Note 9 to Section 151
25 Effect of setting aside the ex parte decree
26 Ex parte decree against a firm
27 Dismissal of an application to set aside an ex parte decree if can be restored See Note 9 to O 9 General
28 Limitation
29 Appeal
30 Revision

Other Topics (miscellaneous)

Against him See Note 23
Applications under this rule how far proceedings in the suit See Note 2
Question as to service of summons on defendant decided—Fresh suit attacking it if barred See Note 12

1 Legislative changes —

The words as against him after the words shall make an order setting aside the decree have been newly added with a view to make it clear that the *ex parte* decree can only be set aside in favour of the defendant against whom it has been passed unless it be that the proviso applies [1]

The proviso to the rule is also new

Order 9 Rule 13 — Note 1

1 See the Statement of Objects and Reasons

O. 9 R. 13
Notes 2-4

2. Scope of the Rule. — The object of the rule is to ensure, within reasonable limits as to public convenience, that every defendant shall have a hearing[1] and to place the successful applicant in the same position in which he would have been if no decree had been passed against him[2] An application under this rule is not strictly speaking an application for a re hearing although it may result in it[3] The proceedings contemplated are not merely a branch of the suit which terminated when the *ex parte* decree was passed, the suit itself does not revive until after the proceedings in the application are terminated successfully[4] The rule applies to suits[5] and not to appeals[6] inasmuch as separate and corresponding provisions have been made in Order 41 therefor This rule applies to orders passed *ex parte* in insolvency proceedings under the Provincial Insolvency Act, V of 1920, by virtue of Section 5 of that Act[7] and also to decrees in arbitration proceedings under Schedule II of the Code[8]

An order setting aside an *ex parte* decree is a judgment within the meaning of Section 2 sub section 9 *ante* and cannot therefore "be altered or added to, save as provided by Section 152 or on review"[9] See Order 20 Rule 3

Although it is the practice of the mofussil Courts to pass an order declaring a defendant *ex parte* the Code does not in terms provide for an application to *set aside* such order It is only when a *decree* has been passed that an application to set aside such decree has been expressly provided for by the Code[10]

3. Applicability to execution proceedings. — See Note 1 to Order 9, General and also the undermentioned cases[1]

4. Decree passed by the Presidency Court of Small Causes. — Section 37 of the Presidency Small Cause Courts Act, XV of 1882, declaring the finality of small cause decrees, does not apply to an *ex parte* decree and an application will consequently lie under this rule to set it aside[1] Where an application is made under this rule and is dismissed, an application cannot be made under Section 38 of that Act for a new trial[2] It was held in the case noted below[3] that under the rules framed by the Calcutta

Note 2

(*Ex*
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10 ('39) AIR 1939 Mad 385 (385)

Note 3

1 ('34) AIR 1934 Mad 699 (699) (*Held* not applicable)
('39) AIR 1939 Rang 115 (116) 1939 Rang L R 134 (O 9 R 13 has no application to execution proceedings but only to decrees in suits or in proceedings in administration or guardianship akin to suits)

Note 4

1 ('92) 17 Bom 507 (509)
2 ('05) 8 Cal L Jour 199 (201)
3 ('03) 30 Cal 588 (592)

High Court, the *Registrar* of the Court of Presidency Small Causes had no jurisdiction to entertain an application under this rule O. 9 R. 13 Notes 4-6

5. Decree passed by the Provincial Court of Small Causes. — Section 17 of the Provincial Small Cause Courts Act (IX of 1887) requires the deposit of the decretal amount or the furnishing of security as a condition precedent to the entertaining of an application to set aside an *ex parte* decree[1] Where security is furnished within the period of limitation but on its being found to be insufficient the deficiency is made up after the expiry of limitation, the provisions of Section 17 of the Provincial Small Cause Courts Act should be held to be complied with[2]

Even where the Small Cause Court by which an *ex parte* decree was passed has been abolished, the requirements under Section 17 as to deposit or security should be complied with in the case of an application to set aside the *ex parte* decree[3]

An order setting aside an *ex parte* decree of a Provincial Small Cause Court is one passed *under the Code*[4]

See also the Authors' Commentaries on the Limitation Act, Article 164, Note 3.

6. When a decree can be said to be ex parte. — The present rule is limited to decrees made *ex parte* under the provisions of Order 9 and does not govern other decrees, though *ex parte*, unless Order 9 has been extended to those decrees by other provisions in the Code[1] Thus, where a suit is decided under O 17 R 3[2] or O 11 R 21, the decree is not *ex parte* so as to entitle the defendant to apply under this rule The reason is that the Court is not *empowered* under those rules to proceed under Order 9 The decree referred to is clearly a decree passed either at the first hearing under Rule 6 of this Order[3] or at an adjourned hearing under O 17 R 2 read with Rule 9[4] Under O 17 R 2 specific provision is made for the Court to proceed under Order 9 and the

Note 5

1. ('06) 28 All 470 (472)
('34) AIR 1934 Nag 43 (43)
('10) 6 Ind Cas 400 (400) 34 Mad 88
('04) 8 Cal W N 355 (356)
('08) 5 All L Jour 295 (297)
('98) 2 Cal W N 693 (695)
('17) AIR 1917 All 484 (485) 38 All 425 (Transfer of suit from Court of Small Causes to another Court — The latter is to be deemed Small Cause Court under S 24 C P C)

tainable)
('36) AIR 1936 Oudh 407 (409) 12 Luck 287
[*See also* ('36) AIR 1936 All 371 (372) (Court ordering deposit of decretal amount—Court can condone delay in making deposit and extend the time)
('36) AIR 1936 Mad 524 (524) (Delay in furnishing full security due to Court's action—Judgment debtor should not be penalised)]

3. ('34) AIR 1934 All 943 (944) (Proceeding for setting aside *ex parte* decree of Small Cause Court is governed by S 17, Provincial Small Cause Courts Act and not by C P C even after Court of Small Causes is abolished)
4. ('35) AIR 1935 Mad 380 (381) 58 Mad 687 (FB).

Note 6

1. ('98) 2 Cal W N 676 (679)

('18) AIR 1918 Pat 256 (257) 3 Pat L Jour 481.
('68) 4 Mad H C R 254 (257)
('68) 4 Mad H C R 56 (59)
('25) AIR 1925 Mad 316 (317)
('08) 35 Cal 1023 (1027)
('35) AIR 1935 Mad 210 (211) 58 Mad 817.
('36) AIR 1936 All 670 (671)
3. ('09) 2 Ind Cas 67 (68) (Cal)
('96) 18 All 241 (244) (Appearance by pleader with *vakalat* signed by a third person applying for adjournment — Adjournment refused — Decree passed is *ex parte*)
4. ('23) AIR 1923 All 551 (552) 45 All 618
('79) 4 Cal 318 (321)

O. 9 R. 13
Notes 6-7

aggrieved party is also entitled in such a case to the remedy provided for by this rule.[5] A decree passed on default of appearance of the defendant at the hearing of a remanded suit is nevertheless an *ex parte* decree.[6] Similarly, a *final* decree passed in the absence of the defendant is an *ex parte* decree within the meaning of this rule.[7]

A decree cannot be *ex parte* when there is evidence already on record and the Court goes into the *merits* before decreeing the suit.[8] Thus, where both the parties have let in their evidence and nothing remains to be done except arguments, the Court ought not to proceed to pass an *ex parte* decree.[9] Similarly, where the defendant who has been summoned as a witness by the plaintiff fails to appear, the Court is not justified in passing an *ex parte* decree when the pleader for the defendant is ready to proceed with the case.[10] Where the defendant actually appears, a mere failure on his part to adduce *evidence* will not make the decree passed an *ex parte* decree.[11] A defendant's pleader on the day fixed for trial filed an additional written statement and applied for a fresh issue being framed. On such issue being framed, he applied for an adjournment and on adjournment being refused, reported no instructions and the trial proceeded. It was held that the acts of the pleader in filing the additional written statement and applying for the framing of a fresh issue were acts done by him in the conduct of the suit and towards the progress of the suit which had then been called on for hearing and that they constituted an appearance.[12]

Where a compromise decree is passed in a suit and a party applies to set it aside on the ground that the applicant was no party to the compromise and that he had given no authority to file the compromise, there is a conflict of opinion as to whether the application can be treated as one under this rule, for which see the undermentioned cases.[13]

The recitals on the record are not conclusive as to the character of the decree[14] and the defendant is entitled to show that the decree is, as a matter of fact, *ex parte*.[15]

7. Where a written statement is filed. — Where the defendant has filed a written statement in the case but fails to appear when the suit is called on for hearing, the decree passed is nevertheless an *ex parte* decree and can be set aside under this rule.[1]

... in presence of defendant's pleader — Plaintiff's witnesses also cross examined — Decree not *ex* ...

... defendant and pleader present at hearing of suit and not prevented in any way from addressing Court—Decree is not *ex parte*.)

1. (09) 4 Ind Cas 1167 (1167) 31 Mad 505

8 Remedies in the case of an ex parte decree — A defendant against whom an *ex parte* decree has been passed has four courses open to him *viz* —

(1) to apply under this rule to set aside the *ex parte* decree [1] or
(2) to apply for a review [2] or
(3) to appeal from the decree [3] or
(4) to institute a suit on the ground of fraud [4]

See also Note 12 to Section 96

9 Whether the remedies are concurrent — As to whether and how far the remedies 1 and 3 referred to in Note 8 above are *concurrent* see Note 12 to Section 96

The defendant may apply for a review without applying under this rule[1] or even after an application under this rule has been rejected[2] According to the High Courts of Calcutta[3] and Madras[4] the fact that an application for a review is made at a time when an application under this rule would be barred by limitation is no ground for refusing a review But the High Court of Lahore[5] has held *contra* namely that no review can be granted in such a case and that the defendant cannot be allowed to evade the law of limitation It is submitted that the former view is correct If the party is entitled to a review he is equally entitled to apply for the same within the period of limitation prescribed *therefor* and not for any other application

10 Hearing of application pending appeal — As has been seen in Note 12 to Section 96 *ante* the mere filing of an appeal does not take away the jurisdiction of the trial Court to entertain an application under this rule In fact such an application ought to be presented to the Court which passed the decree [1] for the decree continues to be the decree of the primary Court until it is reversed confirmed or varied in appeal [2] The proceedings under this rule and in an appeal are entirely distinct in their scope and purpose and there is no possibility of any conflict between the judgments to be pronounced in the two proceedings [3]

Where a decree is *ex parte* against some defendants and contested against the rest and the contesting defendants alone appeal without impleading the *ex parte* defendants as respondents the application by the *ex parte* defendants ought to be

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(69) 1 N W P H C R 154 (154)
(71) 6 Beng L R 688 (690 691)
(25) AIR 1925 Oudh 717 (717 718)
[But see (69) 11 Suth W R 5 (5)
(81) 3 Mad 264 (265)]

Note 8

f

Note 9

1 (12) 15 Ind Cas 554 (554) (Cal)
2 (73) 20 Suth W R 284 (284) (Without an application being made for rev e v a Judge has no power to alter or amend h s judgment *proprio motu*)
3 (12) 16 Cal W N 643 (644)
4 (20) AIR 1920 Mad 633 (634)
5 (12) 13 Ind Cas 318 (319) (Lah)
(20) AIR 1920 Lah 261 (262)

Note 10

1 (21) AIR 1921 Mad 568 (568 569) 44 Mad 731
(09) 32 Mad 416 (420) (FB)
(24) AIR 1924 Lah 224 (225) (An appeal from the *ex parte* decree does not affect the appeal
f

aggrieved party is also entitled in such a case to the remedy provided for by this rule[5] A decree passed on default of appearance of the defendant at the hearing of a remanded suit is nevertheless an *ex parte* decree[6] Similarly, a *final* decree passed in the absence of the defendant is an *ex parte* decree within the meaning of this rule[7]

A decree cannot be *ex parte* when there is evidence already on record and the Court goes into the *merits* before decreeing the suit[8] Thus, where both the parties have let in their evidence and nothing remains to be done except arguments, the Court ought not to proceed to pass an *ex parte* decree[9] Similarly, where the defendant who has been summoned as a witness by the plaintiff fails to appear, the Court is not justified in passing an *ex parte* decree when the pleader for the defendant is ready to proceed with the case[10] Where the defendant actually appears, a mere failure on his part to adduce *evidence* will not make the decree passed an *ex parte* decree[11] A defendant's pleader on the day fixed for trial filed an additional written statement and applied for a fresh issue being framed On such issue being framed, he applied for an adjournment and on adjournment being refused, reported no instructions and the trial proceeded It was held that the acts of the pleader in filing the additional written statement and applying for the framing of a fresh issue were acts done by him in the conduct of the suit and towards the progress of the suit which had then been called on for hearing and that they constituted an appearance[12]

Where a compromise decree is passed in a suit and a party applies to set it aside on the ground that the applicant was no party to the compromise and that he had given no authority to file the compromise, there is a conflict of opinion as to whether the application can be treated as one under this rule, for which see the undermentioned cases[13]

The recitals on the record are not conclusive as to the character of the decree[14] and the defendant is entitled to show that the decree is, as a matter of fact, *ex parte*[15]

7. Where a written statement is filed. — Where the defendant has filed a written statement in the case but fails to appear when the suit is called on for hearing, the decree passed is nevertheless an *ex parte* decree and can be set aside under this rule[1]

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defendant and pleader present at hearing of suit and not prevented in any way from addressing Court—Decree is not *ex parte*)

12. ('35) AIR 1935 Mad 210 (211), 58 Mad 617.

that a

1. ('09) 4 Ind Cas 1167 (1167), 31 Mad 505.

8. Remedies in the case of an ex parte decree. — A defendant against whom an *ex parte* decree has been passed has four courses open to him, *viz* —

(1) to apply under this rule to set aside the *ex parte* decree,[1] or
(2) to apply for a review,[2] or
(3) to appeal from the decree,[3] or
(4) to institute a suit on the ground of fraud [4]

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The defendant may apply for a review without applying under this rule[1] or even after an application under this rule has been rejected [2] According to the High Courts of Calcutta[3] and Madras[4] the fact that an application for a review is made at a time when an application under this rule would be barred by limitation, is no ground for refusing a review But the High Court of Lahore[5] has held *contra*, namely that no review can be granted in such a case and that the defendant cannot be allowed to evade the law of limitation It is submitted that the former view is correct If the party is entitled to a review, he is equally entitled to apply for the same within the period of limitation prescribed *therefor* and not for any other application

10. Hearing of application pending appeal. — As has been seen in Note 12 to Section 96 *ante*, the mere filing of an appeal does not take away the jurisdiction of the trial Court to entertain an application under this rule In fact, such an application *ought to* be presented to the Court which passed the decree,[1] for, *the decree continues* to be the decree of the primary Court until it is reversed, confirmed or varied in appeal [2] The proceedings under this rule and in an appeal are entirely distinct in their scope and purpose and there is no possibility of any conflict between the judgments to be pronounced in the two proceedings [3]

Where a decree is *ex parte* against some defendants and contested against the rest, and the contesting defendants alone appeal without impleading the *ex parte* defendants as respondents, the application by the *ex parte* defendants ought to be

('69) 1 N W P H C R 154 (154)
('71) 6 Beng L R 688 (690 691)
('25) AIR 1925 Oudh 717 (717, 718)
[But see ('69) 11 Suth W R 5 (5)
('81) 3 Mad 264 (265)]

Note 8

1. ('29) AIR 1929 Cal 322 (325) 56 Cal 21
('20) AIR 1920 Lah 408 (409) 1 Lah 344
('74) 22 Suth W R 213 (214)
2. [illegible]

4 [illegible]

Note 9

1 [illegible]
2 [illegible]
motu)
3. ('12) 16 Cal W N 648 (644)
4. ('20) AIR 1920 Mad 633 (634)
5. ('12) 13 Ind Cas 318 (319) (Lah)
('20) AIR 1920 Lah 261 (262)

Note 10

1. ('21) AIR 1921 Mad 568 (568, 569) 44 Mad 781,
('09) 32 Mad 416 (420) (FB)
('24) AIR 1924 Lah 224 (225) (An appeal from the *ex parte* decree does not affect the appeal [illegible] for setting [illegible] filing an [illegible] under this [illegible] rule)
[illegible] 36

O. 9 R. 13
Note 12

was satisfied as to due service of summons before proceeding *ex parte*[8]

A suit is maintainable notwithstanding the fact that it has not been preceded by an application under this rule[9] or that an application was filed under this rule and proved infructuous[10] But where the question raised in the suit has already been decided adversely to the applicant in an application under this rule such decision will operate as *res judicata* and will bar the re opening of the same question in the suit[11] Further, no suit can be entertained where the only question submitted is one that could and should have been dealt with under this rule[12] For instance where the only fraud alleged is *bare non service of summons* no suit can succeed[13] It is quite a different matter however where the *whole suit* is attacked on the ground of fraud and the incident of improper or defective service is relied on as *one* of the *indicia* of fraud[14] As the Judicial Committee observed in *Khagendra Nath* v *Pran Nath* (I L R 29 Calcutta 395) O 9 R 13 assumes the existence of a real suit and has no application where the suit itself is attacked on the ground of fraud and the fraudulent and violent incidents of its progress *e g* at the stage of service are treated as parts and *indicia* of a whole A fraudulent suppression in the matter of the service of summons can afford a sufficient ground for setting aside the *ex parte* decree[15] Thus, where the plaintiff got summons served on a wrong person suppressing the father s name of the real defendant and knowing full well that the defendant was not a partner got him impleaded as a partner, it was held that the decree was tainted with fraud[16] Similarly where the plaintiff falsely and intentionally represented to the Court that the defendant was away in a distant place and got substituted service effected, the decree passed in the case was held to be vitiated by fraud[17]

8 (23) AIR 1923 Pat 406 (407)
9 (17) AIR 1917 Upp Bur 9 (10) 2 Upp Bur Rul 106

— Fraudulent suppress on of summons and fraud of defendant must be proved)
(37) AIR 1937 Pat 384 (384) (Decree passed by competent Court cannot be set aside by suit

(36) AIR 1936 Pat 135 (136)
14 (1902) 29 Cal 395 (400) 29 Ind App 99 (P C)
(23) AIR 1923 Pat 242 (244) 2 Pat 335
(17) AIR 1917 Pat 161 (168)
15 (10) 5 Ind Cas 198 (199 200) 37 Cal 197
(94) 21 Cal 605 (609)

proper service as required by Section 148 (g) Bengal Tenancy Act — Separate suit to set aside rent decree does not lie unless there is fraud regarding service or Court is kept in ignorance of real state of affairs)]
16 (22) AIR 1922 Sind 20 (21) 16 Sind L R 109
17 (14) AIR 1914 Lah 450 (452) 1914 Pun Re No 65

The mere fact that the *ex parte* decree has been procured by *false or perjured evidence* is no ground for setting it aside Something more should be proved in support of the allegation of fraud [18]

Where the very question of fraud has been already in issue and agitated between the same parties and decided upon in an application under this rule, the decision will operate as *res judicata* in a separate suit [19]

The question whether the original suit itself is revived after the *ex parte* decree in that suit has been set aside in a subsequent suit, depends on the issues and the actual decision in the later suit [20]

If the *ex parte* decree be not set aside it is final and will operate as *res judicata* [21]

See also Note 19 to Section 11

13. Application to be made to the Court which passed the decree. — The rule requires an *application* by the defendant for an order to set aside the decree [1] The application under this rule ought to be made to the Court which passed the decree though the presiding Judge may be different [2] Where, however, by reason of territorial re adjustment, the Court itself becomes different the defendant is not debarred from applying to the Court which is seised of the matter [3]

According to the undermentioned case of the High Court of Madras[4] an application should be made only to the trial Court even after *disposal* of the appeal against the *ex parte* decree This view, as has been seen in Note 11 above, cannot be accepted as correct In an earlier decision of the same High Court[5] it was held that the High Court can in second appeal, entertain an application for setting aside an *ex parte* decree passed by the trial Court

An application under this rule is not bad merely because it omits to give the names of some of the decree holders [6]

14. Fresh vakalatnama, if necessary. — A pleader who had duly appeared in the suit is not obliged to file a fresh *vakalatnama* for the purpose of an application under this rule [1]

15. Who can apply to set aside. — The application under this rule is not limited to the case of a *sole* defendant who has not appeared or, where there are more defendants than one, none of them had appeared, *any one of several defendants* against

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('20) AIR 1920 Lah 88 (89)

Note 13

1. [illegible]

2. ('68) 10 Suth W R 156 (157)
('90) 1890 Pun Re No 158 page 516
3. ('22) AIR 1922 Mad 10 (12) 40 Mad 1
4. ('27) AIR 1927 Mad 722 (723 724)
5. ('16) AIR 1916 Mad 641 (641)
6. ('35) AIR 1935 Cal 506 (507) 62 Cal 1057

Note 14

1. ('29) AIR 1922 Bom 207 (209) 47 Bom 11.

O. 9 R. 13
Notes 15–17

whom the decree is *ex parte* can apply[1] The words "against the defendant" do not necessarily imply that the only defendant against whom relief has been in terms granted by the decree can apply for an order to set it aside, they are comprehensive enough to include a case in which the decree *adversely affects* the rights of a contesting defendant Thus, where the real question is whether the plaintiff or the contesting defendants are really entitled to the claim in suit and an *ex parte* decree is passed, the contesting defendants are competent to apply under this rule[2] But a person who is not a party though he may be interested in the suit is not entitled to apply under this rule[3] Nor can a person who though a formal party but against whom nothing is said in the operative portion of the decree[4] or who has been expressly exempted from the decree, apply under this rule[5] It follows that a person against whom the suit is dismissed cannot apply[6]

The Court cannot *suo motu* set aside an *ex parte* decree without there being an application by the party[7]

16 Application by the legal representative of the defendant. — When a defendant dies after an *ex parte* decree is made against him his legal representative can apply under this rule to set it aside[1] The reason is that the legal representative enjoys the same rights and liabilities as the original defendant The contrary view expressed in the undermentioned cases[2] that the provision only authorises applications by the *defendant against whom an ex parte* decree was passed is not correct under the present Code having regard to Section 146

Where proceedings under this rule have been already initiated by the defendant, his legal representative is entitled to continue the same[3] See also Section 146, Notes 2 and 7 for fuller discussion

17. Grounds for setting aside an ex parte decree.—In an application under this rule, the Court has to satisfy itself (a) whether the summons has not been duly served or (b) whether the applicant has been prevented by sufficient cause from appearing[1] The words in the rule are imperative and if either of these conditions is satisfied the Court is bound to set aside the *ex parte* decree and cannot refuse it on any other ground[2] Thus the fact that the defendant did not take out summons to his witnesses is no ground for refusing the application if otherwise the conditions of this rule are satisfied[3] Conversely where either of these conditions is not satisfied the Court has *no jurisdiction* to grant the application for any other reason[4] Thus, where a suit

Note 15

1 ('04) 8 Cal W N 621 (625)
2 ('34) AIR 1934 All 163 (164) 56 All 578
3 ('26) AIR 1926 Cal 1015 (1015)
4 ('04) 1 All L Jour 470 (472)
5 ('21) 61 Ind Cas 484 (485) (All)
6 ('11) 11 Ind Cas 141 (142) (All)
('27) AIR 1927 Mad 227 (228) (Some defendants sailing with plaintiff—Withdrawal ordered in their absence—Petition by them to set it aside and allow them to continue the suit—Not sustainable)
7 ('27) AIR 1927 Lah 372 (372)

Note 16

1 ('23) AIR 1923 All 30 (30)
3 ('07) 29 All 574 (575)

Note 17

1 ('25) AIR 1925 Lah 577 (577)
('35) AIR 1935 All 565 (566)

is restored to file under Rule 9, *ante*, and the Court passes an *ex parte* decree on the same day on account of the fact that the defendant was not ready to go on with the trial, it has been held that the decree could not be set aside under this rule[5] In such a case the decree is however illegal and can be set aside in appeal or revision as the case may be

The Court should decide upon evidence[6] or proper affidavits[7] and come to a definite finding as to the facts alleged in the application[8] An application under this rule in rent suits under the Bengal Tenancy Act,[9] and the Orissa Tenancy Act[10] must contain a statement of the injury sustained by the applicant by the *ex parte* decree and must also be accompanied by a deposit in Court of the amount of rent admitted due by the applicant unless the Court otherwise directs

See also the undermentioned case[11] decided under the further proviso added by the High Court of Allahabad

18 Summons not duly served. — The *onus* of proving that the summons has not been duly served is upon the applicant claiming the benefit of this rule[1] If he makes out that the necessary proof of due service required by Rule 6 was not given before the Court proceeded *ex parte*, the decree ought to be set aside[2] But a mere assertion of ignorance on the part of the defendant is not enough to prove want of due service[3] The Court must decide the matter upon enquiry and upon evidence[4]

Although in the first instance the *onus* lies on the applicant it will shift to the opposite party where the service is not on the defendant personally but on his *gumasta*, and he must show that the provisions of O 5 R 12 or R 13 were complied with[5] It is necessary in each case for the Court to see that the serving officer has used

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(36) AIR 1936 Mad 49 (49) (If the Court sets the decree aside on terms on the ground that he has a good defence that order is without jurisdiction)
(38) AIR 1938 Cal 797 (798) (Defendant served with summons months before suit fixed for *ex parte* hearing — Being absent when suit heard *ex parte* decree passed — Applying same day for time to file statement — *Ex parte* decree *held* could not be set aside)
(37) AIR 1937 All 691 (693) (An applicant seeking to avail himself of the rule must comply with the conditions laid down in the rule i e, he must satisfy the Court either that the summons was not duly served or that he was prevented by any sufficient cause from appearing in Court when the suit was called on for hearing) [*See* (36) AIR 1936 Mad 524 (524) (Where a Court decides to set aside an *ex parte* decree under O 9 R 13 although it is not obligatory on the Court to state reasons why *ex parte* decree should be set aside it is most desirable [illegible] the absent def n lant)]

9 The Bengal Tenancy Act (VIII of 1885) Section 153 A
(21) AIR 19 1 1 at 284 (286)

10 The Orissa Tenancy Act (II of 1913) S 205

11 (33) AIR 1933 All 165 (166) (*Ex parte* decree—Irregularity in service of summons—Defendant aware of hearing — No ground for setting aside)

Note 18

1 [illegible]
(75) 24 Suth W R 262 (262)
(28) AIR 1928 Nag 80 (80) 22 Nag L R 166

2 (01) 23 All 99 (100 101)

3 (26) AIR 1926 Mad 558 (559)
(28) 108 Ind Cas 753 (754) (Mad)

4 (11) 9 Ind Cas 31 (32) (All)
(23) AIR 1923 Mad 27 (28)
(74) 21 Suth W R 242 (243)
(66) 6 Suth W R Misc 36 (37)
(25) [illegible]

5 (13) 21 Ind Cas 922 (922 923) (Mad)

O. 9 R 13
Note 18

all due and reasonable diligence with a view to find out the defendant before affixing the summons [6]

Although the words duly served would *appear* to relate to the method of service yet a summons cannot be said to be duly served if it is a misleading document having no relevance to the real proceeding which is contemplated and having no reference to the order ultimately passed because under such circumstances service even if effected is a mere sham [7] Where the summons has not been served because it contained the wrong name of the defendant s father [8] or where the summons is served not upon the defendant but on his brother [9] or where the service is by registered post and the defendant denies receipt of the same [10] or where in the case of a substituted service there is nothing on record to show that the provisions of O 5 Rr 19 and 20 were complied with [11] or where the order for substituted service was obtained by misrepresentation or fraud [1] or where the defendant is not served in sufficient time to enable him to appear and defend [13] the Court is justified in setting aside the *ex parte* decree The unrebutted oath of the applicant that he was not served has been held to be sufficient proof of non service [14] The affidavit of the serving officer is admissible in evidence to show service of summons But when service is denied it is desirable that the serving officer is put in the witness box so that he can be cross examined by the party denying service [15]

Appearance before the registration of suit in a proceeding for the appointment of a guardian *ad litem* does not dispense with the service of suit summons [16] Where the summons has not been duly served the fact that the defendant *knew* of the suit will be no ground for not restoring the suit [17] Where however the defendant has refused the summons[18] or has wilfully or carelessly failed to appear after due service [19] the *ex parte* decree cannot be set aside Similarly a mere *irregularity* in service of summons on a co defendant[20] or on the defendant himself where he has *waived* the irregularity by accepting the summons is not sufficient to set aside the *ex parte* decree [1]

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make)
(35) AIR 1935 All 660 (662) (Summons intended for a *parda ashin* lady served on a male member when the lady is inside the house—Service not sufficient)]
10 (22) AIR 1922 Bom 377 (377) 46 Bom 130
(26 AIR 926 P h 00 (000 (Th r

this case t e e is no se v ce o su n on)
11 (28) AIR 1928 Lah 799 (800)

(24) AIR 1924 Lah 191 (191)
(30) AIR 1930 Lah 560 (560)
[*See also* (34) AIR 1934 Cal 745 (74) (Even though substituted service may be considered as personal service on the defendants under the provisions of O 5 R 20 this cannot preclude the defendants from afterwards showing that in fact there had been no service on them at all and that the order for substituted service was r

The summons referred to is the first summons issued to the defendant giving him notice of suit and not of any *application* made during the course of the suit [23]

See also Order 5 generally

19. Sufficient cause. — See Order 9 Rule 9 Note 8, "sufficient cause" It may, among other things, include a fraudulent suppression of summons from the knowledge of the defendant [1]

20. Minor defendant. — If a minor defendant *is properly represented* in the suit an *ex parte* decree is as binding upon him as a decree in a contested suit,[1] and cannot be set aside on the ground that he has not been served with the notice of the intention to appoint a court officer as guardian *ad litem* [2] As to whether a minor can apply to set aside an *ex parte* decree where *he has not been properly represented*, there is a conflict of judicial opinion The High Court of Madras[3] and the Judicial Commissioner's Court of Nagpur[4] have held that the minor in such a case cannot be regarded as a *party* to the suit at all, that the decree passed is in effect a *nullity* and the Court cannot re open the suit under this rule On the other hand, the High Court of Allahabad,[5] and the Chief Court of Oudh[6] have held that he is entitled to apply under this rule In the undermentioned case[7] decided by the Patna High Court the Judges differed on this point

But the mere fact that the guardian did not appear or that the court guardian failed to appear owing to want of instructions,[8] or that there are mere irregularities in the matter of the appointment of a guardian,[9] is not a sufficient ground for setting aside the *ex parte* decree But it has been held that where the guardian has wrongfully or negligently allowed a claim against a minor to be decreed *ex parte*, the decree can be set aside under this rule [10] See also Note 8 to Order 9 Rule 9

It is, however, open to the minor to impeach an *ex parte* decree got against him by a *separate suit* in cases where he can show that the guardian has been guilty of *fraud* or gross negligence[11] and if his interests were prejudiced thereby [12] The fact that he has not applied under this rule is no bar to the suit [13]

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22 (23) AIR 1923 Nag 13 (15)

Note 19

1 (31) AIR 1931 Pat 204 (205) 10 Pat 516 (FB)
[*See also* (80) 6 Cal L Rep 69 (70)]

Note 20

1

[But see (35) AIR 1935 Mad 196 (197) (Suit by minor dismissed for default should be

put forward and the guardian absents himself only on account of his realising this the *ex parte* decree cannot be set aside)

(36) AIR 1936 Mad 961 (962) (Do)

O. 9 R. 13
Note 18

all due and reasonable diligence with a view to find out the defendant before affixing the summons [6]

Although the words 'duly served' would *appear* to relate to the method of service yet a summons cannot be said to be duly served if it is a misleading document having no relevance to the real proceeding which is contemplated and having no reference to the order ultimately passed because under such circumstances service even if effected is a mere sham [7] Where the summons has not been served because it contained the wrong name of the defendant s father [8] or where the summons is served not upon the defendant but on his brother [9] or where the service is by registered post and the defendant denies receipt of the same [10] or where in the case of a substituted service there is nothing on record to show that the provisions of O 5 Rr 19 and 20 were complied with [11] or where the order for substituted service was obtained by misrepresentation or fraud [12] or where the defendant is not served in sufficient time to enable him to appear and defend [13] the Court is justified in setting aside the *ex parte* decree The unrebutted oath of the applicant that he was not served has been held to be sufficient proof of non service [14] The affidavit of the serving officer is admissible in evidence to show service of summons But when service is denied it is desirable that the serving officer is put in the witness box so that he can be cross examined by the party denying service [15]

Appearance before the registration of suit in a proceeding for the appointment of a guardian *ad litem* does not dispense with the service of suit summons [16] Where the summons has not been duly served the fact that the defendant *knew* of the suit will be no ground for not restoring the suit [17] Where however the defendant has refused the summons[18] or has wilfully or carelessly failed to appear after due service [19] the *ex parte* decree cannot be set aside Similarly a mere *irregularity* in service of summons on a co defendant [20] or on the defendant himself where he has *waived* the irregularity by accepting the summons is not sufficient to set aside the *ex parte* decree [21]

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(A service ... is not a service on other members of the family who are impleaded in suit as they may have their own defence to make)
(35) AIR 1935 All 660 (662) (Summons intended

this case there is no service of summons)
11 (28) AIR 1928 Lah 799 (800)

(24) AIR 1924 Lah 191 (191)
(30) AIR 1930 Lah 560 (560)
[*See also* (34) AIR 1934 Cal 745 (74.) (Even though substituted service may be considered as personal service on the defendants under the provisions of O 5 R 20 this cannot preclude

1 *Where the decree is joint and indivisible*[4]

Illustration

A *B* and *C*, who are coparceners of a joint Hindu family together execute a mortgage to *X* ... pear and an *ex parte* ... aside the decree Here ...

Where the decree is not joint and indivisible[6] *e g* where the suit is to obtain possession of separate items of properties from separate sets of defendants[7] or where the decree itself is divisible and each of the defendants has separate defence the whole decree need not be set aside[8]

2 *Where the decree proceeds on a ground common to all the defendants*[9]

Illustration

A sues *B* and *C* on a promissory note *B* is the principal debtor and *C* is the surety An *ex parte* decree is passed against both *B* alone applies to set aside the decree and shows sufficient cause for his absence The decree ought to be set aside against *C* also as the liability of both is based on a common ground[10]

Where however the decree does not proceed on a common ground[11] and the defence of the several defendants is distinct or peculiar to each of them[12] the whole decree ought not to be set aside Thus where *A* sues *B* and *C* on a promissory note, on the allegation that *B* is the executant of the promissory note and that *B* and *C* (his nephew) are members of an undivided Hindu family of which *B* is the manager and after the passing of an *ex parte* decree against both *C* alone applies to set aside the decree the proper course is to set aside the decree only as against *C* and not as against *B* also inasmuch as his liability is based on the ground that he executed the promissory note while the liability of *C* is based on the distinct ground that the debt was binding upon him and his defence is peculiar and not common to that of *B*[13]

3 *Where it is necessary that the whole decree should be re opened in the interests of justice*[14] *or in other words where the relief which the applicant is entitled to cannot effectively be given except by setting aside the decree against the r defendants also*

Thus in the case of an *ex parte* decree against several mortgagors it has been held that the better course would be to set aside the decree against all the defendants[15]

Illustration

A files a suit against *B* *C* and *D* on a mortgage bond and gets an *ex parte* decree against all of them *B* alone applies to set aside the decree Neither in the mortgage bond nor in the plaint nor in the decree is there any specification of the shares and liabilities of the several defendants The decree ought to be set aside against all the defendants[16]

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the proviso to O 9 R 13 set aside the *ex parte* decree against both the firm and *G*)
(07) 6 Cal L Jour 226 (227 231)
7) AIR 1927 Mad 550 (550) (The fact that decree is a compromise one makes no difference)
36) AIR 1936 Lah 243 (243) (*Ex parte* decree against Hindu father and son on basis of trust

tions will arise at the time of execution and ... ious results may follow)
[*See* (1900) 5 Cal W N 58 (59)]
(26) AIR 1926 Mad 256 (257)

7 (21) AIR 1921 Mad 451 (451)
(08) 31 Mad 454 (456 457 458)
8 (01) 6 Cal W N 109 (110)
9 (71) 15 Suth W R 371 (371)
10 (17) AIR 1917 Lah 194 (195)
(14) AIR 1914 Oudh 220 (220)
11 (03) 26 Mad 604 (606)
12 (25) AIR 1925 Oudh 181 (182)
(07) 6 Cal L Jour 226 (232)
1
14
1
(18) AIR 1918 Cal 179 (180)
16 (30) AIR 1930 Cal 700 (701)



O. 9 R. 13
Notes 23-25

4 *When the suit would result in two inconsistent decrees if the ex parte decree be not set aside against the other defendants also*[17]

Illustrations

(i) *X* sues *A* and *B* two joint executants of a promissory note for the recovery of the amount due thereunder *B* has as a matter of fact paid the amount due to *X* *B* is not served and does not appear and *A* who is served also does not appear and an *ex parte* decree is passed against both *B* applies to set aside the decree Can the decree be set aside against *A* also? Yes The reason is that if *B* succeeds at the hearing in proving the payment, the result of not setting aside the decree against *A* also would be two *inconsistent* decrees[18]

(ii) *A* sues *B* and *C* alleging that they are in joint possession of a certain immovable property *and asking for a declaration that he is in joint possession with them* *B* alone is served but not *C* and there is an *ex parte* decree against both *C* applies for a re hearing under this rule The decree ought to be set aside against *B* also because if *C* establishes at the hearing that *A* has no title whatsoever to the property, the result will be two *inconsistent* decrees one against *B* and another against *C*[19]

The principle above referred to equally applies to cases where the decree is *ex parte* against some of the defendants and *contested* against the rest[20] Thus, where the decree is one and indivisible it can be set aside against all,[21] but where it is divisible it can be set aside only as against the defendant applying[22] The undermentioned cases[23] which lay down that the whole decree cannot be set aside where some defendants contest the suit are it is submitted, not correct

See also the undermentioned case[24]

24. Inherent power of Court to set aside an ex parte decree. — See Note 2 to Section 151

25. Effect of setting aside the ex parte decree. — The effect of setting aside an *ex parte* decree is to restore the parties to the position they previously occupied[1] and the Court should proceed to decide the suit as it stood before the decree[2] The trial of the suit should commence *de novo* as against the persons in whose favour the decree was set aside and the evidence that had been taken in the *ex parte* proceedings

17 ('02) 24 All 383 (388) (FB)
('36) AIR 1936 Lah 243 (243)
18 ('02) 24 All 383 (388) (FB)
19 ('02) 24 All 383 (388) (FB)
20 ('98) 25 Cal 155 (156, 157) (Decree means whole decree as can be seen from the word the Court shall appoint a day for proceeding with the suit)

ration of title against *A* and for possession against *B*)

was how
t apply)

24 [illegible]
ground that he had no *locus standi* to defend

that the order was not proper and that it is
...to allow
when he
ex parte

Note 25

1 ('18) AIR 1918 Cal 883 (883)

('34) AIR 1934 Lah 45 (46)
('28) AIR 1928 Mad 969 (971) (Proceedings during non-appearance of defendant are not binding when an *ex parte* decree is set aside)
2. ('07) 17 Mad L Jour 81 (82)

should not be used against them[3] Any attachment that has been issued[4] or any sale that has taken place in pursuance of the *ex parte* decree[5] becomes null and void and the Court can also order restitution[6] except as against a stranger auction purchaser, of anything taken in execution of the decree

But, the setting aside of an *ex parte final* decree does not have the effect of vacating the preliminary decree[7]

26. Ex parte decree against a firm. — An *ex parte* decree passed against a firm after it has been served in the manner contemplated by Order 30 cannot be set aside on the application of a partner who alleges that he has not been duly served, it can never be said that a decree against a firm is *ex parte* against one of its partners because he has not appeared[1] Where, however, the applicant denies that he is a partner of the firm along with other defendants, the Court can enquire into the matter and set aside the decree[2] See also the undermentioned case[3]

27. Dismissal of an application to set aside an ex parte decree, if can be restored. — See Note 2 to Order 9, General

28. Limitation. — In an application under this rule the Court has first of all to see that the application is presented within the prescribed period of limitation[1] The Article applicable is 164 of the Indian Limitation Act, IX of 1908, under which the defendant can apply within thirty days *from the date of the decree* or, where the summons is not duly served, within thirty days from the date of his *knowledge* of the decree[2] The Court has no power, inherent or otherwise, to enlarge the period of limitation[3] Section 5 of the Limitation Act is not applicable to this rule unless the High Court under its rule making powers extends its application[4] The Bombay, Madras and Nagpur High Courts have added a proviso to this rule, extending Section 5 of the Limitation Act to applications under this rule[5] Section 22 of the Limitation Act does not apply to this rule[6] Nor can the time spent in prosecuting an application

3. (12) 16 Ind Cas 96 (97) (Mad)
(69) 12 Suth W R 130 (131)
4. (06) 29 Mad 175 (176)
(68) 10 Suth W R 99 (99)
5. (98) 25 Cal 175 (178)
(16) AIR 1916 Mad 706 (707)
(17) AIR 1917 Cal 564 (565)
(09) 3 Ind Cas 30 (31) (Cal)
6. (06) 3 Cal L Jour 181 (182)
7. (24) AIR 1924 Mad 890 (891)

Note 26

1 (24) AIR 1924 Bom 366 (367) · 47 Bom 778
2. (10) 8 Ind Cas 448 (449) (Low Bur)
3. (38) AIR 1938 Lah 823 (824) (Suit by or against firm — Addition of partners' names is [illegible]

[illegible]

aside both against firm and G and not only against firm)

Note 28

1 [illegible]

[illegible]

(33) AIR 1933 Pat 279 (279) 17 Pat 745 (Application is to be filed within 30 days from know [illegible]

O. 9 R. 13
Notes 28-29

under this rule be excluded in computing the period of limitation for appeals[7]

The *onus* of proving that the application is within thirty days of the knowledge of the decree is upon the applicant[8] But a *vague* knowledge that some decree has been passed by some Court is not enough to start limitation against the applicant[9] In the case of an application to set aside an *ex parte final* decree, it has been held that limitation starts from the *date of the decree* as it is not necessary to give a fresh notice before the passing of the final decree[10]

"*Duly served*" in Article 164 means served in such a manner as to give the defendant information of the proceedings taken against him[11] In the case of a *substituted* service, time begins to run from the *date of the decree* as the service is deemed to be due service,[12] unless the defendant can show that the circumstances under which substituted service could legally be ordered did not exist[13]

See also the undermentioned cases[14]

29. Appeal. — The rule contemplates three classes of orders[1]—

(1) Order *setting aside* the *ex parte* decree

(2) Order *setting aside* the *ex parte* decree on certain *terms*

(3) Order *rejecting* the application to set aside the *ex parte* decree

No appeal lies from an order falling under class 1[2] As to whether an *error, defect* or *irregularity* in passing such an order can be made a ground of objection under Section 105 of the Code in an appeal from the final decree see Note 6 to Section 105, *supra* But when the order was passed without *jurisdiction*, it was held in the undermentioned cases[3] under the Code of 1877, that it could be objected to in appeal

In the *second class* of cases where the Court passes a conditional order, *e g*, where, on the failure of the applicant to comply with certain terms it is ordered that the petition will stand dismissed, the question arises whether the order by itself is appealable It has been held by the High Courts of Bombay, Rangoon and Madras

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7. ('96) 23 Cal 325 (327)

[illegible] ('35) AIR 1935 [illegible]

[illegible] word "duly" is not equivalent to "personally" ')]

12. ('25) AIR 1925 Lah 639 (639)

[illegible] decree holders after the period of [illegible])

('35) AIR 1935 Pesh 7 (8) (The summons referred to in Art 164 is the summons for the first hearing of the case and there is no essential difference between the case where a suit is adjourned owing to the absence of the presiding officer or some other cause and a case in which a suit is remanded for retrial by the Appellate C[illegible]

[illegible] thereafter to inform themselves of what is being done in the case)

Note 29

1. ('37) AIR 1937 [illegible]

that the rejection referred to in O 43 R 1, clause (d) signifies an *immediate rejection* and not a conditional or prospective rejection[4] and, therefore it is only the *final order* passed on failure to fulfil the conditions imposed that is appealable The High Court of Allahabad[5] has, however, taken a contrary view **O. 9 R. 13 Notes 29–30**

In the *third class* of cases the order is appealable under O 43 R 1, clause (d)[6] whether the rejection is on the merits or on default[7] The Appellate Court may in such an appeal remand the application for enquiry[8] The fact that a final decree has been passed in the case is no ground for refusing to entertain an appeal from an order rejecting an application to set aside an *ex parte* preliminary decree as, in the present Code, the two decrees are independent and separate[9] As has been seen in Note 12 to Section 96, *ante*, where an application to set aside an *ex parte* decree has been dismissed on the merits, the propriety of the order of dismissal cannot be questioned in the appeal from the *ex parte* decree itself But such finality of the order dismissing the application under this rule is confined to matters which are within the scope of this rule Therefore, the Appellate Court in hearing an appeal from the *ex parte* decree is not precluded from considering and deciding the question whether under the circumstances of the case it would not have been better, in the interests of justice, for the trial Court

See also the undermentioned cases[1?]

30. Revision. — An order setting aside an *ex parte* decree not being appealable, a revision will lie therefrom if the conditions of Section 115 of the Code are satisfied[1]

('71) 8 Bom H C R A C 44 (47)
('74) 22 Suth W R 5 (6)
('75) 23 Suth W R 147 (148)
('71) 15 Suth W R 315 (317) (But the objection will be too late in special appeal)

4. ('18) AIR 1918 Mad 257 (258) (Setting aside on Letters Patent Appeal, AIR 1917 Mad 596)
('33) AIR 1933 Rang 63 (64)
('34) AIR 1934 Rang 192 (193)
('25) AIR 1925 Mad 1182 (1183)
('27) AIR 1927 Bom 1 (3) 51 Bom 67 (F B) (Overruling AIR 1926 Bom 353)

5 ('14) AIR 1914 All 336 (337) (Case decided under O 9 R 9)

6. ('78) 2 Bom 644 (648, 649)

23

and that the circumstances were such as to leave the client helpless to proceed further with the

('22) AIR 1922 All 50 (50) (Small Cause decree *ex parte*—Successor not empowered—Decree is final)

Note 30

O 9 R 13
Notes 28–29

under this rule be excluded in computing the period of limitation for appeals[7]

The *onus* of proving that the application is within thirty days of the knowledge of the decree is upon the applicant[8] But a *vague* knowledge that some decree has been passed by some Court is not enough to start limitation against the applicant[9] In the case of an application to set aside an *ex parte final* decree it has been held that limitation starts from the *date of the decree* as it is not necessary to give a fresh notice before the passing of the final decree[10]

Duly served in Article 164 means served in such a manner as to give the defendant information of the proceedings taken against him[11] In the case of a *substituted* service time begins to run from the *date of the decree* as the service is deemed to be due service[12] unless the defendant can show that the circumstances under which substituted service could legally be ordered did not exist[13]

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29 Appeal — The rule contemplates three classes of orders[1]—

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No appeal lies from an order falling under class 1[2] As to whether an *error defect* or *irregularity* in passing such an order can be made a ground of objection under Section 105 of the Code in an appeal from the final decree see Note 6 to Section 105 *supra* But when the order was passed without *jurisdiction* it was held in the undermentioned cases[3] under the Code of 1877 that it could be objected to in appeal

In the *second class* of cases where the Court passes a conditional order *e g* where on the failure of the applicant to comply with certain terms it is ordered that the petition will stand dismissed the question arises whether the order by itself is appealable It has been held by the High Courts of Bombay Rangoon and Madras

7 ('96) 23 Cal 325 (32)

by the defendant)

[*See* ('35) AIR 1935 Pesh 137 (139) (The words or where the summons was not duly served connote an inquiry into the due service of the summons which can only be found out by [illegible]

[illegible] is not equivalent to personally)]

12 ('25) AIR 1925 Lah 639 (639)

[illegible] decree [illegible] after the period of [illegible]

('35) AIR 1935 Pesh 7 (8) (The summons referred to in Art 164 is the summons for the first hearing of the case and there is no essential difference between the case where a suit is [illegible]

thereafter to inform themselves of what is being done in the case)

Note 29

1 ('27) AIR 1927 Bom 1 (3) 51 Bom 6 (FB)

2 ('89) 16 Cal 496 (496)

('78) 1 All 748 (750) (F B)

('05) 1905 Pun Re No 103 p 308

('97) 19 All 355 (356)

('27) AIR 1927 Lah 775 (776)

('19) AIR 1919 All 426 (427)

3 ('77) 2 Cal 114 (115)

('71) 15 Suth W R 175 (176)

O. 9 R. 13 Note 30

A dismissal of an application under this rule cannot be said to be a denial of the right of fair trial so as to justify the interference of the High Court under Section 107 of the Government of India Act of 1915[13] (See now Section 224 of the Government of India Act of 1935, under which the revisional powers of the High Court have been taken away.)

O. 9 R. 14

No decree to be set aside without notice to opposite party

R. 14. [S. 109.] No decree shall be set aside on any such application as aforesaid unless notice thereof has been served on the opposite party.

[1877, S. 109]

Local Amendment

CALCUTTA

Cancel the word 'thereof' and *substitute* therefor the following words 'together with a copy thereof (or concise statement as the case may be)'

1. Notice to opposite party. — The rule is imperative that no *ex parte* decree can be set aside without notice to the opposite party so as to give him an opportunity to be heard[1]. A mere oral notice given to a pleader who appeared in execution proceedings in connection with the same decree but who was different from the pleader who appeared in the suit[2] or a service on plaintiff's pleader in the absence of any order of the Court,[3] or a service on plaintiff's *chela*[4] has been held to be not sufficient.

The words "*opposite party*" mean such of the parties to the suit as are interested in opposing the application. The words do not include a court auction-purchaser[5] or an attaching decree holder who has attached the *ex parte* decree[6] or a co-defendant in a case.[7]

Local Amendments

BOMBAY

Add the following as Rule 15:

"R. 15. In the application of this Order to appeals, so far as may be, the word 'plaintiff' shall be held to include an appellant, the word 'defendant' a respondent, and the word 'suit' an 'appeal'." O 9 R.15 (Bombay)

MADRAS

Add the following:

"15. (1) Rules 6, 13 and 14 shall apply *mutatis mutandis* to those proceedings in execution falling within Section 47 of the Code in which notice to the opposite party is required under the provisions of the Code. O 9 R.15 (Madras)

Setting aside ex parte orders in execution

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and plaintiff not estopped from applying in revision.)]

13. ('26) AIR 1926 Pat 37 (38). [*See also* ('20) AIR 1920 Pat 568 (570) (The ...

3. ('21) 63 Ind Cas 47 (48) (Pat).

4. ('20) AIR 1920 Oudh 220 (220) : 23 Oudh Cas 104.

5. ('99) 26 Cal 267 (270).

('36) AIR 1936 All 410 (410) (Person impleaded as defendant in mortgage suit by reason of being subsequent purchaser of part of mortgaged property is not opposite party—Service of notice on him is not necessary — The mere fact that he subsequently purchases a portion of the property in execution of the *ex parte* decree is no reason for regarding him as a person benefited by the decree itself.)

6. ('10) 7 Ind Cas 66 (66) (Mad).

7. ('27) AIR 1927 Cal 692 (693) : 55 Cal 78.

O 9 R 15 (Madras) (2) Subject to the provisions of sub rule (2) of Rule 13 an application under this rule shall be made within thirty days of the date of the order or where the notice was not duly served of the date when the applicant has knowledge of the order

NOTE —The above rule which was made in March 1933 is not retrospective in effect and does not apply to *ex parte* orders passed prior to its coming into force [1]

ORDER X.

Examination of Parties by the Court

O 10 R. 1 **R. 1.** [S 117] At the first hearing of the suit the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made The Court shall record such admissions and denials

Ascertainment whether allegations in pleadings are admitted or denied

[1877, S 114]

Synopsis

1 ' Shall ascertain
2 Effect of statements by party or his pleader

1 **"Shall ascertain "**— The powers which this Order vests in the Civil Courts are mainly intended to draw by *viva voce* examination the real points in controversy between the parties and thus prevent the real matter in dispute remaining undecided or left out of consideration [1] The proper way of clearing up the pleadings after the plaint and the written statement are filed is that provided by this rule the provisions of which are peremptory [2] Permitting parties to file a series of written statements against each other is not justified under this rule [3] An examination under this rule is not necessary or proper where the pleadings on the record are complete and clear [4]

2 **Effect of statements by party or his pleader** —The party or his pleader is bound to answer questions put by the Court but he can properly refuse to make admissions about matters not directly involved in the suit especially when the questions are put at the suggestion of the opposite party whose object is to get useful answers for a contemplated litigation [1]

The admission of a party is conclusive against him[2] but is not evidence against the opposite party [3]

Order 9 Rule 15 (Madras)
1 (35) AIR 1935 Mad 714 (715)
(35) AIR 1935 Mad 585 (586)
Order 10 Rule 1 — Note 1

s made on

Note 2
1 (30) AIR 1930 Lah 2?0 (2 0)
2 (26) AIR 1926 All 710 (710) 49 All 219
3 (30) AIR 1930 Lah 947 (918)

The Court must *record* the admissions or denials made under this rule[4] but cannot act upon the answers recorded and pass final judgment in the suit without *framing issues* in the case[5] **O. 10 R. 1 Note 2**

As to the effect of admissions by pleader, see Order 3 Rule 4

Where all the defendants confess judgment, it is permissible for the Court to record a joint statement of all the defendants and pass a decree on admission[6]

R. 2. [S. 118.] At the first hearing of the suit, or at any subsequent hearing, any party appearing in person or present in Court, or any person able to answer any material questions relating to the suit by whom such party or his pleader is accompanied, may be examined orally by the Court; and the Court may, if it thinks fit, put in the course of such examination questions suggested by either party. **O. 10 R. 2**

Oral examination of party or companion of party.

[1877, Ss. 118, 119; 1859, S. 125.]

1. Oral examination. — The object of the examination under this rule is to ascertain the *matters in dispute* and not to take evidence or to ascertain what is to be the evidence in the case[1] It is not intended to be a substitute for a regular examination on oath[2] but is intended to help the elucidation of what is *obscure and vague* in the plaint, the allegations of facts contained in the oral examination under this rule cannot be read into the plaint and thus enlarge its scope[3] "The power under this rule is intended to be used by the Judge only where he finds it necessary to obtain from a party information on any *material questions relating to the suit*, and ought not to be employed so as to supersede the ordinary procedure at trial as prescribed in Order 18 "[4] A statement made by a party under this rule is binding on him to the same extent as the statement made by his pleader would be binding on him But a statement made by a person who accompanies the pleader to look after the case on behalf of the party would not necessarily bind the party on whose behalf he appears[5]

Where a defendant appears by a pleader the fact that he does not file a written statement does not warrant the trial of the suit *ex parte* The Judge should proceed under this rule and ascertain what are the matters in dispute and then proceed with the suit[6]

See also the undermentioned case[7] under the old Code of 1859

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4 (22) AIR 1922 Oudh 178 (188, 189)
5 (30) 1930 All W N 170 (170)
(83) 13 Cal L Rep 266 (271) 10 Ind App 74 (PC)
(92-96) 2 Upp Bur Rul 245 (248) (A case under Upper Burma Civil Justice Regulation)
6 (34) AIR 1934 Lah 540 (541)

Order 10 Rule 2 — Note 1

1. (26) AIR 1926 All 411 (412)
(05) 2 All L Jour 777 (778)
2. (26) AIR 1926 All 411 (412)
(05) 2 All L Jour 777 (778)
3. (02) 1902 All W N 35 (38)
4. (31) AIR 1931 P C 175 (176, 177) (PC)
5. (26) AIR 1926 All 411 (412)
(05) 2 All L Jour 777 (778)
6 (1865) 2 Mad H C R 311 (312)
7. (69) 12 Suth W R 207 (208)

O. 10 R. 3

[a]R. 3. [S. 119.] The substance of the examination shall be reduced to writing by the Judge, and shall form part of the record.

Substance of examination to be written.

[1877, S. 119; 1859, S. 125.]

a This rule does not apply to the Chief Court of Oudh *vide* Oudh Courts Act (U. P Act IV of 1925), Section 16 (2)

1. Applicability to Chartered High Courts. — This rule does not apply to Chartered High Courts in the exercise of their Ordinary or Extraordinary Original Civil Jurisdiction See O 49 R 3, clause (2) The applicability of this rule has been excluded by the undermentioned special and local laws [1]

O. 10 R. 4

R. 4. [S. 120.] *(1)* Where the pleader of any party who appears by a pleader or any such person accompanying a pleader as is referred to in rule 2, refuses or is unable to answer any material question relating to the suit which the Court is of opinion that the party whom he represents ought to answer, and is likely to be able to answer if interrogated in person, the Court may postpone the hearing of the suit to a future day and direct that such party shall appear in person on such day.

Consequence of refusal or inability of pleader to answer

(2) If such party fails without lawful excuse to appear in person on the day so appointed, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit.

[1877, S. 120; 1859, S. 127. See O. 5 R. 3.]

Synopsis

1. Scope of the Rule.
2. Order for personal appearance
3. Refusal or inability of pleader to answer See Notes 2 and 4
4. Effect of non-attendance without lawful excuse
5. Effect of dismissal under this Rule.
6. Appeal.

1. Scope of the Rule. — The intention of the rule is to enable the Court not only to get obscure points cleared up by obtaining information from either of the parties, but also, if possible, to get admissions so as to narrow down the issues [1]

Order 10 Rule 3 — Note 1

1. The Oudh Courts Act (IV of 1925), S 16 The N.-W F Province Law and Justice Regulation (VII of 1901), S 46 (Repealed by Reg 1 of 1931, S 38) The Rangoon Small Cause Courts Act (VI of 1920), S 111
See also Order 50, C P C, as to Provincial Small [illegible]) [illegible] ts generally

Order 10 Rule 4 — Note 1

1. ('03) 5 Bom L R 687 (688).
('33) AIR 1933 All 517 (519) (Pleader or agent [illegible]

2. Order for personal appearance. — An order under this rule directing a party to appear in person can be passed only where the Court finds that there is a *material question* relating to the suit that has to be answered by such party or his pleader, and the pleader refuses or is unable to answer such question [1]

The order should be specific and sufficiently explicit[2] and must state the reasons therefor A mere statement that "it is necessary that the defendant should appear in person" is not sufficient [3] The Court has, however, a discretion to decide which of the parties ought to answer the question [4]

3. Refusal or inability of pleader to answer. — See Note 2 above and Note 4 below

4. Effect of non-attendance without lawful excuse. — Where the party directed to appear by the Court under this rule fails to appear in person *without lawful excuse*, the Court may pronounce judgment against him [1] Where one party has failed to appear without lawful excuse but others have appeared, the Court cannot pronounce judgment against the persons who have so appeared [2] It has been held by the High Court of Madras that this rule is a self contained one applicable to all cases where a party has been ordered to attend for his examination under this rule and that where a judgment is pronounced against a party for failure to attend as directed, the order must be taken to have been made only under this rule, and not under the provisions of O 9, even though the Court purported to pass the order under those provisions [3] On the other hand the High Court of Allahabad has held that where the party directed to appear and his pleader are both absent on the day appointed, the Court dismissing the suit must be taken to have acted only under the provisions of Order 9, even though it purported to act under this rule [4] The reason given is that where the party and his pleader are both absent it could not be said that the party failed to attend *without lawful excuse*, and unless it could be said so, the Court cannot act under this rule [5]

A person exempted under the Code from appearance in Court has a lawful excuse for not appearing in Court as directed [6]

The Court is not bound to pass a decree against the defaulting party but may pass any order in relation to the suit as it deems fit [7]

In a suit for rent, defendant pleaded discharge but was prepared to withdraw the plea if the plaintiff would himself depose that there was no discharge The Court ordered her appearance under this rule It was held that the proper procedure would

Note 2

1 ('18) AIR 1918 Oudh 429 (429) 21 Oudh Cas 252
('99) 23 Bom 318 (320)
('74) 22 Suth W R 270 (271)
('73) 20 Suth W R 165 (166)
3 ('03) 2 All L J Cas 463 (464) (All)
4 ('03) 5 Bom L R 687 (688)

Note 4

1. (1865) 2 Suth W R 161 (161)
('03) 5 Bom L R 687 (688, 689)
('33) AIR 1933 Lah 922 (924)
2 (1864) 1 Suth W R 25 (25) (Case decided under S 170 of the Code of 1859 corresponding to O 16 R 20)
(1864) 1 Suth W R 168 (169 170)
3 ('21) AIR 1921 Mad 417 (418)
4. ('17) AIR 1917 All 136 (136)
[*See also* ('32) AIR 1932 All 595 (596) (Court can dismiss suit for default of plaintiff's appearance under this rule—Such suit can also be restored under O 9 R 9)]
5 ('96) 1896 Bom P J 629 (629)
6 Marsh 627
7. ('70) 2 N W P H C R 67.

O. 11 R. 1
Notes 2–5

opposite party to obtain such information by *discovery* Under the present Code, however, it has been held that in view of the fact that the present Order is now the same as Order 31 of the Rules of the Supreme Court, interrogatories can be administered in the same manner as is done in England, even for discovering the *nature* of the opponent's case [4]

3. Interrogatories and pleadings. — From what has been said before, it is clear that interrogatories as to the truth or untruth of statements of facts made in the pleadings are admissible [1] A party is entitled to interrogate his opponent with a view to ascertain what case he has to meet and the facts relied on, and to limit the generality of the pleadings and find out what is really in issue [2] But the interrogatories are not like pleadings confined to the material facts on which the parties intend to rely Either party may interrogate as to any link in the chain of evidence necessary to support his own case, inasmuch as the question is relevant as leading up to a matter in question in the suit [3] Thus, if a defendant denies that he wrote a material document, he may be asked if other documents produced to him are not in his handwriting, though such documents have nothing to do with the suit but will be used for comparison of handwriting [4] Similarly, a defendant is entitled to ask the plaintiff in a suit on a *hundi* which the defendant denies to state in what form the consideration for the *hundi* was paid, the particulars of the place where the defendants drew or accepted the *hundi* and where and by whom the *hundi* was presented for payment [5] But, where in a suit on a promissory note the defendant pleads want of consideration, the onus of proof lies on him and he cannot escape from the onus of proof without laying any evidentiary basis, by seeking to get admissions from the plaintiff by interrogatories [6]

4. Interrogatories and cross-examination. — Interrogatories can be allowed only where they relate to any *matters in question in the suit* Interrogatories, therefore, which are really in the nature of cross examination, such as questions put only to test the credibility of the party interrogated, will not be allowed [1]

5. Interrogatories must be as to relevant facts. — Interrogatories must be confined to facts which are relevant to the matters in question in the suit They are not confined to facts *directly in issue* [1] Where, however, the issue was on what terms the defendant and *A* had purchased certain properties interrogatories as to the terms on which they had purchased *other properties* are irrelevant and will not be allowed [2] Similarly, in a suit seeking to charge defendants as agents, where the existence of the agency is the real issue, interrogatories as to *private transactions* are irrelevant [3] So

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(95) 23 Cal 117 (124 125)

4. (14) AIR 1914 Cal 767 (767) 41 Cal 6

Note 3

1. (1882) 20 Ch D 519 (527) Attorney General v ...iskil
...35) 29 Ch D 29 (42) Bidder v Bridges
[illegible]

(1882) 20 Ch D 519 (526), Attorney General ...askil
...(1885) 15 Q B D [illegible], Jones v Richards
...(14) AIR 1914 [illegible] 41 Cal 6
...(39) AIR 1939 [illegible]

Note 4

1. (12) 17 Ind Cas 152 (154) 37 Bom 347
(1895) 1 Ch 334 (338) Kennedy v Dodson
(1879) 5 C P D 47 (49, 50) Sheward v Lonsdale
(1878) 3 Q B D 654 (656) Allhusen v Labouchere
(1881) 18 Ch D 477 (486) Parker v Wells

Note 5

1. (1886) 17 Q B D 154 (16?) Marriott v Chamberlain (Cited in 12 Cal L Jour 505)
(1911) 2 Ch 71 (76 83) Nash v Layton
(1914) 2 Ch 129 (130) Osram Lamp Works Ltd v Gabriel Lamp Co
2. (1895) 1 Ch 334 (338) Kennedy v Dodson
3. (1874) 9 Ch 376 (378), Great Western Colliery Co v Tucker

also the procedure of delivering interrogatories in order to prove the contents of documents which have been held inadmissible in evidence is entirely misconceived[4]

6. Interrogatories as to evidence or witnesses. — 'The purpose of interrogatories is not to enable a litigant to come into Court knowing how his opponent is going to prove his case He is not entitled to ask what his opponent's evidence is going to be "[1] Interrogatories therefore, as to the *evidence* which a party intends to adduce in support of his case, or the contents of his brief or as to the names of his witnesses are not permissible[2] Thus, where in a suit for damages the defendant wanted the plaintiff to ' state how your estimate of damages to the amount of Rs 13,000 mentioned in the 8th paragraph of the plaint is arrived at," it was held that the plaintiff was not bound to answer it[3] Similarly, questions as to the names of the persons in whose presence this or that event took place will not be allowed[4] The reason is that the allowing of such questions would enable the other party to tamper with the witnesses or to manufacture evidence in contradiction and so shape the case as to defeat justice[5]

7. Names of persons. — As has been seen in the previous Note, questions as to the names of the persons in whose presence an event has taken place will not generally be allowed but where the name and address of a person is a *material fact*, it must be disclosed, although the party may thereby have to disclose the names of his witnesses[1] Thus, in actions for the infringement of trade marks or patents, the defendant is entitled to discovery of the names of "diverse persons" alleged in the plaint to have been induced to purchase the defendant's goods as the plaintiff s[2] But in an action for damages arising from the bite of a dog the Court refused to allow interrogatories to be put to the plaintiff as to persons alleged to have been previously bitten[3]

Interrogatories with a view to ascertain whether *some person other than the defendant is liable*, will not be allowed[4]

8. Interrogatories on questions of law. — Interrogatories must be as to questions of *fact* and must not ask for conclusions of law, inferences of facts, or construction of documents[1] A question relating to *foreign law* will not be allowed unless the party ordered to answer is an expert in that law[2]

9. Time for the delivery of interrogatories. — Interrogatories will not, as a general rule, be allowed until after the defence is filed as, until then, it is not known

4. (34) AIR 1934 Nag 181 (182)

Note 6

1 (1911) 2 K B 725 (732) Knapp v Harvey (Per Buckley L J)
2 (1885) 29 Ch D 29 (37) Bidder v Bridges
(33) AIR 1933 Cal 151 (153)
(1911) 2 K B 725 (730) Knapp v Harvey
(17) AIR 1917 Cal 658 (659)
[*See also* (12) 17 Ind Cas 152 (154) 37 Bom 347]
3 (87) 14 Cal 703 (706)
4 (1877) 3 Ex D 335 (337) Eade v Jacobs (More fully reported in 37 L T 621)
(1879) 13 Ch D 375 (379) Lyon v Tweddell
[*See also* (1879) 13 Ch D 370 (374) Johns v James]
5. (1880) 16 Ch D 93 (100) Benbow v Low (Cited in 38 Cal 237)
(1895) 1 Ch 439 (447, 448) Re Strachan

Note 7

1. (1886) 17 Q B D 154 (161, 162) Marriott v Chamberlain (Cited in 12 Cal L Jour 505)
(1914) 2 Ch 129 (133) Osram Lamp works, Limited v Gabriel Lamp Co
2 (1883) 22 Ch D 629 (632) Birch v Mather
3 (1911) 2 K B 725 (730) Knapp v Harvey
4. (1916) 2 Ch 245 (249) Sebright v Hanbury

Note 8

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[illegible] Maachappij v Doen

O. 11 R. 1
Notes 2–5

opposite party to obtain such information by *discovery* Under the present Code, however, it has been held that in view of the fact that the present Order is now the same as Order 31 of the Rules of the Supreme Court, interrogatories can be administered in the same manner as is done in England, even for discovering the *nature* of the opponent s case[4]

3. Interrogatories and pleadings. — From what has been said before, it is clear that interrogatories as to the truth or untruth of statements of facts made in the pleadings are admissible[1] A party is entitled to interrogate his opponent with a view to ascertain what case he has to meet and the facts relied on, and to limit the generality of the pleadings and find out what is really in issue[2] But the interrogatories are not like pleadings, confined to the material facts on which the parties intend to rely Either party may interrogate as to any link in the chain of evidence necessary to support his own case, inasmuch as the question is relevant as leading up to a matter in question in the suit[3] Thus if a defendant denies that he wrote a material document, he may be asked if other documents produced to him are not in his handwriting, though such documents have nothing to do with the suit but will be used for comparison of handwriting[4] Similarly, a defendant is entitled to ask the plaintiff in a suit on a *hundi* which the defendant denies to state in what form the consideration for the *hundi* was paid the particulars of the place where the defendants drew or accepted the *hundi* and where and by whom the *hundi* was presented for payment[5] But, where in a suit on a promissory note, the defendant pleads want of consideration, the onus of proof lies on him and he cannot escape from the onus of proof without laying any evidentiary basis, by seeking to get admissions from the plaintiff by interrogatories[6]

4. Interrogatories and cross-examination. — Interroga [illegible] h be allowed only where they relate to any *matters in question in th* [illegible] nteriogatories therefore, which are re [illegible] nature of cro [illegible] na [illegible] questions put only to test the cr [illegible] interr [illegible] [1]

5. Int [illegible] gatories must be confined to [illegible] e suit They are not confined [illegible] as on what terms the defendant an [illegible] es as to the terms on which they had purchase [illegible] ll not be allowed[2] Similarly, in a suit seeking to charge [illegible] the existence of the agency is the real issue, interrogatories as to *p* [illegible] s are irrelevant[3] So

(95) 23 Cal 117 (124 125)
4. (14) AIR 1914 Cal 767 (767) 41 Cal 6

Note 3

1. (1882) 20 Ch D 519 (527) Attorney General v Gaskil
(1885) 29 Ch D 29 (42) Bidder v Bridges
2. (1877) 7 Ch D 435 (449) Saunders v Jones
(34) AIR 1934 Nag 181 (18?)
(1878) 38 L T 44, Ashley v Taylor
3. (1882) 20 Ch D 519 (528), Attorney General v Gaskil
4. (1885) 15 Q B D 439 (440) Jones v Richards
5. (14) AIR 1914 Cal 767 (767) 41 Cal 6
6 (33) AIR 1933 Mad 298 (299)

Note 4

1 (12) 17 Ind Cas 152 (154) 37 Bom 347
(1895) 1 Ch 334 (338) Kennedy v Dodson
(1879) 5 C P D 47 (49 50) Sheward v Lonsdale
(1878) 3 Q B D 654 (656) Allhuson v Labouchere
(1881) 18 Ch D 477 (486) Parker v Wells

Note 5

1 [illegible] v Cham [illegible] n [illegible] orks Ltd
2. (1895) 1 Ch 334 (339) Kennedy v Dodson
3. (1874) 9 Ch 376 (378), Great Western Colliery Co v Tucker

grounds for refusing to answer them or some of them[2] He has a right to come into Court and ask that the order be re considered, and, if found to have been wrong, set aside If the interrogatories are scandalous, or in any way an abuse of the process of the Court, the Court may interfere at any stage In other cases, the party might omit to answer the interrogatories to which he objects at his peril, or he may file his affidavit in answer, stating in it his objections to answer such questions as he objects to, and in such a case an interrogating party, if dissatisfied, can apply under Rule 11, *infra*[3]

13. Impleading party for discovery. — A person should not be made a party to an action merely for the purpose of getting discovery, however important the discovery might prove to be[1]

14. Probate proceedings. — This Order applies to probate proceedings by virtue of Section 266 of the Succession Act, XXXIX of 1925 The Judge can direct an executor on delivery of interrogatories to make a full discovery of the assets of the deceased Strictest relevancy may not be required and the Judge has got power to exclude anything which is offensive or improper[1]

15. Land acquisition and other proceedings. — This Order applies to proceedings under the Land Acquisition Act, I of 1894, by virtue of Section 53 of that Act[1] and to enquiries into election matters by commissioners under the Indian Elections Offences and Inquiries Act, XXXIX of 1920 (Section 5) Some of the rules of this Order have been excluded from application to proceedings under the undermentioned Local Acts[2]

R. 2. [New.] On an application for leave to deliver interrogatories, the particular interrogatories proposed to be delivered shall be submitted to the Court. In deciding upon such application, the Court shall take into account any offer, which may be made by the party sought to be interrogated to deliver particulars, or to make admissions, or to produce documents relating to the matters in question, or any of them, and leave shall be given as to such only of the interrogatories submitted as the Court shall consider necessary either for disposing fairly of the suit or for saving costs. **O. 11 R. 2**

Particular interrogatories to be submitted

[R. S C., O. 31 R. 2.]

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2. ('91) 18 Cal 420 (421)
3 ('80) 5 Cal 707 (710)

Note 13

Note 14

1. ('16) AIR 1916 Cal 953 (954) 43 Cal 300

Note 15

1. ('10) 8 Ind Cas 107 (113) . 38 Cal 230 (An order for discovery of documents made)
2. The Bengal Tenancy Act (VIII of 1885) S 148 (Suits for recovery of rent) the Orissa Tenancy Act (II of 1913), S 198 (Do), the Madras Estates Land Act (I of 1908) S 192

O. 11 R. 2
Note 1

1. "As the Court shall consider necessary." — The Court under this rule has no power to *settle* the interrogatories but to state merely *what interrogatories* should be administered[1]

The practice in England is that it is obligatory to draw up the proposed interrogatories and to deliver a copy of them to the opposite party with notice It is necessary also to give a copy for the Master to consider and initial The Judge or the Master has a discretion to allow or refuse leave to interrogate,[2] and the Master's discretion will not be interfered with unless he acts on a wrong principle[3] He will also consider any offer to deliver particulars or to make admissions or produce documents that may be made If he decides to allow interrogatories at all, the Master will consider the particular interrogatories sought to be delivered and will hear arguments on both sides for and against allowing any particular question Leave should be given as to such only of the interrogatories as the Court considers necessary either for disposing fairly of the suit or for saving costs Interrogatories as to the contents of documents cannot be said to be necessary either for disposing fairly of the suit or for saving costs[4] The reason is that under the Evidence Act, the contents of a document may not, except when secondary evidence is admissible, be proved by oral evidence In running down cases, interrogatories relating to the details of the accident are not ordinarily necessary and will not be allowed except under special circumstances for the purpose of disposing fairly of the suit or for saving costs[5] The opposite party need not be served personally,[6] it is sufficient if his solicitor is served[7]

The grant of leave to one party to deliver interrogatories to another does not, as has been seen in Note 12 to Rule 1 *ante*, amount to an order requiring the other party to answer them It is not a decision which has to be obeyed The party may have good grounds of objections under Rule 6[8]

An order disallowing interrogatories is not a decree and is not open to appeal The Judicial Commissioner's Court of Nagpur has held that it is a "case decided" and is open to revision, provided the conditions of Section 115 are satisfied[9] According to the Judicial Commissioner's Court of Sind the order is not revisable inasmuch as the party adversely affected has another remedy by way of appeal from the final decision of the Court[10]

O. 11 R. 3

Costs of interrogatories

R. 3. [S. 123] In adjusting the costs of the suit inquiry shall at the instance of any party be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing officer or of the Court, either

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Order 11 Rule 2 — Note 1

1. (1894) 38 Sol Jo 338, Toy v Willoughby (Per Chitty J)
(16) AIR 1916 Cal 953 (954) 43 Cal 300
2. (1906) 1906 W N 57 (58), Codd v Delap
3. (1920) 1 K B 659 (666), Griebart v Morris
4. (34) AIR 1934 Nag 181 (182)
5. (1920) 1 K B 659 (663) Griebart v Morris
(1883) 1883 W N 196 (196), Jones v London Road Car & Company
6 (1874) 30 L T 367 Little v Roberts
7. (1878) 47 L J Ch 609 (610), Re Mulcaster
8 (91) 18 Cal 420 (421)
(26) AIR 1926 All 553 (553)
9. (34) AIR 1934 Nag 181 (182) (Allowing leave to deliver interrogatories which are not necessary is a material irregularity)
10. ('20) AIR 1920 Sind 1 (5) 14 Sind L R 23.

with or without an application for inquiry, that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be paid in any event by the party in fault. O. 11 R. 3 Note 1

[R. S. C., O. 31 R. 3.]

1. Costs. —Ordinarily the costs of an application will be dealt with on the application and be costs in the suit This rule makes a special provision for ordering the party at fault to pay costs in *any event* irrespective of the result of the suit See Section 35

The Court has power to order under the corresponding English rule that costs of a *viva voce* examination under R 11 be paid by the party examined in any event,[1] but the costs of an oppressive *viva voce* examination may be ordered to be paid by the party delivering the interrogatory [2]

R. 4. [New.] Interrogatories shall be in Form No. 2 in Appendix C, with such variations as circumstances may require. O. 11 R. 4

Form of interrogatories

[R S C, O. 31 R. 4.]

R. 5. [S. 124.] Where any party to a suit is a corporation or a body of persons, whether incorporated or not, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation or body, and an order may be made accordingly. O. 11 R. 5

Corporations

[R. S. C., O. 31 R. 5.]

1. Corporations and companies. — The secretary of a corporation or company is, as a rule, the person to be interrogated [1] But the Court may issue delivery of interrogatories to be answered by any other officer of the company [2] Before issuing such an order, however, the Judge must be satisfied that the officer selected by the party has a competent knowledge of the facts and the means of answering

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Order 11 Rule 3 — Note 1

1 (1882) 9 Q B D 168 (170), Vicary v G N Ry. Company

2. (1894) 54 L J Ch 207 (208), Litchfield v Jones

Order 11 Rule 5 — Note 1

1. (1880) 16 Ch D 58 (59), In re Alexandra Palace Company

2. (1896) 2 Q B 153 (156) Chaddock v British South Africa Co (Form of the order under this rule)

(1892) 3 Ch 70 (74), Attorney-General v North Metropolitan Tramways Co

O. 11 R. 5 Note 1 the questions[3] The officer interrogated is bound to answer only with reference to knowledge acquired in the course of his employment and on inquiries of other officers who have acquired their knowledge in the same way[4] There is no obligation on the part of the officer either to disclose his knowledge or to obtain or disclose the knowledge of other agents or servants of the company acquired by him or them *otherwise than in the course of his or their employment*[5]

The answer of the officer is the answer of the company and can be read as admission which binds the company.[6]

A foreign State has been held to be a corporation for the purposes of this rule[7]

O. 11 R. 6

R. 6. [S. 125.] Any objection to answering any interrogatory on the ground that it is scandalous or irrelevant or not exhibited *bona fide* for the purpose of the suit, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer.

Objections to interrogatories by answer.

[1877, S. 125; R. S. C., O. 31 R. 6.]

Synopsis

1. Scope of the Rule
2. Scandalous interrogatories
3. Irrelevant interrogatories
4. Not exhibited bona fide.
5. "Not sufficiently material at that stage."
6. "Any other ground"
7. Fishing interrogatories.
8. Wagering contracts.
9. Defamation.

1. Scope of the Rule. — This rule enables the party interrogated to file his objections, and indicate the grounds of objection which he might take[1] The party taking such objection is entitled to have it adjudicated upon by the Court and a clear and specific order passed directing him to answer such of the interrogatories as the Court holds to be relevant The mere fact that he could apply under Rule 7 to have the interrogatories set aside or struck out does not take away his right to have his objection adjudicated upon[2]

2. Scandalous interrogatories. — Questions irrelevant to the matters in issue and taken for the purpose of abusing, insulting or degrading the opposite party are scandalous interrogatories and are not permissible But nothing can be scandalous

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3. (1879) 13 Ch D 97 (99), Barkely v Standard Dis Co
4. (1900)2 Ch 1(6), Welsbach Co v New Sunlight Co
(1878) 3 Q B D 315 (321), Southmark v Quick
5. (1900) 2 Ch 1 (10), Welsbach Co v New Sunlight Co.
6. (1896) 2 Q B 153 (158), Chaddock v. British South Africa Co.
7. (1875) 1 Ch D 171(174), Republic of Costa Rica v Erlanger (Referred to in 22 Cal 757, 16 All 259)

Order 11 Rule 6 — Note 1

1. ('80) 5 Cal 707 (710)
('80) 5 Cal L Rep 171 (171) (Where interrogatories have been administered for the examination of a witness by one party, the other party, if he objects to any of the questions, must make his objections on the face of his cross interrogatories)
[*See* ('96) 23 Cal 117 (124)]
2. ('18) AIR 1918 All 303 (304, 305).

which is *relevant*[1] even though tending to criminate the person interrogated[3]

3. Irrelevant interrogatories — As a general rule the question taken must be *relevant* to the matter in issue[1] though it need not be *confined* to the *facts in issue*[2] Thus interrogatories asking plaintiff whether similar charges as that made in the suit had not been made against him previously in a newspaper and whether he had contradicted them or taken any notice of them on that occasion are clearly *irrelevant*[3] Similarly, in a suit by *A* for a declaration that he and the defendant purchased a certain land as co partners interrogatories relating to the arrangements under which *other purchases* had been made by them together are irrelevant[4] In no case will interrogatories be allowed if the defence at which they aim would be no defence in law to the suit[5]

4. Not exhibited bona fide. — Where the questions though relevant, are not put *bona fide* for the purposes of the present action but for other and ulterior objects, *e g*, in view of a future litigation they will be disallowed by the Court[1]

5. "Not sufficiently material at that stage." — The word 'material means more than relevant A fact may be *relevant* but not *material at a particular stage*[1] The question of materiality must be tested by reference to the case made by the pleadings and to what will be in issue at the hearing Generally, "the Court is unwilling before *the right to relief* is established to make an order for discovery which may be injurious to the defendant and will only be useful to the plaintiff if he succeeds in establishing his title to relief[2] Similarly the Court is not justified in ordering a plaintiff to answer interrogatories which are in the nature of eliciting evidence before the defendant has filed his written statement[3] Compare Rule 20 which makes a provision for the postponement of discovery till after determination of issue or question Nevertheless the Court has a discretion to order discovery at once on other grounds[4]

6. "Any other ground" — These words mean grounds *ejusdem generis* with those specified[1] They will include the following grounds —

(a) that the questions are criminatory,

(b) that they relate to privileged communications between the party and his legal advisers

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Note 2

1 (1894) 10 T L R 254 (371) Kemble v Hope
(1878) 8 Ch D 645 (653) Fisher v Owen (Referred in 14 Cal W N 153)

2 (1878) 3 Q B D 654 (660) Allhusen v Labouchere
(1906) 1906 A C 434 (437) National Association v Smiths
(1878) 8 Ch D 645 (653) Fisher v Owen (Referred in 14 Cal W N 153)
(1884) 10 P D 122 (130) Harvey v Lovekin
(1875) 10 Q B 217 (218) Greenfield v Reay

Note 3

1 (1895) 1 Ch 334 (338 340) Kennedy v Dodson

3 (1886) 2 T L R 682 Pankhurst v Hamilton

4 (1895) 1 Ch D 334 (338) Kennedy v Dodson
(1917) 1917 W N 319 (319) Blair v Haycock Cadle Co

5 (1890) 24 Q B D 573 (577) Rogers & Co v Lambert & Co

Note 4

1 (1905) 2 K B 523 (526) Edmundson v Birch & Co Ltd
(1875) 44 L J Ch 305 (308) Heugh v Garrett
(1920) 1 K B 336 (339) Chapman v Leach

Note 5

1 ('87) 14 Cal 703 (706)

2 (1881) 18 Ch D 477 (486) Parker v Wells (Suit for breach of trust—Denial of trust—Question as to account of profits of trust premature)
(1888) 37 Ch D 184 (187) Tennessy v Clark (Amount of damages)

3 ('3?) AIR 193? Mad 316 (317)

4 ('84) 10 Cal 803 (814)
('02) 4 Bom L R 342 (343)

Note 6

1 (1878) 8 Ch D 645 (65) Fisher v Owen (Cited in 14 Cal W N 153)

O. 11 R. 5 Note 1 the questions[3] The officer interrogated is bound to answer only with reference to knowledge acquired in the course of his employment and on inquiries of other officers who have acquired their knowledge in the same way[4] There is no obligation on the part of the officer either to disclose his knowledge or to obtain or disclose the knowledge of other agents or servants of the company acquired by him or them *otherwise than in the course of his or their employment*[5]

The answer of the officer is the answer of the company and can be read as admission which binds the company[6]

A foreign State has been held to be a corporation for the purposes of this rule[7]

O. 11 R. 6

R. 6. [S. 125] Any objection to answering any interrogatory on the ground that it is scandalous or irrelevant or not exhibited *bona fide* for the purpose of the suit, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer.

Objections to interrogatories by answer

[1877, S. 125; R. S. C, O. 31 R. 6.]

Synopsis

1 Scope of the Rule
2. Scandalous interrogatories
3 Irrelevant interrogatories
4 Not exhibited bona fide
5 "Not sufficiently material at that stage."
6 "Any other ground"
7. Fishing interrogatories.
8. Wagering contracts.
9 Defamation.

1. Scope of the Rule. — This rule enables the party interrogated to file his objections and indicate the grounds of objection which he might take[1] The party taking such objection is entitled to have it adjudicated upon by the Court and a clear and specific order passed directing him to answer such of the interrogatories as the Court holds to be relevant The mere fact that he could apply under Rule 7 to have the interrogatories set aside or struck out does not take away his right to have his objection adjudicated upon[2]

2. Scandalous interrogatories. — Questions irrelevant to the matters in issue and taken for the purpose of abusing, insulting or degrading the opposite party are scandalous interrogatories and are not permissible But nothing can be scandalous

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3 (1879) 13 Ch D 97 (99), Barkely v Standard Dis Co

4 (1900) 2 Ch 1(8), Welsbach Co v New Sunlight Co
(1878) 3 Q B D 315 (321), Southmark v Quick

5 (1900) 2 Ch 1 (10), Welsbach Co v New Sunlight Co.

6. (1896) 2 Q B 153 (158), Chaddock v British South Africa Co.

7. (1875) 1 Ch D 171(174), Republic of Costa Rica v Erlanger (Referred to in 22 Cal 757 16 All 259)

Order 11 Rule 6 — Note 1

1 (80) 5 Cal 707 (710)
(80) 5 Cal L Rep 171 (171) (Where interrogatories have been administered for the examination of a witness by one party, the other party, if he objects to any of the questions, must make his objections on the face of his cross interrogatories)
[*See* (96) 23 Cal 117 (121)]

2. (18) AIR 1918 All 303 (304, 305)

which is *relevant*[1] even though tending to criminate the person interrogated [2]

3. Irrelevant interrogatories — As a general rule the question taken must be *relevant* to the matter in issue [1] though it need not be *confined* to the *facts in issue* [2] Thus, interrogatories asking plaintiff whether similar charges as that made in the suit had not been made against him previously in a newspaper and whether he had contradicted them or taken any notice of them on that occasion, are clearly *irrelevant* [3] Similarly, in a suit by *A* for a declaration that he and the defendant purchased a certain land as co partners interrogatories relating to the arrangements under which *other purchases* had been made by them together are irrelevant [4] In no case will interrogatories be allowed if the defence at which they aim would be no defence in law to the suit [5]

4 Not exhibited bona fide — Where the questions though relevant, are not put *bona fide* for the purposes of the present action but for other and ulterior objects *e g*, in view of a future litigation they will be disallowed by the Court [1]

5. "Not sufficiently material at that stage." — The word "material means more than relevant A fact may be *relevant* but not *material at a particular stage* [1] The question of materiality must be tested by reference to the case made by the pleadings and to what will be in issue at the hearing Generally, 'the Court is unwilling before *the right to relief* is established to make an order for discovery which may be injurious to the defendant and will only be useful to the plaintiff if he succeeds in establishing his title to relief [2] Similarly, the Court is not justified in ordering a plaintiff to answer interrogatories which are in the nature of eliciting evidence before the defendant has filed his written statement [3] Compare Rule 20 which makes a provision for the postponement of discovery till after determination of issue or question Nevertheless the Court has a discretion to order discovery at once on other grounds [4]

6 "Any other ground" — These words mean grounds *ejusdem generis* with those specified [1] They will include the following grounds —

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Note 2

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(1906) 1906 A C 434 (437) National Association v Smiths
(1878) 8 Ch D 645 (653) Fisher v Owen (Referred in 14 Cal W N 153)
(1884) 10 P D 122 (130) Harvey v Lovekin
(1875) 10 Q B 217 (218) Greenfield v Reay

Note 3

1 (1895) 1 Ch 334 (338, 340) Kennedy v Dodson

2 [illegible]

3 (18[illegible]) 2 T L R 682 Pankhurs v Hamilton

4 (1895) 1 Ch D 334 (338) Kennedy v Dodson
(1917) 1917 W N 319 (319) Blair v Haycock Cadle Co

5 (1890) 24 Q B D 573 (577) Rogers & Co, v Lambert & Co

Note 4

1 (1905) 2 K B 523 (526) Edmundson v Birch & Co Ltd
(1875) 44 L J Ch 805 (808) Heugh v Garrett
(1920) 1 K B 336 (339) Chapman v Leach

Note 5

1 (87) 14 Cal 703 (706)

2 (1881) 18 Ch D 477 (486) Parker v Wells. (Suit for breach of trust—Denial of trust—Question as to account of profits of trust premature)
(1888) 37 Ch D 184 (187) Tennessy v Clark (Amount of damages)

3 (32) AIR 1932 Mad 316 (317)

4 (84) 10 Cal 808 (814)
(0) 4 Lom L R 342 (348)

Note 6

1 (1878) 8 Ch D 645 (653) Fisher v Owen (Cited in 14 Cal W N 153)

(c) that they relate to a party's evidence, and

(d) that they are injurious to public interests

In general, questions excluded by Sections 121 to 129 of the Evidence Act and which could not be asked if the party were in the witness box cannot also be taken as interrogatories [2] Questions relating to communications made for the purpose of litigation between third persons and the legal adviser of a party or between third persons and the party for the purpose of submission to the adviser,[3] or questions offending against a rule of public policy may also be objected to [4] Similarly, it is open to an assessee of income tax to object to answering interrogatories on statements made by him in income tax proceedings on the ground that they are privileged [5] But even if no objection is taken by the party it is the duty of the Court to consider whether a rule of public policy does not prevent the disclosure of the documents or of the information sought [6]

7. Fishing interrogatories. — The questions asked must not be "fishing," that is to say they must refer to some definite and existing state of circumstances and must not be put merely in the hope of discovering some flaw in the opponent's case[1] or with the object of filling up blanks in the interrogator's own pleadings [2] Thus, where the plaintiff was charged with having used certain blasphemous words interrogatories tending to show that if he did not use those words on the particular occasion, still he had on other occasions said something very much like it are merely "fishing" interrogatories and will be disallowed [3]

8. Wagering contracts. — In cases where the defence of wagering is set up, the Court will refuse to allow the party setting up this defence to interrogate his opponent generally as to his business transactions apart from the particular transactions in the suit, the reason is that it will be "manifestly unfair to compel a man to disclose his general dealings on the chance that thereby his opponent may discover something that will support his case' [1]

9 Defamation. — Where, in a plaint in an action for slander, publication to one named person and also to various other persons unnamed is alleged, it is not permissible to ask the defendant whether he spoke the words complained of to any person or persons *other* than the person named and the names of other persons if any Such an interrogatory is a fishing interrogatory the object of which is to find out some cause of action or defence other than that specifically alleged [1] So also the defendant in a libel case will not as a rule be allowed before he has given particulars to interrogate or get discovery for the purpose of finding out whether he has a defence or not [2]

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2 (90) 15 Bom 7 (10)
3 (05) 7 Bom L R 709 (711, 712)
4. (1888) 21 Q B D 509 (521) Hennessy v Wright (Cited in 27 Bom 189)
5 (34) AIR 1934 Nag 181 (182)
6 (02) 4 Bom L R 842 (850)

Note 7

1 (90) 17 Cal 840 (849 849) Hennessy v Wright (1888) 21 Q B D 445 (448) Barham v Lord (1913) 2 K B 193 (197, 199), Barham v Lord Huntingfield
2 (14) AIR 1914 Cal 767 (768) 41 Cal 6
3 (1886) 2 T L R 682, Pankhurst v Hamilton.

Note 8

1 (13) 17 Ind Cas 152 (154) 37 Bom 347.

Note 9

1. (1913) 2 K B 193 (199) Barham v Huntingfield
2. (1893) 2 Q B 183 (188), Tuerenlery v Labouchere (1909) 2 K B 151 (161), Arnold v Bottomley.

R. 7. [New.] Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary or scandalous; and any application for this purpose may be made within seven days after service of the interrogatories. O. 11 R. 7

Setting aside and striking out interrogatories.

[R. S. C., O. 31 R. 7. (Annulled in 1917).]

1. Setting aside or striking out interrogatories. — Interrogatories must not be oppressive or exceed the legitimate requirements of the particular occasion [1] Thus, interrogatories as to profits requiring a search through business books of several years when it is absolutely irrelevant in a suit for a declaration,[2] or as to an *innuendo* and the names of all the persons to whom the libel had been published in a libel action,[3] or as to a secret manufacturing process, have all been held to be vexatious and oppressive [4] The mere *irrelevancy* of the interrogatory is no ground for setting aside the interrogatory under this rule The party has to proceed under Rule 6

R. 8. [S. 126.] Interrogatories shall be answered by affidavit to be filed within ten days, or within such other time as the Court may allow. O. 11 R. 8

Affidavit in answer, filing.

[1877, S. 126, R. S. C., O. 31 R. 8. See R. 9 below.]

1. Matters within the knowledge of party's agent or servant. — The party interrogated cannot escape giving an answer by saying that he has no *personal* knowledge as to matters inquired into [1] He is bound to obtain the information from his agents or servants, if such knowledge has been acquired by them in the ordinary course of their employment He can, however, show that it would be unreasonable to require him to do so in any particular case, as for instance, where either his agents or servants have left his employment or where it would occasion unreasonable expense or an unreasonable amount of delay or the like to get such information [2] A party's banker or solicitor is his agent within the meaning of this rule [3] As has been seen in the Notes to Rule 5 *ante*, a party need not disclose matters that have come to the knowledge of his agents or servants otherwise than in the ordinary course of their employment [4]

Order 11 Rule 7 — Note 1

1 (1893) 1 Q B 5 (13) Oppenheim v Sheffield

4

Order 11 Rule 8 — Note 1

1. (1884) 29 Ch D 297 (290), Foakes v Webb. (1878) 3 Q B D 315 (321), Southwark & Vauxhall Water Co v Quick (Cited in 15 Bom 7)

2. (1882) 10 Q B D 161 (171), Bolckow Vaughan & Co v Fisher

(1883) 24 Ch D 110 (113), Rasbotham v Shropshire Union Railway and Canal Co

3 (1895) 2 Ch 111 (115), Alliott v Smith.

4. (1900) 2 Ch 1 (10,11) Welsbach Incandescent Gas Light Co v Sunlight Incandescent Co.

O. 11 R. 12 discovery is not necessary, or not necessary at that stage of the suit or make such order, either generally or limited to certain classes of documents,[1] as may, in its discretion, be thought fit: Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs

[1877, S 129; R. S. C, O 31 R 12]

O. 11 R. 13 **R. 13.** [S 129, para 2] The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which (if any) of the documents therein mentioned he objects to produce, and it shall be in Form No 5 in Appendix C, with such variations as circumstances may require

Affidavit of documents

[R S C, O 31 R 13]

RULES 12 & 13.

Synopsis

1 Scope of the Rules
2 Application for discovery of documents may be made without affidavit
3 Grounds of objection to discover documents
  4 Professional or legal privilege
  5 Documents relating solely to the case of the party giving discovery
  6 Documents not in the sole possession of the party
  7 Documents held in possession as agent of third party
  8 Documents incriminating party
  9 Where production of public official documents is injurious to public interests
10 Court may inspect a privileged document
11 Contents of affidavit of documents
  12 Sufficient description of documents
13 Against whom order for discovery may be made
  14 Any party
  15 Benamidar
  16 Corporation
  17 Crown
  18 Foreign Prince or State
  19 Several defendants and plaintiffs See Note 11
  20 Next friend of minor or lunatic
  21 *Advocate General*
  22 Official Liquidator
  23 Marine insurance
24 Affidavit of documents, if conclusive — Further affidavit
25 Effect of non disclosure of documents
26 Right to seal part of documents

Other Topics (miscellaneous)

Affidavit in the case of several plaintiffs or defendants See Note 11
Court's discretion under the rule See Note 2
Discovery from a co-defendant or co plaintiff See Note 13
Documents in possession of a party either jointly with others or with no proprietary interest See Note 11
Document meaning of See Note 11
Duties of attorneys in respect of affidavit of documents See Note 11
"Matter in question" meaning of See Note 11
Possession of agent See Note 6
Production of documents See Note 1

Order 11 Rr. 12 & 13 Notes 1–3

1. Scope of the Rules. — These rules deal with the second branch of discovery, *viz*, the discovery of *documents* They enable a party to apply to the Court for the purpose of compelling his opponent to disclose the documents he has in his possession or power,[1] and the object of this procedure is two fold (1) to secure as far as possible that all material documents are disclosed by putting the opposite party on oath as to the documents in his possession or power with the consequent penalties attaching to a false oath, and (2) to put an end to what might otherwise lead to a protracted inquiry as to the material documents actually in the possession or under the control of the opposite party [2]

The right to have the *existence* of a document disclosed in the affidavit of documents under these rules does not necessarily involve any right to have it produced for *inspection*, nor is a protection from *production for inspection* a sufficient reason for not disclosing its *existence* The rule does not alter the principles relating to the production of documents but gives the Court a discretion to refuse the discovery of documents when there is no reasonable prospect of its being of any use,[3] or to limit the nature and extent of the discovery [4]

These rules do not preclude an application under Rule 18, sub rule 2 [5]

2. Application for discovery of documents may be made without affidavit. — An application under Rule 12 need not be supported by an affidavit as is generally required in the case of other applications [1] The Court has power either to refuse or adjourn the application and, in exercising its discretion, it is guided by the pleadings and the nature of the action The party who applies must, where there is contest show that he has a good cause of action and that the documents are relevant to the case [2]

3. Grounds of objection to discover documents. — A party against whom an order for discovery of documents has been made by the Court cannot object to *specify* the existence of the documents [1] He is also, as a general rule, bound to *produce* every document in his possession or power which is material or relevant to the suit, unless it is covered by some established privilege [2] The fact that a document was written on a privileged occasion, in the special sense in which that term is used in actions of defamation is no reason for refusing to produce it it is not, on that ground, privileged from inspection [3] But there are several classes of documents which have been recognized as being privileged from production These may be dealt with in the following order —

(1) Documents protected by professional or legal privilege

(2) Documents relating solely to the case of the party giving discovery

(3) Documents not in the sole possession of the party giving discovery

(4) Documents in the possession of a party only as agent or on behalf of another

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Order 11 Rules 12 & 13 — Note 1

1 (95) 23 Cal 117 (125)

2 [illegible]

3

4

5

Note 2

1. (95) 23 Cal 117 (125)

Note 3

1 (1881) 45 Law Times 360 (361) Swanston v. Lishman

2. (1876) 2 Ch D 644 (656) Anderson v. Bank of British Columbia (Cited in 6 Bom 572)

3 (1880) 5 Ex D 103 (112) Webb v. East

Order 11
Rr 12 & 13
Notes 3-4

(5) Documents tending to criminate or expose to forfeiture

(6) Documents protected on the ground of public policy

4 **Professional or legal privilege** — A communication between parties and their legal advisers has always been protected from disclosure even at the risk of the possibility of truth being concealed thereby[1] The object of the rule is to enable persons to obtain legal advice safely and effectually[2] A party is thus not bound to produce any confidential communication between him and his legal advisers[3] It is necessary however *to distinguish between documents and communications that are* privileged irrespective of whether litigation was contemplated or was pending and those that are privileged only where litigation was contemplated or was pending at the time when they came into existence The first class of cases will cover the following documents —

(1) Letters and communications passing between a party or his predecessors in title and his or their legal advisers provided they are *confidential* and written to or by the solicitor or legal adviser in his professional capacity for the purpose of *getting legal advice or assistance*[4] If the communications are not made *confidentially* there is no privilege[5]

(2) Such letters and communications made *through a clerk or agent* employed by the legal adviser or the client for the purpose of conveying information to or from the legal ad isers[6]

(3) Letters and communications between a solicitor and his partner or professional agent[7] but not between solicitors for opposite parties[8]

(4) Instructions and briefs to counsel and counsel s briefs and notes[9]

The second class of documents will cover the following —

(1) Communications between a solicitor and a *non professional* agent or a third party directly or through an agent and made with a view to pending or contemplated litigation and for the purpose of getting or giving advice or for obtaining or collecting evidence[10]

(2) Communications between the client and a *non professional* agent or third party, *which are made in answer to inquiries made by the party as the agent for or at*

Note 4

1 Halsbury Vol II page 72

2 (1881) 17 Ch D 675 (681 682) Wheeler v Le Marchant

(1901) 1901 App Cas 196 (200) Bullivant v Attorney General

3 ('91) 15 Bom 7 (10)

('27) AIR 1927 *Bom* 367 (367 368)

4 (1891) 1891 P 286 (289) O Shea v Wood

(1878) 4 Ex D 49 (53) Gardner v Irvin

(1883) 23 Ch D 837 (404) Kennedy v Lyell

(1878) 3 Q B D 315 (318) Southwark & Vauxhall Water Co v Quick (Statement of facts drawn up by the client for submission to his solicitor and documents prepared by him for the purpose of providing the solicitor with evidence and information for the conduct of his case)

(1913) 3 K B 850 (856) Birmingham and Midland Motor Omnibus Co v London & North Western Ry Co (Do)

(1913) 2 K B 565 (568) *Feuerheerd v London* General Omnibus Co (Do)

('80) 4 Bom 576 (582) (*Statements laid by clients before* counsel for the the purpose of obtaining legal advice)

(1883) 3 Times Rep 578 Ward v Marshal (Entries in the solicitor s diary of communications between himself and his client)

5 (1874) 30 Law Times 585 Original Hartlepool Collieries Co v Moon (Affirming 30 Law Times 193)

('79) 3 Bom 91 (93)

('94) 18 Bom 263 (272)

('03) 5 Bom L R 122 (123)

6 (1881) 17 Ch D 675 (682 684) Wheeler v Le Marchant

7 (1876) 34 Law Times 531 Mostyn v West Mostyn Coal & Iron Co

(1827) 4 Russ 190 (191) Hughes v Biddulph

8 (1851) 21 L J Ch 10 Gore v Harris

(1862) 32 Beav 162 (166) Ford v Tennant

9 (1876) 34 Law Times 531 Mostyn v West Mostyn Coal Co

(1911) 1911 P 161 (184) Curtis v Beaney

10 (1876) 2 Ch D 644 (650) Anderson v Bank *of British Columbia* (Cited in 6 Bom 579)

the request or suggestion of his solicitor or without any such request but *for the purpose of being laid before the legal adviser* for the purpose of *advice in respect of a pending or contemplated litigation*[11] But a mere communication between a principal and agent though confidential is not privileged[12] even after litigation has commenced and legal advice has been taken as to its course[13] Similarly the reports made by a servant to his master are not privileged though they may relate to the subject matter of the suit[14]

(3) The correspondence between co defendants after the institution of a suit is not as a general rule privileged from production but where one of the co defendants is agent or solicitor for the other co defendant the communications between them are privileged[15] Where one of the trustees of a will is a sol citor and acts as a solicitor for the trustees communications between him and his co trustees which would be privileged if he were not a co trustee are privileged[16]

No privilege attaches to communications between a client and his legal adviser made in furtherance of a fraudulent or illegal purpose which is definitely alleged in the pleadings or in the affidavits[17] The privilege is confined to *legal advice* and does not extend to communications between a party and his medical[18] or spiritual[19] adviser or non professional friend or adviser[20] See Sections 126 to 129 of the Evidence Act

5 Documents relating solely to the case of the party giving discovery —A party will not be compelled to produce for inspection documents which he swears relate to his own case and do not relate to or tend to support the case of his opponent and do not impeach his own case[1] Thus he need not produce any document which he can swear relates solely to his own *title* to any real property and to contain nothing which tends to establish the title of his opponent[2]

Documents disclosing party s evidence —A party cannot be compelled to produce documents which form the *exclusive evidence* of his own case or title[3] But they must not in any way tend to prove or support the adversary s title[4] if they are necessary to support the adversary s case[5] or may be evidence for the adversary as well[6] their production cannot be refused In order to claim this privilege the party may state in his affidavit that the document constitutes evidence of his own case or title that they contain nothing *supporting or tending to support the adversary s case or title* an l that they contain nothing *impeaching his own case or title*[7] But a party is

11 (1876) 2 Ch D 644 (648 650) Anderson v Bank of Br Columb a (C ted in 6 Bom 572)
12 (1878) 2 Bom 453 (456) Wallace v Jafferson
(85) 11 Cal 655 (657)
13 (91) 15 Bom 7 (10)
(95) 22 Cal 105 (111)
14 (27) AIR 1927 Bom 367 (367 368)
15 (1873) 16 Eq 112 (115) Hamilton v Nott (Co-defendant)
1[illegible]
Bulli
(1[illegible]) 1 Ch 3 0 (335 339) Whitworth In re
18 (1[illegible]) 17 Ch D 675 (681) Wheel r v Le Marc[illegible]
19 (18[illegible]) 2 Ch D 644 (650) Anderson v Bank of Br Columb a (C ed in 6 Bom 572)
20 (1874) 18 Eq 649 (654) Smith v Dani ll
(Cited in 4 Bom 576)

Note 5

[illegible]
3 (1893) 2 Q B 432 (435) Budden v Wilkinson
(1897) 2 Q B 62 (65) Frankenste n v Gavin s Co
(27) AIR 1927 Bom 367 (367)
4 (93) 17 Bom 581 (584)
5 (84) 10 Cal 808 (814)
6 (1842) 1 Y & C Ch Cas 631 (651) Combe v London Corporat on
[illegible] General
[illegible] C tl

Order 11 Rr 12 & 13 Notes 5–9

not confined to the affidavit in which the claim is first set up he is entitled to put in and use a further affidavit in support of his claim of privilege [8]

Opinions upon or steps taken in reference to a suit in which the plaintiff and defendant are putting forward opposing contentions cannot be said to relate solely to the case of the plaintiffs [9]

6 **Documents not in the sole possession of the party** — The rule of the Court of Chancery in England is thus laid down by Lord Cottenham in *Taylor* v *Rundell*[1]

> If a defendant has a joint possession of a document with somebody else who is not before the Court the Court will not order him to produce it and this for two reasons the one is that a party will not be ordered to do that which he cannot or may not be able to do the other is that another party not present has an interest in the document which the Court cannot deal th

Thus it was held that a partner or his agent cannot be asked to produce documents belonging to partnership where the other partners are not before the Court [2] But in a similar case in the High Court of Bombay [3] Sir Charles Sargent C J held that the case before him did not fall within either of the reasons mentioned above that the defendants (partners) physically speaking could produce the document and that legally speaking they *represented the other partners* for the purpose of production of documents as there was no other person having an interest distinct from their own interest

For the purpose of the disclosure of the existence of documents possession includes possession by an agent of the party giving the discovery [4]

7 **Documents held in possession as agent of third party** — No party can be compelled to produce documents of which he is not the owner but of which he has the custody as the agent of a third party who is not a party to the action as where the documents are in the possession of a party as a trustee or as a mortgagee regarding title deeds of mortgagor etc [1]

8 **Documents incriminating party** — It is a good ground of privilege that the document if *produced* would tend to criminate the party producing them But this objection does not apply to the *discovery* of the documents [1]

See however Section 132 of the Evidence Act

9 **Where production of public official document is injurious to public interests** — Public official documents need not be produced when an objection is taken in the affidavit of documents by the head of the department or by some responsible officer [1] the mere fact that the documents are official or confidential is not enough to protect them in case of doubt the Judge may in his discretion adjourn

8 (94) 29 Cal 105 (110) (Citing (1876) L R 1 C P D 471 M Corquodale v Bell)

9 (91) 15 Bom 7 (11)

(1876) 1 Q B D 423 (427) Bustros v White (Cited in 15 Bom 7)

(1882) 10 Q B D 191 (201) Attorney General v Emerson (Cited in 15 Bom 7)

Note 6

1 (1841) 5 Jur 1129 (Cited in 1 Bom 496) [*See also* (1871) 7 Ch App 312 (313) Hadley v McDougall]

2 (1841) 5 Jur 1129 Taylor v Rundell (Cited in 1 Bom 496)

(1849) 14 Jur 467 Reid v Langlois (Cited in 1 Bom 496)

3 (76) 1 Bom 496 (498 499)

4 (1881) 45 L T 360 (361) Swanston v Lishman

Note 7

1 (1836) 18 Beav 457 (461) Few v Guppy

Note 8

1 (1897) 2 Q B 124 (130) Spokes v Grosvenor Hotel & Co

(1906) 1906 App Cas 434 (437) National Association of Operative Plasterers v Smithies

Note 9

1 (01) 27 Bom 189 (216)

(1888) 21 Q B D 509 (521) Hennessy v Wright

the question to the trial[2] But, as a general rule, if the objection is taken by the proper person the Court will not go behind it, the foundation of the rule being that the information cannot be disclosed without injury to the public interest See also the Evidence Act, Sections 123 and 124 and the undermentioned case of the Privy Council[3]

10. Court may inspect a privileged document. — Where privilege is claimed by a party, the Court may inspect the document to decide whether the privilege claimed is proper and valid[1] See Rule 19, sub rule (2)

11. Contents of affidavit of documents. — A party who is ordered under Rule 12 to make discovery on oath should set forth in his affidavit all documents which *are* or *have been* in his possession or power relating to the matter in question[1] A document may be described as a writing or printing capable of being read, no matter what the material is upon which it is impressed or inscribed[2] The expression "matter in question means a question or issue in dispute in the action, and not the thing about which question or issue arises thus, in an action to recover possession of land, it means the plaintiff's alleged title and not the land[3] Every document which will throw any light on the case is a document relating to a matter in dispute in the suit[4] It is not confined to such as would be *admissible in evidence*[5] but includes all documents containing information which may either directly or indirectly enable the party seeking discovery, either to advance his own case or damage that of his adversary, or which may fairly lead him to a train of inquiry which may have either of these two consequences[6] Every such document must be included in the affidavit of documents even if the party is in possession thereof *jointly with others* or even if he has therein no property at all, provided they are in his corporeal possession As regards documents which are not, but *had been* in the party's possession, he must state what has become of them It is always desirable to adopt the form given in the Code as otherwise an affidavit may be regarded as insufficient[7] When the affidavit is insufficient, a summons may be taken to consider its sufficiency[8]

Ordinarily, an affidavit of documents must be made by the party himself, but the Court may in special cases allow the affidavit to be made by the agent of the party[9] Where there are several plaintiffs all of them must ordinarily join in the affidavit[10] It is possible on a proper case being made out that the order may be limited to a particular party[11] In the case of a *pardanashin* lady it is doubtful if a verification is necessary[12] It is the duty of an attorney to be very careful in ascertaining from his client, who has to make an affidavit of documents, exactly what materials and documents are in his possession It is further his duty the moment he finds that there are other documents which have not been disclosed, at the very earliest moment, to bring those documents to the notice of his opponent and give him an opportunity of inspecting them[13]

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2 (1916) 1 K B 822 (830) Asiatic Petroleum Co v Anglo Persian Oil Co [illegible]
3 (31) AIR 1931 P C 254 (257, 258) (PC)

Note 10

1 (1900) 1 Ch 376 (383) Millbank v Millbank.
(31) AIR 1931 P C 254 (259 261) (PC)

Note 11

[illegible]

12. Sufficient description of documents. — It is necessary that there should be a *sufficient description* of documents in the schedule annexed to the affidavit of documents It is sufficient, however, if the documents are described in such a manner as to enable enforcement of production, if ordered [1] Where a party claims to withhold documents or letters on the ground of privilege, a less degree of particularity will suffice, it is not necessary to give such description as will enable the opponent to know its *contents* [2]

If the documents are not numerous the most advisable course is to set out each of them separately and number them in the margin of the schedule But if there are numerous documents of the same class or description, it is not necessary to number each of them separately, it will be proper to tie them up in bundles and number the documents or otherwise earmark them in such a way that the other party may ask for those which he wants to inspect [3]

13. Against whom order for discovery may be made. — As a general rule, discovery is confined to the parties only[1] and does not apply to third parties [2] The words any party and any other party ' in Rule 12 contemplate *opposite parties* within the meaning of Rule 1 [3] See Note 11 to Rule 1, and Notes 14 to 21 below

14. Any party. — In a suit brought by a nominal plaintiff, the persons really interested may be ordered to give discovery and the suit may be stayed unless they give such discovery [1] So also where a *principal residing abroad* is the real plaintiff, but is suing through his agent, the defendant is entitled to have the action stayed until such discovery is made as the real plaintiff would have been obliged to make, had he been the plaintiff on the record [2]

15 Benamidar. — Where a person uses the name of another as a nominal plaintiff only for the purpose of bringing an action in which he alone is really interested, the *real* plaintiff may be called on to give discovery [1] But the nominal plaintiff also will be liable to make an affidavit of documents [2]

16 Corporation. — The Court has power to order an officer of a company or corporation to give discovery [1] A public body cannot burke discovery on the ground that there are a large number of papers, the production of which would flood the Court [2]

17. Crown — The Crown has a right of discovery as against a subject but cannot be compelled to give discovery,[1] though as a matter *of practice it does give*

Note 12

1. (1906) 2 K B 217 (224), James Nelson & Sons v Nelson Line
2. (1900) 16 T L R 434 (451), Williams v Ingram (Affirmed in 16 T L R 451)
3 (32) AIR 1932 Cal 72 (72, 73) 58 Cal 1091 (No contest between co defendants—Not opposite parties)

Note 14

1. (1906) 2 K B 217 (226, 227), James Nelson & Sons v Nelson Line
(1892) 2 Q B 324 (326) Willis v Baddeley
2 (1892) 2 Q B 324 (326 327), Willis v Baddeley

Note 15

1. (1892) 2 Q B 324 (326) Willis v Baddeley
2 (1881) 7 Q B 553 (555) Willson v Raffalovitch (Cited in 15 Bom 7)

Note 16

1. (1875) 1875 W N 220 (220) Cooke v Oceanic
(1885) 30 Ch D 189 (191) *Dykes v Stephens* (The case of a company is not the same as that of an infant)
2 (22) AIR 1922 All 1 (4) 44 All 202

Note 17

1 (1897) 2 Q B 384 (388), Attorney General v. Newcastle Corporation

discovery by way of a list of documents in the same way as a subject would be bound to give, unless some principle of public interest is involved [2]

18. Foreign Prince or State. — A foreign Sovereign or State is also bound to give discovery like any other suitor[1] and the suit will be stayed until a proper person is named to give it [2]

19. Several defendants and plaintiffs. — See Note 11

20. Next friend of minor or lunatic. — The next friend of a minor or lunatic may be called upon to file an affidavit of documents see Rule 23, *infra*

21. Advocate-General. — The Advocate-General cannot be called upon to make discovery on oath in a suit filed by him at the instance of relators under Section 92, Civil Procedure Code But an affidavit of documents may be required from the *latter* [1]

22. Official Liquidator. — As an officer of the Court, the Official Liquidator must not ordinarily be compelled to make an affidavit of documents in his possession. The proper course is to apply to him for inspection in the first instance, and on his refusal, to apply to the Court [1] The same rule would seem to apply to the Official Receivers and Assignees under the Insolvency Acts

23. Marine insurance. — In actions on policies of marine insurance, the defendant underwriters are entitled to apply for and obtain, as a matter of course, an order for the production of all material documents and papers relating to the insurance, not only from the *plaintiff* and all persons interested in the proceedings but *all other persons* who are in possession of such documents or papers [1] This does not, of course, include the underwriters themselves but in an action brought by a mortgagee of a ship on a policy of marine insurance a mortgagor who has sailed the ship as the managing owner has been held to be a person who should produce the ship's papers [2] The practice extends to all actions on policies which are substantially marine policies whether on a ship or cargo [3]

24. Affidavit of documents, if conclusive — Further affidavit. — The affidavit of documents filed by a party against whom an order for discovery has been passed is conclusive, and must be accepted by the party seeking discovery as true, both with regard to the documents that are, or have been, in the possession or power of the party making discovery,[1] and as to their relevancy,[2] unless there is something like an answer in cross examination or some other documentary evidence showing

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[illegible]

Note 18

1. [illegible]

2. (1875) 1 Ch D 171 (174) Costa Rica Republic v Erlanger
(1875) 20 Eq 140 (141), Peru Republic v. Weguelin
(1867) 2 Ch App 582 (590), United States of America v Wagner

Note 21

1. ('06) 30 Bom 474 (476)

Note 22

1. (1883) 22 Ch D 714 (720) Mutual Society In re

Note 23

1. (1898) 2 Q B 187 (191 192 193) China Traders Insurance Co v Royal Exchange Assurance Corporation
(1924) 1 K B 79 (86), Teneria Moderna Franco Espanola v New Zealand Insurance Co
2 (1877) 2 Ex D 472 (474) West of England Bank v Canton Insurance Co
3 (1898) 2 Q B 187 (191) China Traders Insurance Company v Royal Exchange Assurance Corporation

Note 24

1. [illegible] Irvin.]
2 [illegible] tkinson.

Order 11
Rr. 12 & 13
Notes 24-25

conclusively that there are other documents It is also conclusive as to the grounds stated in support of a claim for privilege from production [3] The party seeking discovery cannot for the purpose of obtaining a further affidavit or inspection of documents for which privilege is claimed, adduce evidence or otherwise show that the affidavit of documents is insufficient or untrue [4] Nor, as a rule can he interrogate with a view to show that the affidavit is untrue [5] There are two cases however, where the affidavit of the document can be controverted —

(1) Where from the *affidavit itself*, or from the documents referred to therein or from admissions made either in pleadings or otherwise it appears that the party making discovery has or has had other relevant documents in his possession or power [6]

(2) Where the basis on which the first affidavit has been made turns out to have been wrong in other words where the party making the affidavit has misconceived his case so that the Court is practically certain that if he had conceived properly and acted on a correct view of the law he would have disclosed further documents [7]

In a suit for ejectment the Court will not as a rule go behind the affidavit and where in such a suit either party claims to refuse production on the ground that the documents relate solely to his own title and do not in any way tend to prove or support the title of the opposite party, the Court cannot go behind the affidavit and enquire whether his statement is true or not [8] But in a suit for the recovery of the price of materials supplied to the defendant in which the defence was that the materials were defective the Court ordered the production of the engineer s report referred to in his pleadings where his statement showed that the report was not of the character described by the defendant [9]

25 Effect of non-disclosure of documents — Where no application is made under this rule a party is not bound to produce any document He is entitled to refrain from producing any document which he considers irrelevant and no adverse presumption can be drawn against the party from its non production[1] except where from the nature and circumstances of the case it is the imperative duty on his part to produce them [2] but where an order is made against a party for discovery and he alleges as to some of the documents that they have been destroyed or may have perished he is bound to give evidence of diligent search for them In the absence of such evidence a presumption that if produced they will be unfavourable to that party will arise [3]

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Edwards

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Video Gas Co

(1882) 11 Q B D 55 (59) Compagnie Financiere v

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(Refer

(1863) 39 L J Ch 676 (677) Noel v Noel (Case of reasonable suspicion)

('75) 1 Cal 178 (179)

('93) 17 Bom 384 (388) (Mere suspicion not sufficient)

(1910) 1 K B 904 (912 913) Kent Coal Concessions v Duguid

7 (1912) 1 K B 369 (376) British Association of Glass Bottle Manufacturers Ltd v Nettlefold (Affirmed in (1912) AC 709)

('97) 2 Cal W N 17 (17)

8 ('93) 17 Bom 581 (583 (584)

(1889) 23 Q B D 287 (290) Morris v Edwards (Affirmed in (1890) 15 App Cas 309)

9 ('95) 22 Cal 105 (110 111)

Note 25

1 ('15) AIR 1915 P C 96 (98) 37 All 557 42 Ind App 202 (PC)

2 ('17) AIR 1917 P C 6 (8) 40 Mad 402 44 Ind App 98 (PC)

3 ('17) AIR 1917 P C 1 (4) (PC)

Order 11 Rr. 12 & 13 Note 26

26. Right to seal part of documents. — A party may seal up such portions of the documents produced by him as he swears are privileged He must, however, specify what parts of the documents referred to he claims to seal up and the grounds upon which the claim is based[1] The rule is the same with regard to portions of documents which do not relate to the matters in question[2] The party making discovery has the option either to disclose such portions in his affidavit or to disclose the whole and state that such portion alone is relevant and to seal up the rest[3] When the right of the party to seal up parts of the document is contested, the Court will appoint an officer to whom the party desiring inspection is to state in confidence why he wants to inspect any portion of the documents sealed, and the officer, after looking at the documents as to whether and in what way the part noted or desired to be noted is material to the case, should make a report for the orders of the Court[4] The Court can also order the sealed parts to be unfastened for its personal inspection[5]

O. 11 R. 14

R. 14. [S. 130.] It shall be lawful for the Court, at any time during the pendency of any suit, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.

Production of documents.

[1877, S. 130, R. S. C., O. 31 R. 14.]

Synopsis

1. Scope of the Rule. — An order for *production* of documents under this rule is quite different from an order for *discovery* under Rule 12 or an order for *inspection* under Rule 18, *infra*,[1] or for an order for answering *interrogatories* under Rule 11, *ante*[2] A party must set out every document in his possession or power where an order

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Note 26

1. ('33) 20 Cal 587 (589)
2. ('97) 3 C W N 495 (497)
3. (1874) 7 Ch 686 (691) Kettlewell v Barstow. (1883) 25 Ch 247 (249) Pickering v Pickering (1888) 58 L J 601 Jones v Andrews
4. ('95) 23 Cal 117 (120) ('79) 4 Cal 635 (836)
5. ('01) 25 Cal 424 (426)

Order 11 Rule 14 — Note 1

1. ('24) AIR 1924 Mad 582 (583) (Rule 21 inapplicable) ('28) 112 Ind Cas 285 (285) (All) ('12) 14 Ind Cas 51 (52) (All).
2. ('22) AIR 1922 All 235 (237) 44 All 566 (Rule 21 inapplicable and defence not to be struck off)

O. 11 R. 14 Notes 1-2

for discovery has been passed against him, but he is not bound to produce them unless an order for production has been passed against him[3] An order for production can only be made after an order for discovery has been made under Rule 12[4] The mere production of the documents does not give an immediate and indefeasible right of inspection to the other party[5] Nor does such document become *ipso facto* a piece of evidence in the case[6]

Under this rule the Court acts of its own motion and not on the application of any party[7] It cannot, however, delegate the exercise of the power under this rule to a commissioner[8] No order should be made against a party unless he has directly or indirectly admitted the document to be in his possession or power[9] and unless such documents are in *existence*[10] The words "at any time during the pendency of the suit" show that an order for production can be made even *before the issues are framed*[11]

It was held in the undermentioned case[12] of the Bombay High Court that a Court has no discretion to refuse production unless the documents are privileged But in a later case of the same High Court[13] it has been held that the Court *has* a discretion in compelling production of documents even though they are privileged An order for production must be a *written summons* on the party for such production and not a mere *verbal* order[14] It must not be a general order that all the documents in the defendant's possession should be produced[15] except where the general description is sufficient *for the identification of the documents or books sought to be produced*[16]

Where the documents are produced in obedience to the order of the Court, the Court can deal with them in such manner as appears *to it to be just*[17]

The power to compel the production of documents has been extended to tribunals acting under various local Acts[18]

2. "Possession or power." — The words "*possession or power*," as a general rule mean *exclusive* possession[1] They also mean *legal possession*,[2] *i e*, a right and power to deal with the documents[3] There is no power to compel a party to produce documents not in his control or possession, or documents the possession of which he has parted with before the date of the application A person who claims a lien upon a deed has generally the right to refuse production thereof[4] Where a Collector acts as

3 (1881) 45 L T 340 (361) Swanston v Lishman
4 (23) AIR 1923 Pat 337 (338)
5 (24) AIR 1924 Mad 846 (846 847) 47 Mad 934
6 (21) AIR 1921 Lah 328 (330)
7 (23) AIR 1923 All 53 (53)
(69) 1869 Pun Re No 60 page 300
8 (09) 4 Ind Cas 364 (367) (Cal)
9 (20) AIR 1920 Pat 131 (135) 5 Pat L Jour 590
10 (92) 1892 Pun Re No 59 page 216
11 (09) 4 Ind Cas 364 (366) (Cal)
12 (78) 2 Bom 453 (456)
13 (05) 7 Bom L R 709 (711)
14 (1864) 1864 Suth W R (Gap No) 164 (165)
(98) 1898 Pun Re No 58 page 191
15 (98) *1898 Pun Re No 58 p 191*
16 (22) 65 Ind Cas 661 (664) (Lah)
17. (07) 30 Mad 280 (280)
(98) 1898 Pun Re No 58 page 191
18. See Bengal Land Registration Act (VII of 1876) S 53 Bengal Sanitary Drainage Act (VIII of 1895) S 23 Bengal Survey Act (V of 1875) S 50, the Calcutta Improvement Act (V of 1911), S 71 (c) the Chota Nagpur Tenancy Act (Bengal Act, VI of 1908), S 265 (3) the Broach and Kaira Incumbered Estates Act (*Bombay Act XXI of 1881*) S 35, the Bombay Local Boards Act (VI of 1923) S 123 (2), the Sind Incumbered Estates Act (Bombay Act XX of 1896) S 37 the Burma Boundaries Act (V of 1880) S 15 the Burma Forest Act (IV of 1902) S 3 (1) (b) the Orissa Tenancy Act (II of 1913) S 67 (10) the Oudh Taluqdars Relief Act (XXIV of 1870) S 14 the Sikh Gurdwaras and Shrines Act (*Punjab Act VI of 1922*) S 24 (4) the Bundelkhand Encumbered Estates Act (U P Act I of 1903) S 34 the U P Town Improvement Act (II *of* 1914) S 58 (c)

Note 2

1 (1872) 7 Ch App 312 Hadley v Macdougall
2 (1849) 1 Mac & G 627 (636) Reid v Langlois (Cited in 1 Bom 496)
3 (1883) 10 Q B D 465 (467) Kearsley v Phillips (Cited in 9 Bom L R 569)
(1839) *1839 Cr J Ph 114 (125)* Murray v Walter (Cited in 1 Bom 496)
4 (1848) 7 Hare 290 (304 305) Griffith v Ricketts (Cited in 5 B H C R (OC) 152)
(1869) 5 Bom H C R (OC) 152 (155)

the agent of the Secretary of State for India in Council in a particular suit, it cannot be said that every document in the possession of the Collector in one capacity or other is in his possession in his capacity as agent of the Secretary of State for India in Council in such suit. No order can therefore be made for the production of documents which are not in the possession of the Collector in his capacity as the agent of the Secretary of State for India in Council in the suit.[5] Documents filed in Court are not in the possession or power of a party, they are in the possession and power of the Court.[6]

3. "Relating to any matter in question in such suit." — The order under this rule is to be limited to such documents alone as relate to the *matters in dispute* and the Court must, before it makes the order, determine, for the purpose thereof, what are the matters in question in the suit.[1] Every document which will throw any light on the case comes within the meaning of these words.[2] Where, in a suit on a promissory note the defendant puts in no defence, it is impossible to say whether it is necessary to examine the plaintiff's accounts or not and hence, in such cases, there is no justification for an order directing the plaintiff to produce his accounts.[3] In a suit for accounts the Court cannot under this rule call upon the defendant to show in detail the income and expenditure of the estate in suit until the decision of the suit. In other words a Judge cannot invoke the aid of this rule for the purpose of *bringing into existence* a document which may be useful for the case.[4] Copies of income tax returns cannot be ordered to be produced under this Section as such returns are confidential documents under Section 54 of the Income tax Act.[5]

4. Effect of Sections 163 and 164 of the Evidence Act. — These Sections appear in the chapter dealing with the examination of witnesses at the trial of the suit. Under Section 163 when a party calls for a document which he has given the other party notice to produce and such document is produced and inspected by the former party, he is bound to give it as evidence if the latter party requires him to do so. Under Section 164, when a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court. In the undermentioned case[1] the High Court of Madras raised, but did not decide, the question whether Section 163 was applicable to documents produced under the discovery procedure enacted in this rule or whether it only applied to documents produced after the trial had begun.

5. Waiver of privilege. — A party may waive his privilege and produce the documents for which he can claim exemption.[1] Such waiver may be either with reference to the *whole* document or to a *portion* thereof.[2] Where a party expressly refers to documents in the pleadings as the source of his own information and knowledge of facts relevant to the suit and then sets up these facts by way of answer to the plaintiff's claim he cannot afterwards contend that the documents are confidential and intended

5. ('39) AIR 1939 Mad 52 (52, 53)
6. ('36) AIR 1936 Nag 130 (131) : I L R (1936) Nag 142

Note 3

1. ('09) 4 Ind Cas 364 (366) (Cal) (Relating to any matter in question in such suit.)
(1883) 11 Q B D 55 (62) Compagnie Financière v. Peruvian Guano Co.
('12) 14 Ind Cas 51 (52) (Cal)
2. (1882) 11 Q B D 55 (62) Compagnie Financière v. Peruvian Guano Co.
3. ('37) AIR 1937 Nag 13 (13) : I L R (1937) Nag 206 (Until it is known what the plea is and what the points at issue are it is impossible to say that the plaintiff's accounts are relevant.)
4. ('12) 14 Ind Cas 51 (52) (Cal)
5. ('38) AIR 1938 Rang 276 (277) : 1938 Rang L R 213

Note 4

1. ('23) AIR 1923 Mad 607 (608)

Note 5

1. (1898) 1 Q B 759 (761) Calcraft v. Guest
2. (1884) 27 Ch D 1 ([illegible]) [illegible]

O. 11 R. 14 Notes 5-8

merely for his legal advisers or for the purpose of evidence in the case,[3] but the fact that a portion of a privileged document is read to the plaintiff's solicitor by the defendant's solicitor does not amount to a waiver of the privilege as regards the parts not so read [4]

6. Partner. — One partner of a firm represents the other partners for the purpose of production of documents[1] and a notice to one is notice to all the defendants when they are sued as a firm [2]

7. Copies of documents produced, if can be taken. — *See Rule 15 below*

8. Revision. —Orders granting[1] or refusing[2] production are discretionary orders which will not be interfered with in revision except where the lower Court has not understood the provisions of the rule[3] or has acted on an erroneous assumption[4] or makes the order without jurisdiction[5] or under such circumstances as are likely to cause irreparable injury to one of the litigants [6]

O. 11 R. 15

Inspection of documents referred to in pleadings or affidavits.

R. 15. [S. 131.] Every party to a suit shall be entitled at any time to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his pleader, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such suit unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the suit, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice, in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit.

[1877, S. 131; R. S. C., O. 31 R. 15. See R. 16.]

Synopsis

1. Scope of the Rule.	4. Who can inspect under this rule.
2. "At any time"	5. Copies of documents produced, if can be taken.
3. Documents referred to in the pleadings or affidavits	

3. ('95) 22 Cal 105 (111)
4. ('80) 4 Bom 681 (684)

Note 6

1. ('76) 1 Bom 496 (499)
('22) 65 Ind Cas 661 (661) (Lah)
2. ('22) 65 Ind Cas 661 (664) (Lah)

Note 8

1. ('86) 9 Mad 256 (257)
('11) 12 Ind Cas 506 (507) (Lah).
2. ('11) 9 Ind Cas 672 (672) (Mad)
('07) 30 Mad 230 (230)
3. ('24) AIR 1924 Mad 846 (846) 47 Mad 931
4. ('39) AIR 1939 Mad 53 (53)
5. ('38) AIR 1938 Rang 276 (277) 1938 Rang L R 243 (Order for obtaining and producing copies of income-tax returns—Order is without jurisdiction)
6. ('09) 4 Ind Cas 364 (367) (Cal)

Other Topics (miscellaneous)
Order not revisable See Notes 1 and 2
Right to seal a portion See Note 3

1. Scope of the Rule. — Rules 15 to 18 deal with inspection of documents Documents may, for the purposes of inspection, be divided into two classes —

(1) Documents *referred to in the pleadings or affidavits* of the parties
(2) Other documents in the possession or power of the party but *not so referred to*

As regards the *first* class of documents a party may, without the intervention of the Court, give notice to the party in whose pleadings they are referred to, to produce such documents for his inspection (Rule 15) The party to whom such notice is given should, within ten days from the receipt of such notice, give notice to the party claiming such inspection stating the time and place at which the documents may be inspected and stating his objections, if any, to the production of any of the documents (Rule 17) If he fails to do so in the manner required by Rule 17, the other party may apply to the Court for an *order* for such inspection [Rule 18, sub rule (1)], and the Court should grant such inspection unless the documents are privileged in law or relate exclusively to the case of the party producing them and contain nothing supporting or tending to support the opponent s case [1]

As regards the *second* class of documents the party desiring the inspection can only proceed by way of *an application to the Court* along with an *affidavit showing the relevancy* of the documents [2]

A Court has no jurisdiction to order inspection of documents except as provided in Rules 15 to 18 [3] The privilege of inspection by a party of his adversary's documents is not a matter of routine but is to be permitted or refused only on *judicial considerations* and so as to result in as little harm as possible to the parties who are entitled to have the protection of the Court in carrying on their lawful pursuits [4] The object of the rule is to give the opposite party the same advantage as if the documents had been fully set out in the pleadings [5]

By referring to a document in his pleadings a party does not lose the privilege that he might have claimed in respect of the document The only result of such reference is that, if the party referring to it fails to produce it for inspection to the other side on notice, he cannot use it in evidence at the trial Even in such a case, the Court may, if sufficient cause is shown by the defaulting party, allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit [6] Where documents are objected to on the ground of immateriality the Court will, if necessary, order them to be produced for its own inspection in order to judge of their materiality [7] A party who fails to comply with a notice under this rule is not absolved from the penalty prescribed thereby merely because the party giving the notice has not proceeded to apply to the Court for an *order* for inspection under Rule 18 *infra* [8]

Order 11 Rule 15—Note 1

1 ('07) 30 Mad 230 (230) (Order refusing inspection [illegible] revisable)
See Note 1 to Rule 18
2 ('38) AIR 1938 Nag 239 (240)
[See ('05) [illegible] 152 (154)]
3 ('0) 4 [illegible] L R 342 (3 0)
4 ('21) AIR [illegible] Mad 846 (847) 47 Mad 931
5 ('81) 10 Cal 808 (813 814)
(1862) 1 Bom H C R 114 (117) (Case of next of kin entitled to succeed but for the will)
1 Ind Jur (NS) 3'3
('35) AIR 1935 Mad 234 (236) (Object of the rule is that a party is not to have accounts sprung on him at the time of trial the contents of which he had no opportunity to acquaint himself with beforehand)
6 ('93) 17 Bom 591 (591)
7. ('01) 28 Cal 474 (476)
8 ('35) AIR 1935 Mad 234 (237)

O. 11 R. 17

R. 17. [S. 132.] The party to whom such notice is given shall, within ten days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his pleader, or in the case of bankers' books or other books of account or books in constant use for the purposes of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground. Such notice shall be in Form No. 8 in Appendix C, with such variations as circumstances may require.

Time for inspection when notice given

[R S C, O 31 R 17.]

Synopsis

1. Scope of the Rule
2. "Usual place of custody."
3. Bankers books. See Order 7 Rule 17 and Rule 18 of this Order

1. Scope of the Rule. — This rule only comes into operation after a notice under Rule 15 has been given. It applies to all documents mentioned in Rule 15.[1] In *Dhapi v. Ram Pershad* it has been held by the High Court of Calcutta that the correct rule of procedure is that if a party does not desire to produce documents he should refrain from delivering the notice under the rule but wait to see if the plaintiff applies under Rule 18. It has also been held that, when the notice was served at a time when the suit was stayed, the ten days' time begins to run only from the date the suit is revived.

2. "Usual place of custody." — This rule clearly specifies the place of inspection with regard to bankers' books and business books. The words in the old Code "some other convenient place" gave room for discussion and controversy which has now been removed. Where, in a suit instituted in Bombay for breach of a contract to gin cotton in the defendant's mill at Broach, the plaintiff applied for inspection of the defendant's account books in Bombay but the defendant offered to give inspection in Broach, it was held that the latter place was the place where the books were kept and was the proper place for inspection.[1] The Court is not a proper place to offer the inspection of account books.[2]

3. Bankers' books. — See Order 7 Rule 17 and Rule 18 of this Order.

O. 11 R. 18

R. 18. [Ss. 133, 134.] *(1)* Where the party served with notice under rule 15 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his pleader, the

Order for inspection.

Order 11 Rule 17 — Note 1
1. (1897) 1 QB 667 (669, 670), Re Funnerand Lord
2. (87) 14 Cal 768 (777)

Note 2
1. (81) 5 Bom 467 (469)
2. (35) AIR 1935 Mad 231 (235)

Court may, on the application of the party desiring it, make an order for inspection in such place and in such manner as it may think fit: Provided that the order shall not be made when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

(2) Any application to inspect documents, except such as are referred to in the pleadings, particulars or affidavits of the party against whom the application is made or disclosed in his affidavit of documents, shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party. The Court shall not make such order for inspection of such documents when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

[1877, Ss. 133, 134; R. S. C., O. 31 R 18.]

Synopsis

1 **Scope of the Rule.**
2 **Discretion of Court**
3. **Convenient place for inspection.**
4. **Appeal.**
5 **Bankers' Books Evidence Act.**

Other Topics (miscellaneous)

Denial of possession or power conclusive See Note 1
Notice prior to order under sub rule (2) See Note 1

1. Scope of the Rule. — Sub rule 1 of this rule deals with inspection of documents referred to in the pleadings or affidavits of the parties Sub rule 2 deals with inspection of documents *other* than those mentioned in sub-rule 1 The difference between the two cases is that, in the case of documents not mentioned in the pleadings or the affidavits, *an affidavit has to be filed* by the applicant satisfying the Judge that the document is relevant to the case[1] In the case of documents so mentioned, the relevancy is *admitted* while in the other case, the relevancy has to be proved[2] The filing of the affidavit under sub rule 2 is, however, not always necessary, when the Judge is satisfied as to the relevancy of the document, at any rate, the want of an affidavit cannot invalidate an order passed under this rule[3] On the other hand, the filing of an affidavit does not entitle a party *immediately* to an order for inspection[4] The Court should give the opposite party an opportunity of replying by an affidavit the application for inspection, and if the opposite party swears an affidavit that the documents are not in his possession or power, the Court will regard this as final and conclusive[5] This is in consonance with the general rule that the Courts will not go

Order 11 Rule 18 — Note 1

1 ('31) AIR 1931 All 221 (222) 53 All 442
('[illegible]) 21 Cal 117 (125)
[*See also* ('0[illegible]) 1 [illegible]05 All W N 62 (62)]
2. ('31) AIR 1931 All 221 (222) 53 All 442
3. ('31) AIR 1[illegible]31 All 221 (222) 53 All (442)
4. [illegible]

behind the oath of the party against whom inspection is sought.[6]

An order under sub rule 1 cannot be made unless notice has been given under the provisions of R 15[7] and no party is entitled to an inspection of documents not referred to in the pleadings or affidavits without an *order* under sub-rule 2.[8] Nor is he entitled to a roving commission into papers belonging to the other side, the inspection must be restricted to such *specific* documents as the applicant names and which are relevant to his case.[9] A party who fails to comply with a notice under Rule 15 above incurs the penalty prescribed thereby. The fact that the party giving the notice has not proceeded to apply to the Court under sub-rule 1 of this rule for an *order* for inspection does not negative the liability for the penalty laid down by Rule 15.[10]

Where parties require the inspection or production of telegraphic messages, it is for them and not the Court to obtain the necessary sanction from Government.[11]

2. Discretion of Court. — Under sub rule 1, the Court has a discretion limited to the terms of the proviso in making an order for inspection and the *onus* rests on the party resisting an order to show that it should not be made in the special circumstances of the case but it would not be a proper exercise of discretion to refuse inspection on the general ground that it was sought before the written statement was filed nor can the mere number of the documents afford any guide to the exercise of discretion.[1]

3. Convenient place for inspection. — In deciding a question as to the place where the inspection of documents is to be given, the Court should be guided by the balance of convenience.[1] See also Order 11 Rule 17 and Notes thereto.

4. Appeal. — No appeal lies under the Code from an order for inspection under this rule nor does it lie under Clause 15 of the Letters Patent, as an order directing inspection to be given is not a "judgment".[1]

5. Bankers' Books Evidence Act. — The main object of this Act is to enable evidence to be procured and given[1] and to relieve bankers from attendance in Court with their books.[2] The party whose account is sought to be inspected may oppose the application on any ground on which inspection of ordinary documents could be resisted.[3]

('24) AIR 1924 All 510, 46 All 417
('11) 12 Ind Cas 12 (13), 38 Cal 429 (But he can not merely rely on his previous affidavit of documents in answer to an application under this sub rule.)
[*See also* ('98) 2 Cal W N 17 (18) (Falsity of denial of possession can be elicited at trial and then inspection ordered.)]

6. (1890) 24 Q B D 537 (541), Wiedeman v Walpole

7. ('26) AIR 1926 Sind 272 (272), 20 Sind L R 309
('87) 14 Cal 768 (776, 777)
('84) 10 Cal 56 (58)

8. ('12) 14 Ind Cas 51 (52) (All)

9. ('28) AIR 1928 Mad 1093 (1094)
('17) 14 Ind Cas 371 (372) (Lah) (Exposure of trade secrets.)

10. ('35) AIR 1935 Mad 234 (235) (There is absolutely nothing in Rule 18 to suggest that it is a pre-requisite to Rule 15.)

11. ('70) 2 N W P H C R 210 (214)

Note 2

1. ('31) AIR 1931 Mad 825 (828), 55 Mad 421
[*See also* ('32) AIR 1932 Mad 284 (285, 286, 287), 55 Mad 704 (Inability to particularise instances of fraud or error under O 6 R 4 is no ground for refusing inspection of accounts of opposite side—Nor lateness of application which can be met by order for costs if there is no prejudice.)]

Note 3

1. ('35) 39 C W N 667 (668), 164 Ind Cas 791

Note 4

1. ('72) 9 Bom H C R 398 (408, 412)
('09) 2 Ind Cas 167 (167) (Bom)

Note 5

1. (1892) 62 L J Q B 77 (79), Emmott v. Star Newspaper Co
(1913) 29 T L R 635, R v Bona

2. (1892) 1892 P 137 (139), Parwell v Wood (Cited in 5 Bom L R 865.)
(1924) 2 K B 759 (763), Waterhouse v Barker

3. (1924) 2 K B 759 (764), Waterhouse v. Barker.

R. 19. [New] *(1)* Where inspection of any business books is applied for, the Court may, if it thinks fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations or alterations Provided that, notwithstanding that such copy has been supplied, the Court may order inspection of the book from which the copy was made O 11 R. 19

Verified copies

(2) Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court to inspect the document for the purpose of deciding as to the validity of the claim of privilege

(3) The Court may, on the application of any party to a suit at any time, and whether an affidavit of documents shall or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether any one or more specific documents, to be specified in the application, is or are, or has or have at any time been, in his possession or power; and, if not then in his possession, when he parted with the same and what has become thereof Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had, in his possession or power the document or documents specified in the application, and that they relate to the matters in question in the suit, or to some of them

[R S C, O 31 R 19A.]

Synopsis

1 Scope of the Rule
2 Inspection by the Judge — Sub rule (2)
3 Specific documents — Sub rule (3)

1 Scope of the Rule — Sub rule (1) applies particularly to bankers books [1]

2 Inspection by the Judge — Sub-rule (2) — This rule gives the Court power to inspect any document for which privilege is claimed so as to decide whether the claim is justified [1] the object being that such claims ought to be decided at once in

Order 11 Rule 19—Note 1

1 Vide Halsbury's Laws of England Vol 11 page 1

Note 2

1 (1913) 3 K B [illegible] Omnibus Co [illegible]

O. 11 R. 19 Notes 2–3

proper cases[2] The power exists even in respect of state documents and official communications and notwithstanding a certificate from a Minister of State claiming protection, provided of course that such power be exercised so as not to destroy the protection of the privilege in any case in which it may be found to exist[3] The word "document" includes also a sealed-up portion of a document[4]

3. Specific documents — Sub-rule (3).—The rule enlarges the power to order discovery[1] In order to justify an application under this sub rule, the affidavit must name and specify the documents in such a manner as to identify them, an affidavit in a general form containing an argument that the document must be in the possession or power of the opposite party is not sufficient[2] A *prima facie* case of relevancy and possession of the specific document is, however, sufficient to entitle the applicant to the order[3]

O. 11 R. 20

R. 20.

Premature discovery.

[S. 135.] Where the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the suit, or that for any other reason it is desirable that any issue or question in dispute in the suit should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

[1877, S. 135; R. S. C., O. 31 R. 20.]

1. Scope of the Rule. — The general principle of discovery is that discovery should not be granted beyond the exigency of the question in issue It is also desirable to obviate the necessity of a troublesome inspection and discovery which would very much increase the costs of the suit This rule empowers the Court to determine an issue for the exclusive purpose of deciding the right to discovery of documents which is to be used at the trial[1] The Court has also a discretion to postpone discovery or inspection until some issue in the suit is determined[2] The rule, however, does not apply where discovery is wanted for the determination of the issue in the suit[3] An order under this rule is not a 'judgment' [illegible][4]

2 [illegible]
3 [illegible]
4 [illegible]

Note 3

1. (1910) 1 K B 904 (915) Kent Coal Concessions v Duguid
2. (1901) 2 K B 241 (245) White v Spaffora & Co
(1901) 18 T L R 115, Graves v Heinemann and Armstrong
(1911) 1911 W N 84 (34) Huntly v Backworth Collieries
3. (1907) 95 L T 604, Ormerod v St George's Iron Works (A case of a letter produced referring to another letter)

Order 11 Rule 20—Note 1

1. (82) 6 Bom 572 (578)
(1881) 18 Ch D 477 (483), Parkar v Wells.

2 [illegible]
[illegible] Co v Clark
(1884) 26 Ch D 717 (721) Whyte v Ahren
3 (1886) 31 Ch D 374 (377) Leitch v Abbott
4 [illegible]

R. 21. [S. 136.] Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made accordingly. **O. 11 R. 21**

Non-compliance with order for discovery.

[1877, S. 136; R. S. C., O. 31 R. 21. See Rr. 11, 12 and 18.]

Synopsis

1. Scope of the Rule.—There are only three grounds upon which a trial Court is justified, under this rule, in striking off the defence of the defendant or dismissing the suit of a plaintiff, namely—

(1) the refusal to *answer interrogatories under R 11*,

(2) the refusal to make discovery of documents under R 12, and

(3) refusal to permit inspection of documents under R 18.

In the absence, therefore, of an order under Rules 11, 12 or 18 and the disobedience thereof by the party against whom the order is made, the Court cannot act under this rule[1] An order for *production* of documents under Rule 14 is not one of the orders mentioned in this rule, the word "production" which occurred after the word "discovery" in Section 136 of the old Code having been omitted in the present rule There is, however, a difference of opinion as to whether a disobedience of an order for *production* under Rule 14 would empower the Court to take action under this rule The High Court of Allahabad,[2] Madras[3] and Lahore[4] have held that the Court has no such

Order 11 Rule 21 — Note 1

'65

Failure

(Do)

under Rule 2 is not an order to answer)

('15) AIR 1915 All 190 (190) (Suit can be dismissed for failure to comply with an order for discovery or inspection of documents only when the documents are referred to in the pleading or affidavits)

2. ('22) AIR 1922 All 235 (237) 44 All 565
('28) 112 Ind Cas 285 (285) (All)
('29) AIR 1929 All 83 (83)

3. ('24) AIR 1924 Mad 582 (583)
('33) AIR 1933 Mad 870 (870)

4. ('33) AIR 1933 Lah 219 (219)

O. 11 R. 21
Note 1

power, while an opinion in the nature of *obiter dictum* has been expressed by the High Court of Lahore in the undermentioned case[5] that the Court has such power The Court cannot strike out the defendant's defence for his failure to file a *written statement* as directed by the Court[6] or to *appear for examination as a witness* for the opposite side[7] Nor can it be struck off for failure of the legal representative of a deceased defendant to comply with an order against the said defendant[9]

The Court cannot, under this rule, act *of its own motion*, but can only do so on the application of the parties[9] And even where the parties apply for an order under this rule the Court should not impose the penalty except in extreme cases and as a last resort[10] It should be ordered only where the Court is satisfied that the party is avoiding a fair discovery[11] or is guilty of wilful default[12] The word "wilfully" means that the act is done deliberately and intentionally and not by accident or inadvertence[13] Thus, where the time allowed by law to answer interrogatories (ten days) has not expired and the defendant asks for further time, an order striking off the defence is improper[14] Similarly the failure to produce one out of many books ordered to be produced,[15] or the non production of account books by a *minor* defendant,[16] or the failure to produce documents by a *pardanashin* lady,[17] or where the plaintiff is not in a position to make an affidavit of documents as ordered, the Court should not inflict the penalty under this rule[18] An order for giving inspection "forthwith" must be complied with within a reasonable time after the order[19]

Order 11 Rule 14 contemplates an order for the production of documents which are in the possession or power of the party ordered to produce them Where the documents have been filed in Court, they cannot be said to be in the possession or power of the party Hence in respect of such documents, the Court has no power to take action under Rule 14 and this rule[20]

On an application made for taking action under this rule, the Court should give an opportunity to the other side to put in his reply, an order dismissing the *suit or* striking off the defence without giving such opportunity is improper[21]

The terms of the rule contemplate *two* orders, *first* an order under Rr 11, 12 or 18, and *secondly*, upon the failure to comply therewith a *further* order dismissing the suit or the striking off the defence[22] But a conditional order for dismissal of the suit or for striking off the defence on failure to comply with the orders for interrogatories discovery or inspection cannot be said to be without jurisdiction[23] Where

5 ('22) 65 Ind Cas 661 (664) (Lah)
6 ('92) 1892 Pun Re No 59, page 216
7 ('11) 12 Ind Cas 719 (719) (Mad)
8 ('25) AIR 1925 Bom 386 (387)
9 ('89) 1889 Pun Re No 60 page 300
('92) 1892 Pun Re No 59 page 216
('10) 8 Ind Cas 245 (245) (Lah)
10 ('83) 9 Cal 923 (925)
('98) 1898 Pun Re No 50 page 164
('22) 65 Ind Cas 661 (664) (Lah)
('20) AIR 1920 Pat 131 (135) 5 Pat L Jour 550
('80) 5 Cal 707 (710)

[illegible]

19 ('38) AIR 1938 Cal 353 (356) I L R (1939) 2 Cal 14
20 ('36) AIR 1936 Nag 130 (131) I L R (1936) Nag 142
21 ('24) AIR 1924 All 510 (511) 46 All 417
('25) AIR 1925 Bom 386 (387)
('24) AIR 1924 Cal 806 (808)
22 ('25) AIR 1925 Cal 166 (168)
23 ('83) 9 Cal 923 (925)

the defendant fails to comply with an order for discovery, an order allowing him to defend the suit but shutting out all his evidence is not a proper order, the case should be dealt with under this rule and the defence struck out[24] The infliction of the penalty imposed by this rule after the *whole trial is closed* is improper,[25] nor can a Court of appeal punish a party under this rule where the Court of first instance has not taken any action thereunder[26] Where a suit has been referred to arbitration and the arbitrators call upon a party to produce certain documents, the proper remedy of the party seeking discovery is to apply to the Court to have the proceedings stayed or the suit dismissed or the defence struck out the arbitrators are not bound, of their own initiative to refuse to proceed until the order is complied with[27]

The last paragraph of Section 136 of the old Code which made the defaulting party liable to a prosecution under Section 188 of the Penal Code[28] has now been omitted A disobedience of an order for production or inspection can now be dealt with only in the manner prescribed by this rule and is not punishable under the Penal Code[29]

A Registrar of the High Court has no power under the High Court Rules to dismiss a suit under this rule[30]

2. Committal for contempt. — The Chartered High Courts have, under powers conferred on them by the Letters Patent, power to commit a party to a suit filed in such High Court who has failed to obey an order for discovery or inspection, for contempt of Court[1] According to the High Court of Bombay an appeal lies from an order of committal for contempt[2] According to the High Court of Allahabad no such appeal lies[3]

3. Appeal. — Under the old Code, an order under this rule was appealable as a *decree*[1] Under O 43 R 1 (f) of the present Code such an order is appealable only as an *order*[2] An order under this rule includes an order dismissing a suit or striking off a defence as well as an order *refusing* to dismiss the suit or to strike off the defence in either case it is open to appeal[3] But where the Court acts without *jurisdiction* in passing an order under this rule as where it dismisses a suit for failure to comply with an order to *produce documents* under Rule 14, the order cannot be said to be one passed under this rule, the dismissal in such a case will be a decree and will be appealable as such[4] Again, where an order, though purporting to be passed under this rule is really and in substance one under O 6 R 5, no appeal lies therefrom[5]

(1875) 1875 [illegible]

Note 2

1 (2[illegible]) AIR 1[illegible] Cal 117 (118) 55 Cal 1110
(83) 7 [illegible] 1 (3 4)
(83) 7 [illegible] 5 (13)

2 (83) 7 Bom 5 (12, 15)
3 (05) 27 All 380 (381)

Note 3

1 (98) 1898 Pun Re No 43 page 151
(95) 19 Bom 307 (308)
(85) 7 All 159 (160)
2 (25) AIR 1925 Rang 218 (218) 3 Rang 63
(32) AIR 1932 Mad 316 (316 317) (Appeal against the order under Order 43 will lie no withstanding that it has resulted in the dismissal of the suit)
3 (30) AIR 1930 Cal 42[illegible] (427)
4 [illegible]
5 [illegible]
[illegible] O 6 R 5)

O. 11 R. 21
Notes 3-5

Where a party appeals from an order under this rule in ignorance of the fact that a decree has been passed in the suit itself, the proper procedure is to treat the appeal as one from the decree itself [6]

4. Review. — Where a suit is dismissed for want of prosecution under this rule, the remedy of the aggrieved party is by appeal or by review under the provisions of Order 47 [1] Where, however, the provisions of Order 47 do not apply to the particular order in question, the Court cannot review it under its inherent powers under Section 151 of the Code [2]

5. Order, if can be set aside under O. 9 R. 9 or R. 13. — An order under this rule cannot be set aside under the provisions of Order 9,[1] General

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O. 11 R. 22

Using answers to interrogatories at trial

R. 22. [New.] Any party may, at the trial of a suit, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer: Provided always that in such case the Court may look at the whole of the answers, and if it shall be of opinion that any others of them are so connected with those put in that the last mentioned-answers ought not to be used without them, it may direct them to be put in.

[R. S. C., O. 31 R. 24.]

1. Using interrogatories at the trial. — The answers to interrogatories are only affidavits and are not by themselves evidence [1] The party wishing to use them must put them in evidence in the ordinary way [2] They are, when so put, *evidence* against the party answering them, though great caution should be exercised in using them as such [3]

O. 11 R. 23

Order to apply to minors

R. 23. [New.] This Order shall apply to minor plaintiffs and defendants, and to the next friends and guardians for the suit of persons under disability.

[R. S. C., O. 31 R. 29.]

1. Application of Order to minors and lunatics. — This rule is new Under the old Code, there was a conflict of decisions as to whether the Sections *corresponding*

6. ('12) 14 Ind Cas 637 (638 639) (Low Bur)

Note 4

1. ('25) AIR 1925 Rang 218 (218) 3 Rang 63

art

2

1. ('25) AIR 1925 Rang 218 (218) 3 Rang 63

(98) 2 Cal W N 676 (679)

[*See also* (32) AIR 1932 Bom 271 (272) (Court can act under S 151 of the Code)

Order 11 Rule 22 — Note 1

1. (79) 4 Cal 836 (837)
2. (80) 10 Bom 167 (171)
3. ('18) AIR 1918 Mad 1103 (1107) (1911) 2 Ch 71 (77), Nash v Layton

to this Order applied to minors and lunatics[1] This rule has now made it clear that the Order does apply to them also Hence, where the guardian of a minor defendant fails to comply with an order for discovery, the Court is competent to pass an order under Rule 21 *ante* against the minor defendant by virtue of this rule.[2] **O. 11 R. 23 Note 1**

ORDER XII.

ADMISSIONS

R. 1. [New.] Any party to a suit may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party. **O. 12 R. 1**

Notice of admission of case.

[R. S. C., O. 32 R. 1.]

Synopsis

1. Scope of the Rule.
2. Kinds of admissions.
3. Admission by minor.
4. Withdrawal of admissions. See Rule 2
5. Costs. See Rules 2, 4 and 9.

1. Scope of the Rule. — Under Section 58 of the Evidence Act, facts admitted need not be proved The adoption of the procedure provided in this Order would result in saving the costs of such proof and in cheapening and shortening litigation[1] Further, admissions are the strongest evidence possible and even a wrong construction of a document will be assumed to be correct in view of the admission[2]

Admissions must be taken *as a whole* or not at all[3] If made subject to a condition, they must be accepted with that condition[4] But where one portion of a claim is admitted and the other portion denied, the plaintiff is entitled to ask for a judgment on the admitted portion and proceed to trial on the other, there is no rule that he should accept *both* the admission and the denial or must ignore the admission and proceed to trial[5] The value of an admission is, however, limited by its relevancy under the Evidence Act, and a judgment based upon irrelevant material will not be upheld[6] Where the lower Court in its judgment makes a statement that certain admissions were made, the Appellate Court will not lightly doubt the statement[7] The question whether there is a *cause of action* does not depend upon the admission of the defendant, but when the plaint discloses a cause of action, the plaintiff is entitled

('86) 10 Bom 167 (171 172) (No)
('95) 22 Cal 891 (896, 897) (No)
2. ('35) 39 Cal W N 1029 (1030).

Order 12 Rule 1 — Note 1

1 See Statement of Objects and Reasons.
2 ('14) AIR 1914 P C 220 (223) (P C)
3 ('23) 71 Ind Cas 270 (271) (Mad)
('32) AIR 1932 Cal 39 (40)
('24) AIR 1924 Nag 129 (131) : 20 Nag L R 63
('37) AIR 1937 Pat 415 (421)
('35) AIR 1935 Pat 24 (25)

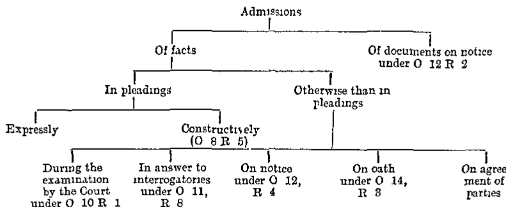
('35) 61 Cal L Jour 80 (82)
('35) AIR 1935 All 916 (918) : 58 All 961 (F B)

son)
('26) AIR 1926 Mad 252 (253)
7. ('21) AIR 1921 Cal 584 (591)
8. ('21) AIR 1921 Pat 280 (280).

O. 12 R. 1 Notes 1–5

Section 97 of the Estates Partition Act (Bengal Act V of 1897) renders provisions of the Code as to compelling production of documents applicable to enquiries under the said Act

2. Kinds of admissions. — The following tabular statement shows the various kinds of admissions *after* suit that may be made As to admissions *before* suit, see Sections 17 to 31 of the Evidence Act



3. Admission by minor. — A *minor defendant cannot make a valid admission* where a guardian *ad litem* has been appointed for him in the suit [1] In the undermentioned case[2] in which a minor and his father were made co defendants to a suit and an admission was made by the father on a matter on which the father was best qualified to speak and the minor who was represented by a pleader did not deny the admission, it was held that the minor was bound by the admission See also Order 8, Rule 5, Note 3

4. Withdrawal of admissions. — See Rule 2, *infra*

5. Costs. — See Rules 2, 4 and 9

O. 12 R. 2

Notice to admit documents.

R. 2. [S. 128.] Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs; and no costs of proving any document shall be allowed unless such notice is given, except where the omission to give the notice is, in the opinion of the Court, a saving of expense.

[R. S. C., O. 32 R. 2.]

Synopsis

1. Object of the Rule
2. Form of notice. See Rule 3
3. Notice to admit facts See Rule 4
4. Admissions between co-defendants.
5. Withdrawal of admission.

Note 3

1. ('16) 32 Ind Cas 368 (368) (U P B R) 2. ('36) AIR 1936 Pat 428 (429).

1. Object of the Rule. — The object of the rule is to save the expense of producing, at the trial, evidence as to the documents which are admitted O. 12 R. 2 Notes 1-5

2. Form of notice. — See Rule 3 below.

3. Notice to admit facts. — See Rule 4 below.

4. Admissions between co-defendants. — Admissions between co-defendants to which the plaintiff is not a party cannot be used as evidence against the plaintiff, or be included in an order for taxation of the general costs of the action [1]

5. Withdrawal of admission. — Leave may be given to withdraw or amend any admissions made by a party, on such terms as may appear just to the Court Thus, an admission made under a mistake may be allowed to be withdrawn and the plaint amended [1] But, except under special circumstances, an admission forming the foundation of a judgment should not be allowed to be withdrawn in appeal [2] An admission on a mixed question of law and fact cannot be allowed to be withdrawn in second appeal [3]

R. 3. [New.] A notice to admit documents shall be in Form No. 9 in Appendix C, with such variations as circumstances may require. O. 12 R. 3

Form of notice.

[R. S. C., O. 32 R. 3.]

R. 4. [New.] Any party may, by notice in writing, at any time not later than nine days before the day fixed for the hearing, call on any other party to admit, for the purposes of the suit only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the Court, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs: Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular suit, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice: Provided also that the Court may at any time allow any party to amend or withdraw any admission so made on such terms as may be just. O. 12 R. 4

Notice to admit facts.

[R. S. C., O. 32 R. 4]

Order 12 Rule 2 — Note 4

1. ('84) 25 Ch D 617 (619), Dodds v Take

Note 5

1. ('92) 3 Ch 226 (236, 237), Hollis v. Burton

2. ('25) AIR 1925 P C 150 (154) (P C)

3. ('35) AIR 1935 Oudh 163 (164)

O 12 R 4
Notes 1-2

Synopsis

1 Scope of the Rule | 2 "Any other party"

1. Scope of the Rule — This rule provides for notice to admit *facts* as the two previous rules provide for notice to admit *documents* The penalty for refusing to admit facts pursuant to a notice given under this rule is that the party receiving the notice may be ordered to pay the costs occasioned by proving the facts which ought to have been admitted A notice to admit facts may be given even before the defence is filed [1]

2 "Any other party" — It is obvious that only opposite parties can be meant [1] For the meaning of opposite party see Note 11 to Order 11 Rule 1

O. 12 R 5

Form of admissions

R. 5. [New] A notice to admit facts shall be in Form No 10 in Appendix C, and admissions of facts shall be in Form No 11 in Appendix C, with such variations as circumstances may require

[R S C, O 32 R 5]

O 12 R 6

Judgment on admissions

R. 6. [New] Any party may, at any stage of a suit, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties and the Court may upon such application make such order, or give such judgment, as the Court may think just

[R S C, O 32 R 6]

Local Amendments

MADRAS

1 *Re number* the existing Rule 6 as sub rule 6 (1) and *insert* the following as sub rules (2) and (3)

(2) The Court may also of its own motion make such order or give such judgment as it may consider just having due regard to the admissions made by the parties

(3) Whenever an order or judgment is pronounced under the provisions of this rule a decree may be drawn up in accordance with such order or judgment and bearing the same date as the day on which the order or judgment was pronounced

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Order 12 Rule 4 — Note 1

1 (1883) 1883 W N 198 (198) Crawford v Chorley

Note 2

1 (1885) 16 Q B D 195 (128) Brown v Watkins (Per Mathew J)

PATNA

Substitute the following for Rule 6 in Order 12

6 Where admissions of fact have been made either on the pleadings or otherwise the Court may at any stage of a suit on the application of any party or of its own motion without waiting for the determination of any other question between the parties make such order or give such judgment as it may think just

RANGOON

Substitute judgment decree or order *for* the words judgment or order and and the Court may either upon such application or upon its own motion give such judgment or make such decree or order as the Court may think just *for* and the Court may just

Add the following as sub rule (2)

(2) A decree or order passed under this rule may be executed at any time notwithstanding that other questions between the parties still remain to be decided in the case

Synopsis

1 Scope of the Rule
2 At any stage "
3 Admissions on pleadings
4 Court may make such order as it may think just
5 Orders that may be passed under this Rule
6 Admissions made otherwise than on pleadings
7 English practice
8 Co plaintiffs
9 Judgment if should be followed by a decree
10 Appeal

1 Scope of the Rule — A party can under this rule move for a judgment upon the admissions made by the opposite party and thus get rid of the portion of the action in which there is no dispute [1] The object is to enable a party to obtain speedy judgment at least to the extent of the relief which according to the admissions of the opposite party he is entitled to [2] But he is not bound to avail himself of this rule and is not precluded by not so applying from relying on such admissions at the trial [3] Nor on the other hand is the Court bound in every case to pass a judgment on the application of a party under this rule the matter is entirely in the discretion of the Court See Note 6 below

In moving for a judgment under this rule the party applying need not relinquish the rest of his claim [4] But the admission on which a judgment can be claimed must be a clear and unequivocal one [5] Further an admission of a defendant will not necessarily entitle the plaintiff to a judgment where the right asserted by the plaintiff has in fact no existence in law [6] or where he has no cause of action at all [7]

The rule refers only to admissions on points of *fact* and not on points of *law* [8]

Order 12 Rule 6 — Note 1

1 (1876) 3 Ch D 637 (640) Throp v Holdsworth
('25) AIR 1925 Oudh 486 (487)

2 ('26) AIR 1926 Sind 119 (120) 20 Sind L R 16
[*See also* (1876) 2 Ch D 686 (687) Gilbert v Smith]

3 (1878) 7 Ch D 403(407 408) Tildesly v Harper

4 ('26) AIR 1926 Sind 119 (120) 20 Sind L R 216

5 ('20) AIR 1920 Cal 163 (165)
('33) AIR 1933 Lah 403 (403)
('27) AIR 1927 Sind 25 (26 27)

6 (1878) 7 Ch D 735(743) Chilton v Corporation of London (Cited in 14 Bom 213)

7 [*See* ('21) AIR 1921 Pat 280 (280)]

8 ('29) AIR 1929 Lah 569 (572)
('72) 18 Suth W R 359 (367) (P C)
(1900) 27 Cal 156 (163) 26 Ind App 216 (P C)

O. 12 R. 6
Notes 2-6

2. "At any stage." — A plaintiff may move for judgment upon admissions on the defence, *although* he has joined issue on *the defence*[1] Similarly, a defendant may apply to have the suit dismissed *after* he has delivered a *rejoinder*[2]

3. Admissions on pleadings. — As has been seen in Note 2 to Rule 1 *ante*, an admission of facts in a pleading may be made either *expressly* or *constructively* Under O 8 R 5 every allegation of fact in the plaint if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted This is a *constructive* admission in a pleading A defendant denying a plaint allegation *evasively* will be deemed *not* to have denied it at all and will therefore be deemed to have admitted such allegation (see O 8 R 4) Thus, in *Harris v Gamble*[1] the defendant in his defence merely put the plaintiffs to proof of their several allegations in their statement of claim Defendant failed to appear at the trial and judgment was given for the plaintiffs without calling evidence, on the ground that such a defence was an admission of facts alleged in the statement of claim

4 Court may make such order as it may think just. — The provisions of this rule are *discretionary* and not mandatory it is not therefore, incumbent on the Courts in all cases to pass a judgment upon admission.[1] If a case involves questions which cannot conveniently be disposed of on an application under this rule, or if the case is such that it is not safe to pass a judgment on admissions, the Court may, in the exercise of its discretion refuse the motion[2] Thus in divorce cases a Court will not ordinarily pass a decree for dissolution of marriage on the mere admissions of the parties in view of possible collusion between the parties[3] Where however the defendant admits the claim but the plaintiff is absent at the trial the suit should not be dismissed a decree should be passed on the strength of the defendant s admission[4] Where an application is made under this rule on the basis of a *constructive admission*, the Court may refuse to pass a decree if, in the circumstances of the case, it is of opinion that the defendant must not be held to have admitted facts not specifically denied in the written statement[5]

5 Orders that may be passed under this Rule. — As a general rule, a judgment on admissions can be passed in all cases in which under the Code a preliminary decree can be passed See Order 20 Rules 13 15 16 and 18

6. Admissions made otherwise than on pleadings. — The use of the words "or otherwise without the words in writing which are used in Rule 1 shows that a judgment may be given even upon *verbal* admission[1] though caution is required in acting upon such admissions[2] The rule is wide enough to afford relief not only in

Note 2

1 (1882) 21 Ch D 716 (717) Brown v Pearson
2 (1881) 50 L J Ch 337 (338) Pasceo v Richards

Note 3

1 (1878) 7 Ch D 877 (877) Harris v Gamble [*See also* (1879) 12 Ch D 755 (759) Rutter v Tregent]

Note 4

1. ('18) AIR 1918 Cal 467 (470) 45 Cal 138
(1877) 5 Ch D 342 (344) Mellor v Sidebottom
('24) AIR 1924 Rang 144 (144) 1 Rang 580
('31) AIR 1931 Oudh 321 (322)
('29) AIR 1929 Lah 569 (572)
('24) AIR 1924 Cal 190 (192)
('11) 10 Ind Cas 351 (352) (Mad) (Admission in evidence by one of the defendants specifically denied by the other defendant in his pleading — First Appellate Court not justified in decreeing on such admission)
('27) AIR 1927 All 175 (176)
2 ('18) AIR 1918 Cal 467 (470 471) 45 Cal 138
3 ('93) 17 Bom 624 (625) (FB)
4 ('29) AIR 1929 Lah 830 (831)
5 ('84) 11 Cal 111 (119) 11 Ind App 186 (PC) See also Proviso to O 8 R 5

Note 6

1 (1894) 1 Ch 499 (502) In re Beeny
('18) AIR 1918 Cal 467 (468) 45 Cal 138 (Remarks of Fletcher J quoted in the judgment)
2 ('84) 6 All 406 (415 416)

cases of admissions made in the pleadings, but also in the case of admissions *de hors the pleadings*[3] Thus, admissions contained in letters written before action is brought[4] or in a letter written after action,[5] are sufficient for the purpose of this rule O. 12 R. 6 Notes 6-10

7. English practice. — See Daniel's Chancery, Form 270 and Seton on Decrees, Vol I, page 399, Form No. 5 See also Chitty's Forms, 15th Edition, page 310.

8. Co-plaintiffs. — An application under this rule for an order against a defendant should, where there are several plaintiffs, be made by *all* of them [1]

9. Judgment, if should be followed by a decree. — According to the Calcutta High Court,[1] there is nothing objectionable to a decree being drawn up on a judgment under this rule and later on to another decree being drawn up after investigation of the claim not admitted But according to the Sind Judicial Commissioner's Court,[2] it is not necessary to have a decree drawn up on a judgment passed under this rule, it being open to the plaintiff to enforce payment of the amount awarded as an order in execution proceedings by virtue of Section 36.

10. Appeal. — An order rejecting an application for a judgment on admissions is a "judgment" within Clause 15 of the Letters Patent and is appealable under the Letters Patent [1]

R. 7. [New.] An affidavit of the pleader or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents or facts, shall be sufficient evidence of such admissions, if evidence thereof is required. O. 12 R. 7

Affidavit of signature

[R. S. C, O. 32 R. 7.]

R. 8. [New.] Notice to produce documents shall be in Form No. 12 in Appendix C, with such variations as circumstances may require. An affidavit of the pleader, or his clerk, of the service of any notice to produce, and of the time when it was served, with a copy of the notice to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served. O. 12 R. 8

Notice to produce documents

[R. S. C., O. 32 R. 8.]

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3. ('26) AIR 1926 Sind 119 (120) 20 Sind L R 216
4. (1884) 27 Ch D 251 (257), Hampden v Wallis
5. (1914) 1 Ch 904 (908, 909), Ellis v Allen

Note 8

1. (1895) 2 Ch 747 (749), Re Wright

Note 9

1. ('18) AIR 1918 Cal 467 (470) 45 Cal 138
2. ('26) AIR 1926 Sind 119 (120) 20 Sind L R 216.

Note 10

1. ('20) AIR 1920 Cal 163 (164)

O. 12 R. 9

R. 9. [New.] If a notice to admit or produce specifies documents which are not necessary, the costs occasioned thereby shall be borne by the party giving such notice.

Costs.

[R. S. C., O. 32 R. 9.]

ORDER XIII.

PRODUCTION, IMPOUNDING AND RETURN OF DOCUMENTS

O. 13 R. 1

R. 1. [Ss. 138, 140.] *(1)* The parties or their pleaders shall produce, at the first hearing of the suit, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has ordered to be produced.

Documentary evidence to be produced at first hearing

(2) The Court shall receive the documents so produced: Provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.

[1877, Ss. 138, 140; 1859, Ss. 128, 129.]

Local Amendments

N.-W.F.P.

Substitute the following

"All documentary evidence shall be produced by the parties or their pleaders in the method and at the time prescribed in Orders 7 and 8 provided that after the settlement of issues, the Court may fix a date, not being more than 30 days after such settlement, within which the parties may present supplementary lists of documents on which they rely"

OUDH

Substitute the following

"1 (1) The parties or their pleaders shall produce or cause to be produced, on the date fixed by the Court, under Order 7 Rule 14, and Order 8 Rule 1 (2), or on any subsequent date which may be fixed by the Court for the purpose, all the documentary evidence of every description in their possession or power on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has permitted or ordered to be produced

(2) The parties or their pleaders may also file, with the permission of the Court, either on the date of hearing or any subsequent date to be fixed by the Court for the purpose, a supplementary list of further documents on which they intend to rely, and such documents shall be produced by them within the time fixed by the Court

(3) The Court shall receive the documents so produced, provided that (whenever the documents are produced at any stage of the case) they are accompanied by an accurate list thereof prepared in such form as the Chief Court may direct

Explanation — A certified copy of a public document is a document "in the power" of a party, but where a document is in the possession of a person other than

the plaintiff or defendant it will not be deemed to be "in the power" of the plaintiff or defendant "

PATNA

After the words "at the first hearing of the suit" *add* the words

"or, where issues are framed, on the day when issues are framed, or within such further time as the Court may permit "

RANGOON

Add the following as sub rule (3)

"(3) The High Court of Judicature at Rangoon directs that such lists shall be prepared in form $\frac{\text{Judicial}}{\text{General 23}}$ which will be given free of charge to parties wishing to tender documents in evidence "

Synopsis

1. **Scope and object of the Rule**
2. **"Shall produce at the first hearing."**
3. **"First hearing "** See O 8 R 1
4. **Admission of documents after first hearing** See Rule 2
5. **"In such form as the High Court directs "** See Appendix H, Form No 5

1. Scope and object of the Rule. — A Court must secure a fair trial of cases, and to that end obviate the chances for the parties to adduce forged or manufactured evidence This rule, accordingly, enjoins on the parties to lay their documents before the Court at the earliest possible opportunity [1] Where the documents are not in the possession or power of the party, they cannot and therefore need not be produced at the first hearing [2]

The rule is *peremptory* that the documents on which a party intends to rely must be produced at the first hearing [3] But as the object of the rule is not to penalise the parties, the Court is given discretion, under Rule 2, to receive any documents at later stages of the suit if there is no suspicion about their genuineness [4]

The provisions of this Order relating to the production of documents are made applicable to proceedings under the undermentioned local Acts [5]

2. "Shall produce at the first hearing." — The procedure under the Code relating to the production of documents by the parties is briefly as follows —

The plaintiff shall produce and deliver into Court with the plaint the document *on which he sues*, if it is in his possession or power (O 7 R 14 sub rule 1) Other documents, whether in his possession or power or not, *on which he relies* in support of his claim need not, however, be produced with the plaint, but a *list* thereof shall be filed at the time of the plaint (O 7 R 14 sub rule 2) In that list the plaintiff need mention only those documents on which he relies for his claim He need not *anticipate the defence case* and mention in the list such documents as may form an answer to

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Order 13 Rule 1 — Note 1

1 ('98) 22 Bom 173 (175)
('07) 6 Cal L Jour 631 (634)
('08) 8 Cal L Jour 147 (151)
('28) AIR 1928 Pat 537 (538)
('31) AIR 1931 Pat 275 (281) 10 Pat 388

2 ('75) 23 Suth W R 29 (30)
('30) 1930 Mad W N 511 (513) (Rule not applicable to documents which are produced by witness on summons)

3. ('31) AIR 1931 Mad 512 (513)

4 ('18) AIR 1918 P C 11 (14) 45 Cal 878 45 Ind App 73 (PC)
('26) AIR 1926 Cal 1 (19)
('28) AIR 1928 Pat 209 (212)
('28) AIR 1928 Pat 555 (556) 7 Pat 569
('68) 9 Suth W R 294 (295)
[*See* ('33) AIR 1933 Lah 892 (893)]

5 The Chota Nagpur Tenancy Act (VI of 1908) S 265 (3), The Bengal Embankment Act (VII of 1866) S 3 The Estates Partition Act (Bengal Act V of 1897) S 97

O 13 R 1
Note 2

such a defence Nor need he mention in the list documents to be produced for the cross examination of the defendant's witnesses or for refreshing the memory of a witness (Order 7 Rule 18 sub rule 2)

Where the document referred to in O 7 R 14 is not in his possession or power the plaintiff shall if possible state in whose possession or power it is (O 7 R 15) After the suit is instituted a summons with a copy of the plaint is served on the defendant to appear and answer the plaintiff's claim (O 5 R 1) The summons will also order the defendant to *produce* all documents in his possession or power on which he intends to rely in support of his case (O 5 R 7) On the day on which the defendant is to appear and answer according to the summons both parties must be present and the Court may *hear* the parties (O 9 R 1) On that day both the parties shall under this rule bring in all the documents on which they rely and the Court is bound to receive them if they duly put them in (sub rule 2)[1]

The language of this rule may be contrasted with the language used in O 7 R 14 with reference to the production of the document on which the plaintiff sues *viz* he shall produce it *in Court* and shall at the same time deliver the document to be filed with the plaint Production as such of documents under *this* rule amounts only to bringing in the documents with the object of leaving them in Court The non production of the documents by a party as per the terms of this rule is done at his own peril the consequence of such non production being that the Court *will not receive* them at a later stage except on satisfactory grounds Accordingly the plaintiff if he desires to avoid the risk of his documents being rejected subsequently and to ensure their being received by the Court must produce under this rule at the first hearing all the documents mentioned in his list filed under O 7 R 14 and also such documents as may be ordered by the Court to be produced under O 11 R 14 But documents of the kind specified in O 7 R 18 sub rule 2 or documents which are not in the possession or power of the plaintiff do not come under this rule[2] The defendant is bound by the same procedure so far as it may be applicable to him

Is the Court bound to pass an order fixing a date for the production of documents? Under the corresponding provision of the Code of 1882 the parties were required only to keep their documents in *readiness* at the first hearing to be produced *when called for by the Court*[3] The present rule requires the parties not only to get ready but also *to produce* *i e* to deposit in Court their documents *at the first hearing* The terms of the present rule are clear and an order fixing a date for production of documents by the parties is not a condition precedent for their production But the rule does not preclude a Court from calling on the parties for valid reasons to produce their documents or a list thereof by a specified date[4] Thus where the Court does not want the production of documents till a particular stage in the suit is reached it may pass an order requiring parties to produce their documents within a specified time[5] The view however that the Court is bound to receive documents at any stage of the suit if there is no order of the Court for production within a fixed time[6] does not appear to

Note 2

1 ('71) 15 Suth W R 323 (324) (Though by the inadvertence of Court officer they were not kept in Court record in due time)

2 ('22) AIR 1922 Pat 569 (571) (Documents ...) Cal 1003 (PC) (Party and pleader ignorant of the existence of a document)

3 ('98) 1898 Pun Re No 58 p 191
('68) 10 Suth W R 179 (181)
[*See also* ('74) 21 Suth W R 49 (49)]

4 See Madras Rules of Practice R 62

5 ('26) AIR 1926 Mad 947 (949)

6 ('28) AIR 1928 Mad 516 (517) 51 Mad 472
('25) AIR 1925 Mad 744 (745)

be sound or consistent with the terms of this rule

3. "First hearing" — See Order 8 Rule 1

4. Admission of documents after first hearing. — See Rule 2

5 "In such form as the High Court directs." — See Appendix H, Form No 5

R. 2. [S 139] No documentary evidence in the possession or power of any party which should have been but has not been produced in accordance with the requirements of rule 1 shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non production thereof; and the Court receiving any such evidence shall record the reasons for so doing

Effect of non production of documents

[1877, Ss 138, 139; 1859, S. 128]

Synopsis

1 Effect of non production of documents
2 ' Unless good cause is shown "
3 Appeal

1. Effect of non-production of documents — The object of the previous rule is to prevent fraud by the late production of suspicious documents see Note 1 to Rule 1 When, therefore the genuineness of a document is beyond doubt there can be no reasonable objection to its reception even at a later stage [1] The rule makes the satisfactory explanation for non production at the first hearing a condition precedent for the reception of documents produced out of time But the rule must be liberally construed so as to advance the cause of justice [2] No documents whether public[3] or

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Order 13 Rule 2 — Note 1

1 (18) AIR 1918 P C 11 45 Cal 678 45 Ind App 73 (PC) (Books filed in another Court previously)

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ment)

(28) AIR 1928 Rang 196 (196) 6 Rang 337

(28) AIR 1928 Cal 416 (416) (Document pro

(37) AIR 1937 Cal 537 (540) I L R (1937) 2 Cal 661

[*See also* (30) 1930 Mad W N 511 (513) (Court has no discretion to refuse reception of documents produced by witness on the ground of late production—O 13 Rr 1 and 2 apply only to documents produced by parties)]

[**See however** (19) AIR 1919 Cal 800 (801) (The Court has a discretion to refer in proper cases)]

2 (98) 22 Bom 173 (176)

(26) AIR 1926 Mad 347 (349)

(24) AIR 1924 Pat 208 (208)

[*See also* (06) 33 Cal 1345 (1348) (Document filed with plaint—Tendered only at close of plaintiff s case—Rejection technically correct—

3

authority)

O. 13 R. 2
Notes 1–3

private[4] which are above suspicion should be excluded if they are necessary for the proper decision of the case

The Court of the Judicial Commissioner of Oudh, while disagreeing with the view which gives a liberal construction to this rule has, however, arrived at the same result by granting the application under its inherent powers under Section 151 of the Code[5]

Once a document is received under this rule, no adverse inference can be drawn against the party on the ground of late production[6]

The discretion to reject a document under this rule must be exercised at the earliest possible opportunity after production, for, documents not promptly rejected[7] or ordered merely to be kept on the file[8] will be deemed to have been received

The rule applies only to documents which are in the possession or power of a party Hence when the documents are in the custody of another Court and are produced after the first hearing, they cannot be rejected under this rule[9]

2. "Unless good cause is shown." — Vexatious and dilatory applications for the reception of documents cannot be granted[1] It is not a good cause for non production that on the day fixed for the production of documents the hearing only resulted in an adjournment[2] The Court must record its reasons for receiving documents beyond time Admission of papers after long delay without recording any reasons is wrong[3] The fact that the documents were in the custody of another Court and that the delay in their production was not due to any fault of the party is sufficient reason for receiving the documents after the first hearing under this rule[4]

3. Appeal. — The admission or rejection of documents under this rule is entirely in the discretion of the trial Court[1] and an Appellate Court will not interfere with it,[2] unless such discretion has been exercised capriciously or improperly[3] In a case where the trial Court in its discretion received documents produced at a late stage, the Privy Council said "If the sanction of the Court can purge the original defect, it *has*

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(24) AIR 1924 Pat 517 (518)
4 (26) AIR 1926 Mad 347 (348) (Unregistered documents)
(30) AIR 1930 Pat 603 (604) (Private documents)
(1864) 1864 Suth W R Gap No 271 (279) (Document on unstamped plain paper genuine—Received)
[*See* (32) AIR 1932 Pat 332 (333) (A receipt filed after long delay involving a new case —
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1. (28) AIR 1928 Nag 223 (225)
2 (19) AIR 1919 Cal 800 (801)

(Ad

not interfere)
(1864) 1 Suth W R 198 (198) (Do)
(85) 8 Mad 373 (375)
(69) 3 Agra 148 (148)
(26) AIR 1926 Cal 106 (106) (Discretion refusing to admit a document)

allowing late production)
3 (26) AIR 1926 Mad 347 (349) (Discretion in allowing late production)
(33) AIR 1933 Lah 892 (893)
(26) AIR 1926 Cal 1 (19)
(19) AIR 1919 Cal 800 (801)
(25) AIR 1925 Mad 744 (745) (No judicial exercise of discretion)
(08) 8 Cal L Jour 147 (150 151)
(28) AIR 1928 Lah 704 (705) (Non compliance of rule by trial Court — No objection by party in trial Court — Party cannot raise point in second appeal)

been so purged, and held that the late production could not be a ground of appeal from the decision in the suit [4] O 13 R. 2 Note 3

R. 3. [S 140] The Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection O. 13 R. 3

Rejection of irrelevant or inadmissible documents

[1877, S 140; 1859, S. 129]

Synopsis

1 Scope of the Rule
2 Objection to admissibility
3 Appeal

1. Scope of the Rule —Under Rule 1 the Court receives as it is bound to do, all documents of every description produced by the parties at the first hearing, however numerous they might be Under Rule 2 again, the Court at its discretion receives documents subsequently produced or rejects them for *late production* Out of the documents received as aforesaid the Court under this rule, is expected and empowered to exercise discrimination and reject, even *in limine* documents considered *irrelevant or otherwise inadmissible* [1] and retain on the file only such of the documents as may if properly proved be used as evidence at the trial [2] Rejection under this rule may be at any stage [3] For the procedure on rejection see Rule 6 below

2. Objection to admissibility. — There is a distinction in this matter between a point of relevancy and a point of admissibility Whether an objection is raised or not every Court is bound to reject irrelevant documents [1] But objections to the admissibility of documents for want of proof or any necessary formality must be taken at the trial [2] and should be decided as they arise and not reserved until judgment is given [3] In case of doubt on a question of admissibility the safer course for the Court in appealable cases is to admit the document [4]

No objection will be allowed to be taken in appeal to the admissibility of

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(39) AIR 1939 Rang 98 (100) 1939 Rang L R 18 (Documents admitted without recording reasons)
4 (69) 12 Suth W R 32 (39) (PC)

Order 13 Rule 3 — Note 1

for Court to inspect and consider—Order to file the documents—No presumption that documents were held admissible)

Note 2

1 (21) AIR 1921 Pat 61 (63)

6 (P C) on the

(Formal Acquie

cence in admission of evidence which the law forbids to be received is no bar to raising objection in appeal)]
2 (28) AIR 1928 Lah 428 (429)
(05) 9 Cal W N 111 (113)
(78) 6 Cal L Rep 109 (111) (Evidence before Commissioner—Objection to document must be before him)
(36) AIR 1936 Pat 634 (635)
(36) AIR 1936 Pat 600 (601) (Objection as to the formality of comparing copies with the originals)
(35) AIR 1935 All 293 (291)
[*See also* (83) 9 Cal 939 (940 941) (Some grounds of objection before Commissioner—Others at the trial—Allowed)]
3 [*See* (90) 17 Cal 1 3 180 187 195)
(98) 25 Cal 401 (403]
4 (00) 12 All 1 (26) (F B)
[*See also* (91) 18 Cal 201 (203) 17 Ind App 159 (P C)]

O. 13 R. 3 Notes 2–3

a document which was admitted in evidence without objection at the trial[5] The reason is that if the objection had been taken at the trial the party tendering the document would have taken steps to duly prove it[6] But this principle does not apply to a document which the law forbids to be received in evidence Thus where a document which is compulsorily registrable under Section 17 of the Registration Act is not registered, Section 49 of that Act forbids such document to be received as evidence of any transaction affecting the immovable property comprised therein In the case of such a document the failure to object to the admission of the document in the trial Court is no bar to raising the objection before a superior Court[7] As to objections on the score of insufficient stamp duty, see Sections 35 and 36 of the Stamp Act (II of 1899) and the undermentioned cases[8]

3 **Appeal** — There is no appeal from an order rejecting a document under this rule though the order may be challenged in an appeal from the decree in the suit[1]

O. 13 R. 4

R. 4. [S 141] *(1)* Subject to the provisions of the next following sub-rule, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely:—

Endorsements on documents admitted in evidence

(a) the number and title of the suit,

(b) the name of the person producing the document,

(c) the date on which it was produced, and

(d) a statement of its having been so admitted;

and the endorsement shall be signed or initialled by the Judge

(2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under the next following rule, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initialled by the Judge

[1877, S 141, 1859, S 132]

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Local Amendments

OUDH

In sub rule (1) (d), *add* "in the Judge's own handwriting" *after* the word "statement"

RANGOON

Add the following as sub rules (3), (4) and (5)

"(3) The Court shall mark the documents which are admitted on behalf of the plaintiff or plaintiffs with capital letters in the order in which they are admitted, thus, *A*, *B*, *C*, etc, and the documents admitted on behalf of the defendant with figures 1, 2, 3, etc

(4) When a number of documents of the same nature are admitted, as for example, a series of receipts for rent the whole series shall bear one number or capital letter, a small number or small letter being added to distinguish each paper of the series

(5) Every document on admission shall be entered in a list in Form Judicial / General 25 prepared by the Bench Clerk and signed by the Judge"

Synopsis

1. Legislative changes
2 Endorsements on admitted documentary evidence

1. Legislative changes. — The words "or initialled' in this rule are new

2. Endorsements on admitted documentary evidence. — There are two stages relating to documents filed in Court — One is the stage when all the documents are filed by the parties in Court the next stage is where the documents are formally *proved and tendered in evidence* It is at this stage that the Court has to decide whether they are to be admitted or rejected [1] If the documents are admitted and proved then the endorsement containing the particulars referred to in the rule is to be made on them The endorsement is intended to be a record of the fact that the document *has been admitted* in evidence after the necessary legal formalities have been complied with [2] An endorsement, therefore, made *before* the documents are proved,[3] or the practice of putting a seal on the documents immediately on their production,[4] is not proper

The rule as to the endorsement of the documents must be strictly followed [5] *In Sadik Husain Khan v Hashim Ali Khan*,[6] *their Lordships of the Privy Council* deprecated strongly the practice of not complying with the provisions of this rule and went on to observe as follows

> "Their Lordships, with a view of insisting on the observance of the wholesome provisions of these statutes will in order to prevent injustice be obliged in future on the hearing of Indian appeals to refuse to read or permit to be used any document not endorsed in the manner required '

Order 13 Rule 4 — Note 2

1 (31) AIR 1931 Lah 546 (550) 13 Lah 126
(87) 1887 Bom P J 384 (385)
(27) AIR 1927 Lah 115 (117) 8 Lah 1
[*See* (1879) 11 Ch D 150 (153), Watson v Rodwell (No document is evidence unless it is formally put in at the trial)]

2. (88) 1888 All W N 22 (23)

3 (28) AIR 1928 Lah 432 (434) 9 Lah 224

4 ...43

(18) AIR 1918 All 244 (245)
(12) 16 Ind Cas 834 (834 835) (Lah)

6 (16) AIR 1916 P C 27 (41) 43 Ind App 212 38 All 627 (PC)

O 13 R 4
Note 2

In *Secretary of State* v *Sarla Devi*[7] in which the provisions of this rule had been completely ignored it was held that the documentary evidence in the case could not be regarded as having been legally brought on the record and as being legally before the Court In *Imam ud Din* v *Sri Ram Perbhu Dial*[8] there was a controversy whether the documents had been admitted in evidence and as it was impossible owing to the absence of the endorsements under this rule to say whether the documents had in fact been admitted in evidence or not the High Court in appeal found it necessary to remand the case to the lower Court for retrial But in *Mukhi Ram* v *Firm Kamta Prasad*[9] the Patna High Court has distinguished the above Privy Council case on the ground that in it there was a controversy as to whether the documents had been admitted in evidence by the trial Court and it was held that where there was no doubt as to the documents having been admitted as a fact by the trial Court the mere absence of the endorsements under this rule did not make the documents inadmissible in evidence A similar view was also taken by the Sind Judicial Commissioner s Court in the undermentioned case[1] The marking of documents for mere *identification*[11] or a mechanical endorsement without the Judge applying his mind to a consideration as to the admissibility of the document[12] does not amount to an admission in evidence Similarly where a document tendered in evidence is marked as an exhibit for purposes of reference but the endorsement prescribed by this rule is not made it cannot be said that the document has been admitted in evidence[13] To such cases the provisions of Section 36 of the Stamp Act will not therefore apply But where no objection is taken to the admissibility of a document at the time it is let in evidence and the formalities prescribed by this rule are complied with the admissibility of the document on the ground that it is insufficiently stamped cannot be raised at any subsequent stage by virtue of Section 36 of the Stamp Act[14]

Documents shown to have been regularly admitted in evidence by a commissioner cannot be objected to on the ground of the want of endorsement by the *Court* under this rule[15]

O. 13 R 5

R. 5. [S 141A] *(1)* Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891, where a document admitted in evidence in the suit is an entry in a letter-book or a shop-book or other account in current use, the party on

Endorsements on copies of admitted entries in books accounts and records

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7 (24) AIR 19?4 Lah 548 (549) 5 Lah 227
8 (28) AIR 1928 Lah 14? (14? 143) 9 Lah 4
9 (37) AIR 1937 Pat 2?? (2??)
1
irregularity)

(27) AIR 1927 Lah 679 (679) (Court induced to endorse behind back of party)
(?7) AIR 1927 Lah 45 (45)
13 (33) AIR 1933 Lah 271 (273)
14 (33) AIR 1933 All 821 (821 8) 56 All 131
(3) AIR 193? Mad 693 (696)
(?9) AIR 19 9 Mad 6?? (6?3)
15 (29) AIR 1929 Rang 211 (213) 7 Rang 164
(30) 6 Cal L Rep 109 (111 112)

whose behalf the book or account is produced may furnish a copy of the entry. O. 13 R. 5 Notes 1-3

(2) Where such a document is an entry in a public record produced from a public office, or by a public officer, or an entry in a book or account belonging to a person other than a party on whose behalf the book or account is produced, the Court may require a copy of the entry to be furnished —

(a) where the record, book or account is produced on behalf of a party, then by that party, or

(b) where the record, book or account is produced in obedience to an order of the Court acting of its own motion, then by either or any party.

(3) Where a copy of an entry is furnished under the foregoing provisions of this rule, the Court shall, after causing the copy to be examined, compared and certified in manner mentioned in rule 17 of Order VII, mark the entry and cause the book, account or record in which it occurs to be returned to the person producing it.

[1877, S. 141; 1859, S. 132.]

Local Amendment

RANGOON

Add the following to sub rule (3)

"A note of the return should be made in the list in Form Judicial / General 25"

Synopsis

1. Stamps, if necessary on copies furnished under this Rule.
2. Admission of unstamped documents.
3. Admission of unregistered documents.
4. Admission of altered documents.

1. Stamps, if necessary on copies furnished under this Rule. — Copies furnished under this rule need not bear any stamp.[1]

2. Admission of unstamped documents. — See Section 35 of the Stamp Act (II of 1889) and the undermentioned cases [1]

3. Admission of unregistered documents. — See Section 49 of the Registration Act (XVI of 1908) and the undermentioned cases [1]

Order 13 Rule 5—Note 1

1. ('03) 27 Bom 150 (154)
('02) 26 Bom 522 (526)
('87) 11 Bom 526 (528)
[*See also* ('91) 15 Bom 687 (690)]

Note 2

1. ('96) 18 All 295 (298)
('13) 19 Ind Cas 445 (446) (All)
('73) 20 Suth W R 63 (63)
('68) 4 Mad H C R 312 (314)
('84) 7 Mad 440 (441)
('94) 17 Mad 473 (476)
(1900) 23 Mad 49 (54)
(1865) 3 Bom H C R A C 92 (93)

Note 3

1. ('96) 18 All 339 (340)
('81) 5 Bom 143 (151 152)

O. 13 R. 5
Note 4

4. Admission of altered documents. — See the undermentioned cases[1]

O. 13 R. 6

R. 6. [S. 142.] Where a document relied on as evidence by either party is considered by the Court to be inadmissible in evidence, there shall be endorsed thereon the particulars mentioned in clauses *(a)*, *(b)* and *(c)* of rule 4, sub-rule (1), together with a statement of its having been rejected, and the endorsement shall be signed or initialled by the Judge.

Endorsements on documents rejected as inadmissible in evidence

[1877, S. 142; 1859, S. 134.]

1. Legislative changes. — The words "or initialled" are new

O. 13 R. 7

R. 7. [S. 142 A.] *(1)* Every document which has been admitted in evidence, or a copy thereof where a copy has been substituted for the original under rule 5, shall form part of the record of the suit.

Recording of admitted and return of rejected documents.

(2) Documents not admitted in evidence shall not form part of the record and shall be returned to the persons respectively producing them.

[1877, S. 142; 1859, S. 134.]

Local Amendments

MADRAS

Add the following proviso to sub rule (2):

"Provided that no document shall be returned which by force of the decree has become wholly void or useless"

NAGPUR

The following shall be *added* as sub-rule (3):

"(3) Every document produced in evidence, which is not written in the Court language or in English, shall be accompanied by a correct translation into English.

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(83) 7 Bom 310 (312)
(94) 18 Bom 13 (17 18)
(94) 18 Bom 396 (400)
(96) 20 Bom 553 (556 557)
(96) 20 Bom 704 (715)
(1900) 24 Bom 609 (614)
(99) 22 Mad 217 (220)

Note 4

1. (1863) 9 Moo Ind App 1 (17) (P C)
(77) 1 Bom 320 (323 330)
(82) 6 Bom 371 (374)
(83) 7 Bom 418 (419)
(86) 10 Bom 487 (492)
(91) 15 Bom 44 (45)
(81) 7 Cal 616 (619)
(86) 12 Cal 313 (315 316)
(86) 9 Mad 399 (405) (FB)
(92) 15 Mad 70 (71, 72)
(89) 12 Mad 239 (241)
(1900) 23 Mad 134 (144)
(99) 12 C P L R 33 (35).

and every document which is written in the Court language but in a script other than Devanagri shall be accompanied by a correct transliteration into Devanagri script If the document is admitted in evidence the opposite party shall either admit the correctness of the translation or transliteration or submit his own translation or transliteration of the document — O. 13 R. 7 Notes 1–2

RANGOON

Add the following to sub rule (2)

"who shall give a receipt for them in Col 6 of the list in Form $\frac{\text{Judicial}}{\text{General 23}}$

Synopsis

1 Scope of the Rule | 2. "Shall be returned"

1. Scope of the Rule. — Documents admitted in evidence are the only documents that can legally be on record[1] Other documents cannot be on the record of the suit Where after a document has been admitted in evidence the Court considers that it is a forged document or that its genuineness has not been satisfactorily established the document should not be rejected but must still form part of the record although the Judge may make an endorsement on the document 'genuineness not established or words to that effect[2]

2. "Shall be returned" — Documents which do not form part of the record as aforesaid should not be used in the case[1] They should be removed from the records and returned to the persons producing them[2]

R. 8. [S 143] Notwithstanding anything contained in rule 5 or rule 7 of this Order or in rule 17 of Order VII, the Court may, if it sees sufficient cause, direct any document or book produced before it in any suit to be impounded and kept in the custody of an officer of the Court, for such period and subject to such conditions as the Court thinks fit — O. 13 R. 8

Court may order any document to be impounded

R. 9. [S 144] *(1)* Any person, whether a party to the suit or not, desirous of receiving back any document produced by him in the suit and placed on the record shall, unless the document is impounded under rule 8, be entitled to receive back the same, — O. 13 R. 9

Return of admitted documents

(a) where the suit is one in which an appeal is not allowed, when the suit has been disposed of, and

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Order 13 Rule 7 — Note 1

1 (99) 14 All 3 6 (357 358)
(69) 12 Suth W R 207 (208) (Party relying on document must prove unless admitted by the other side)
2 (30) AIR 1935 Oudh 298 (301 302) 12 Luck 569

Note 2

1 (80) 5 Cal 317 (3 0)
2 (72) 1972 Bom L J 275 (275)
(79) 5 Cal 317 (3 0)
(31) AIR 1931 Lah 546 (550) 13 Lah 126

O. 13 R. 10

Court may send for papers from its own records or from other Courts.

R. 10. [S. 137.] *(1)* The Court may of its own motion, and may in its discretion upon the application of any of the parties to a suit, send for, either from its own records or from any other Court, the record of any other suit or proceeding, and inspect the same.

(2) Every application made under this rule shall (unless the Court otherwise directs) be supported by an affidavit showing how the record is material to the suit in which the application is made, and that the applicant cannot without unreasonable delay or expense obtain a duly authenticated copy of the record or of such portion thereof as the applicant requires, or that the production of the original is necessary for the purposes of justice.

(3) Nothing contained in this rule shall be deemed to enable the Court to use in evidence any document which under the law of evidence would be inadmissible in the suit.

[1877, S. 137; 1859, S. 138.]

Local Amendment

RANGOON

Sub rule (3) shall be re numbered as (5) and the following shall be *inserted* as sub rules (3) and (4)

"(3) If the Court thinks fit to send for the record, it shall do so by sending a formal proceeding to the Court whose record is required No summons to produce any record shall be issued to any record keeper, chief clerk, or official of any Court

(4) Whenever a Judge sends for the record of another suit or case, or other official papers, and uses any part of such record or papers as evidence in a trial before him, he shall direct that an authenticated copy of the part so used shall be put up with the trial record and shall further direct at the expense of which party such copy shall be made'

Synopsis

1. Scope and object of the Rule.
2. Discretion of Court.
3 "From any other Court "
4. Affidavit in support of the application.

Other Topics (miscellaneous)

Criminal case record See Note 3
Records from Collector s office See Note 2
Revision See Note 2

1. Scope and object of the Rule. — The power given under this rule may be exercised also by an Appellate Court [1] A Court is not bound to send for the whole of the records but only such documents will be sent for as are specifically mentioned in the application [2]

Order 13 Rule 10 — Note 1

1. ('71) 15 Suth W R 173 (171) (But not where party omitted to use document sent for in the lower Court) ('94) 1891 All W N 3 (3) 16 All 126

2. (1864) 1864 Suth W R 272 (273)

Documents do not become evidence in the case by the mere fact of being received into the Court under this rule They must be admitted in evidence by the Court like any other document [3] See sub rule 3

2. Discretion of Court — The Court has a *discretion* to grant or refuse an application under this rule [1] It should not however refuse to send for necessary documents on a proper application [2] nor having *ordered* them to be sent for omit to *actually* send for them to be used by the party as evidence [3] But a Court is not bound to send for a document when the party neglects or fails to make an application [4] or where he could but would not employ other means of production of the documents under the Code [5]

An omission to exercise the discretion in favour of a party in a proper case is a good ground in an appeal or revision provided the party has been prejudiced thereby [6]

3 "From any other Court" — The Court from which a document is sent for need not necessarily be a *Civil Court* [1] But it must be a *Court* [2] A Court from which records are sent for under this rule has no discretion to refuse to send them [3]

4 Affidavit in support of the application — The rule as to the contents of an affidavit under this rule must be strictly complied with An application without setting forth the necessary grounds satisfactorily in the affidavit will be rejected [1]

Local Amendment

RANGOON

The following shall be *inserted* as Rules 10A and 10B

10A Exhibits with their accompanying lists shall not be filed with the record until after the termination of the trial **O 13 R. 10A (Rangoon)**

10B If any exhibit included in the index of contents of the trial record is withdrawn after judgment the fact should be noted in the column of remarks of the index and it should be stated whether a copy has been substituted or not **O 13 R 10B (Rangoon)**

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3 (27) AIR 1927 Lah 69 (70)

[*See also* (1864) 1 Suth W R 63 (64)]

Note 2

1 (1864) 1864 Suth W R 177 (178 180) (FB)
(67) 7 Suth W R 109 (109)

2 (72) 18 Suth W R 127 (128)
(66) 6 Suth W R 79 (79)
(89) 7 Cal 560 (565) (Though the documents cannot be produced before the termination of the trial)

3 (09) 8 C L J Jour 43 (46 47)
(8) 1892 Bom L J 162 (16) (Collector s office not a Court)

4 (83)) Cal 60 (204 205) (P C)
(79) 18 Suth W R 13 (14)

5 (71) 15 Suth W R 150 (151) (Taking out summons for production)
(70) 14 Suth W R 302 (303) (Do)

6 (09) 2 Ind Cas 953 (953) (Cal)
(72) 18 Suth W R 127 (128)
(66) 6 Suth W R 79 (79)
(18) AIR 1918 All 375 (3 6)
(07) 11 Cal W N 112 (114 116)

Note 3

1 (74) 1874 Pun Re No 32 p 147 (Record of a criminal case)

2 (71) 15 Suth W R 150 (151) (A Court of Wards is no Court—*Note* The power to send for documents from Public Offices under S 138 of the Code of 1859 has been taken away from the corresponding provisions of the later Codes) [*See* (71) 15 Suth W R 173 (174) (Record of a c1zre cannot be sent for)

3 (7) 4 Cal L Rep 36 (37)

Note 4

1 (31) AIR 1931 Lah 119 (120)
(94) 1894 All W N 3 (3) 16 All 196

O. 13 R. 11

R. 11. [S. 145.] The provisions herein contained as to documents shall, so far as may be, apply to all other material objects producible as evidence

Provisions as to documents applied to material objects

Local Amendment

ALLAHABAD

Add the following to the end of Order 13·

O. 13 R. 12 (Allahabad) "12 Every document not written in the Court vernacular or in English, which is produced *(a)* with a plaint, or *(b)* at the first hearing or *(c)* at any other time tendered in evidence in any suit, appeal, or proceeding, shall be accompanied by a correct translation of the document into the Court vernacular If any such document is written in the Court vernacular but in characters other than the ordinary Persian or Nagri characters in use, it shall be accompanied by a correct transliteration of its contents into the Persian or Nagri character

The person making the translation or transliteration shall give his name and address and verify that the translation or transliteration is correct In case of a document written in a script or language not known to the translator or to the person making the transliteration, the person who reads out the original document for the benefit of the translator or the person making the transliteration shall also verify the translation and transliteration by giving his name and address and stating that he has correctly read out the original document

O. 13 R 13 (Allahabad) 13 When a document included in the list, prescribed by Rule 1, has been admitted in evidence, the Court shall, in addition to making the endorsement prescribed in Rule 4 (1), mark such document with serial figures in the case of documents admitted as evidence for a plaintiff, and with serial letters in the case of documents admitted as evidence for a defendant, and shall initial every such serial number or letter When there are two or more parties defendants the documents of the first party defendant may be marked A 1, A 2, A 3, etc, and those of the second party B 1, B 2 B 3, etc When a number of documents of the same nature is admitted, as for example a series of receipts for rent, the whole series shall bear one figure or capital letter or letters and a small figure or small letter shall be added to distinguish each paper of the series"

ORDER XIV.

SETTLEMENT OF ISSUES AND DETERMINATION OF SUIT ON ISSUES OF LAW OR ON ISSUES AGREED UPON

O. 14 R. 1

R. 1. [S. 146.] *(1)* Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

Framing of issues

(2) Material propositions are those propositions of law or

fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

(4) Issues are of two kinds: *(a)* issues of fact, *(b)* issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.

[1877, S 146; 1859, S. 139. R. S. C., O. 33 R. 1.]

Synopsis

Other Topics (miscellaneous)

1. Legislative changes. — In sub rule (2), the words "or a defendant must allege in order to constitute his defence" are new

2. Scope and object of the Rule. — The plaint and the written statement constitute the pleadings in a case and mark the *first stage* at which the differences between the parties are placed before the Court The Court itself may also at the *first hearing* examine the parties in order to ascertain with precision, the propositions of law

O. 14 R. 1
Note 2

or fact on which the parties are at variance,[1] and on such questions issues have to be framed and recorded[2]

The framing of issues has a very important bearing on the trial and decision of a case In the *first place*, it is the *issues fixed* and not the pleadings that guide the parties in the matter of adducing evidence[3] Thus, when a point has been the subject of an issue, the parties will not be heard to say that the point was not disputed and so required no proof[4] *Secondly*, the Court *cannot refuse to decide a point* on which an issue has been framed and evidence given by the parties[5] even if the point involved is *not mentioned in the pleadings*[6] *Conversely, the Court should not decide a suit on a* matter on which no issue has been raised[7] *Finally*, if the case goes in appeal it must be dealt with by the Appellate Court *on the issues settled for trial*[8] and not on a point on which there is no issue[9] It is therefore essential to the right decision of a case that appropriate issues should be framed and tried[10]

Sub rule (1) declares that an issue arises when a *material proposition* of law or fact is affirmed by one party and denied by the other,[11] and sub rule (2) defines what material propositions are

The issues should be confined to points necessary for the proper trial and disposal of the case and should not be framed with respect to points *not so necessary*[12] No issue need be framed on a point of law which is perfectly clear,[13] nor is the Court bound to grant an issue on a point not arising on the pleadings[14] But when the pleadings raise points with sufficient clearness, issues should be framed on them though they may not have been put in the pleadings in any particular form[15] Sub rule (3) declares what each issue should contain The issues should be so framed as to embrace the *whole dispute* in the suit[16] but to cover only the points in *dispute* and to cover each point *once only*[17]

It is primarily the *duty* of the Judge to frame the proper issues in a case[18] and

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Order 14 Rule 1 — Note 2

1 (70) 14 Suth W R 181 (182)
(90) 17 Cal 840 (848)
(71) 16 Suth W R 218 (219) (Plaint disclosed no cause of action—Pleaders were examined and issues fixed)

(PC)

listinctness

setting out points for decision before trial is to enable parties to know what evidence they have to produce before the Court)

4 (89) 11 All 896 (398) (PC)

9 (86) 12 Cal 230 (245 246) 12 Ind App 166 (PC)
10 (06) 30 Bom 173 (188)

on
as

(02) 26 Bom 360 (362)
(07) 9 Bom L R 1114 (1115) (Where minors are concerned)

(38) AIR 1938 Mad 329 (329) (But parties should also draw Court's attention to omission in framing issues)

the Judge must apply his mind and understand the facts before framing them[19] Where issues have already been framed in a suit the fact that the Judge who framed the issues has been transferred will not make it obligatory on the incoming Judge to frame issues again[20] Where after the filing of a written statement, the Court passes a consent decree on the agreement of the parties, there is no obligation on the Court to frame issues before passing the decree[21]

Sub rule (6) relates to cases where the defendant makes no defence The Court is not bound to frame and record issues when the defendant is *ex parte* and no written statement has been put in[22] But even in *ex parte* cases if there is any room for doubt about any matter, the Court has been held under certain circumstances to be bound to inform the plaintiff specifically what points he has to prove[23]

As to particular issues arising in certain kinds of suits, see the undermentioned cases[24]

A point alleged by the plaintiff and *admitted* by the defendant cannot be said to be in issue and a decision can be given on the basis of such admission without an issue[25] Averments contained in the plaint which are not traversed in the written statement and as to which no issue has been asked for will be deemed to be admitted[26]

3. Issues between co-defendants. — It is contrary to practice to frame and try issues between co defendants[1] Where, however such an issue is necessary for giving appropriate relief to the plaintiff it should be framed and tried[2]

4 Omission to frame issues — A Court commits a grave irregularity in proceeding to the final hearing of a case without settling issues therein[1] But the mere omission to frame issues is not necessarily *fatal* to the trial of the suit[2] It is an

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19 ('30) AIR 1930 Mad 78 (79)
20 ('87) 1887 All W N 247 (248)
21 ('33) AIR 1933 Sind 304 (304)
22 ('71) 15 Suth W R 145 (146)
('07) 11 Cal W N 871 (872)
[illegible]
23 [illegible]
24 [illegible]
order granting permission to institute a suit under Cl 12 of the Letters Patent may form the subject of an issue for trial in the suit so instituted)
('33) AIR 1933 Sind 134 (134) (Suit for dissolution [illegible] obstruction to easement)
('81) 6 Cal 812 (814) (Suit to establish an easement by prescription when limitation is pleaded)
('96) 20 Bom 753 (755) (Suits for possession of land on a sale deed by a person who is not defendant)
('08) 32 Bom 255 (258) (Suits based on fraud)
('72) 17 Suth W R 432 (438 439) (Suit by a Hindu widow for declaration of her right to maintenance out of her husband s estate which has been mortgaged to defendant by the husband s heir)
('92) 15 Mad 15 (17) (In a suit for declaration that the defendant had no right either to the office of sheik or to the properties in question and for an injunction restraining him from interfering with the properties and for further and other relief it was alleged by the defendant that he was in possession and hence the plaintiff could not maintain a suit for declaration without asking for possession — An issue was framed [illegible]

26 ('70) 12 Suth W R 469 (469)
('72) 18 Suth W R 287 (287)
('75) 23 Suth W R 158 (159)
('02) 26 Bom 735 (737)

Note 3

1 (1865) 2 Suth W R 45 (46)
('67) 8 Suth W R 356 (357 358)
('69) 11 Suth W R 462 (463 464)
2 [*See* (1900) 22 All 386 (390) (Decision on the point of res judicata)

Note 4

1 ('83) 12 Cal L R p 169 (174) 6 Mad 1 [illegible] 9 Ind App 128 (P C)
('66) 11 Moo Ind App 75 (7) (P C)
('70) 2 N W P H C R 183 (184)
2 ('03) 1903 Pun Re No 77 p 321 (Subsidiary issue)

O 14 R 1
Note 4

irregularity which may or may not be a *material* one If such omission has affected the disposal of the case on the merits it will be a ground for remanding the case for a new trial But if on the other hand parties have not been prejudiced by the omission[3] and *substantial justice* has been done in the case notwithstanding the omission to frame issues[4] the decision will not be set aside or remanded for a new trial Thus a decision will not be interfered with in the following cases on the ground of issue not having been framed —

(1) Where the issue omitted relates to a point not necessary for the right determination of the case[5]

(2) Where in spite of the omission of an issue the parties are alive to the point have adduced evidence on it and have discussed it in the trial Court[6] Thus in a case where no specific issue was raised on a point but it was treated as if it arose in the suit and it had been put in issue in another suit between the same parties it was held that evidence in that suit could be considered to determine the question where no surprise would be caused thereby[7]

(3) Where in spite of the omission the party affected had *notice* of the point and had *opportunity* to adduce evidence to meet it[8] or

(4) Where the omission was due to the *deliberate* conduct of the party affected[9]

On the other hand where there has been no trial at all or only an imperfect trial on the point as a consequence of the omission of an issue on it the decision will be set aside[10] In such cases the Appellate Court should frame the proper issues and remand the case for re trial on them[11] Where an issue already framed though in terms covering the main question in the case does not sufficiently direct the attention of the parties to it and may thereby have prevented a party from adducing evidence on it the proper course is to frame fresh issues and to remand the case for re trial on them[12]

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press only one of the issues the Court is not

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ement
of issues — But where judgment has laid points for determination they may be looked upon as

issues unless party is prejudiced)

7 (21) AIR 1921 P C 84 (86 87) 44 Mad 283 48 Ind App 1 (P C)

8 (87) 14 Cal 592 (597)
(97) 24 Cal 306 (309)
(71) 15 Suth W R 145 (146)

9 (80) 5 Cal 283 (286)
(38) AIR 1938 Mad 829 (329 330) (Person alleging that he is not necessary party but not pressing issue to that effect when issues were being framed — That issue must be held to have been waived by him)

10 (69) 11 Suth W R 366 (367) (Suit on lease.)
(74) 21 Suth W R 59 (60)
(79) 3 Bom 210 (211 213)
(87) 9 All 147 (153)

11 (8) 20 Suth W R 401 (402) (Suit for possession)
(11) 12 Ind Cas 53 (54) (Lah)
(96) 18 All 322 (324 325) (Suit for damages for deficiency in area sold — Proper issues to be framed and tried—Issues accordingly framed by Appellate Court and remanded)

12 (73) 21 Suth W R 358 (358 360) 1 Ind App 268 (PC)
(75) 23 Suth W R 172 (173)

5 Wrong issues — Where wrong issues have been framed in a suit and the suit has been disposed of on the findings on those issues the decision will be set aside in appeal and the suit remanded for re trial after framing proper issues[1] This however, will not be done where in spite of the wrong issues the points have been correctly understood by all the parties[2] or where all the available evidence has been adduced on the necessary points and duly discussed[3]

6 Issues by consent.—Where the issues raised in a suit have been *consented* to by a party then the decision cannot be objected to by him on the ground that the issues are wrong or defective or unnecessary[1] Similarly, where the parties affected by the wrong issue have waived their objections thereto the decision will not be interfered with[2]

7. Abandonment of issue — It is open to the parties to abandon issues thereby waiving the points raised therein Such abandonment may be express or implied It has been held by the High Court of Madras that Courts are not bound to raise issues *suo motu* on *questions of fact* where parties do not ask for them that the omission to raise such issues implies an abandonment of such questions by the party interested but that where the question is one of *law* it is incumbent on the Court to frame proper issues on such questions[1] The High Court of Bombay has on the other hand, broadly held that it would be unsafe to presume from the failure of the Court to raise the necessary issues an intention on the part of the party to admit the fact which the other party was bound to prove[2]

Even on points *raised in the pleadings* the conduct of a party may in certain circumstances amount to abandonment[3] A pleader duly appointed to conduct a case on behalf of his client has full authority to abandon an issue raised on behalf of his client and the latter will be bound by such abandonment[4]

8 Delay in raising issue — Rule 5 gives the Court power to raise issues or amend or strike out issues at any time The mere fact that a particular issue was raised at a late stage of the suit will be immaterial if the parties had sufficient opportunity to

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Note 5

1 (11) 12 Ind Cas 137 (138) (Mad)
(69) 12 Suth W R 198 (199) (Suit for damages)
(66) 6 Suth W R 57 (57 58) (PC)
(69) 12 Suth W R 132 (133) (Suit to recover land granted in trust)
(69) 12 Suth W R 460 (461) (Suit for possession)
(70) 14 Suth W R 149 (149 150) (Rent suit —
(72) 17 Suth W R 149 (150) (Suit for accounts)
(72) 17 Suth W R 359 (360) (Suit for injunction)
(72) 17 Suth W R 504 (505) (Suit for rent)
(72) 18 Suth W R 297 (297)

2 (08) 32 Bom 356 (361)
(21) AIR 1921 Sind 159 (164) 16 Sind L R 207

3 (75) 24 Suth W R 275 (276)
(97) 21 Bom 325 (327)

Note 6

1 (69) 11 Suth W R 277 (278)
(68) 10 Suth W R 389 (389)
(69) 11 Suth W R 20 (21)
(70) 13 Suth W R 205 (205)
(70) 14 Suth W R 466 (466)
(73) 20 Suth W R 377 (379) Ind App Sup Vol 212 (PC)
(26) AIR 1926 Nag 164 (167)
Marsh 519

2 (01) 3 Bom L R 535 (537 538)

Note 7

1 (19) AIR 1919 Mad 698 (699)
(02) 26 Mad 363 (363)

2 (02) 26 Bom 360 (362)

3 (25) AIR 1925 Mad 427 (429)

4 (02) 25 Mad 367 (377) 29 Ind App 76 (PC)
(16) AIR 1916 Oudh 195 (197)
(35) AIR 1935 Lah 71 (74) 16 Lah 328

O. 14 R. 1
Notes 8–10

adduce evidence and the Court was in a position to pronounce judgment on it[1] See also the undermentioned decision[2]

9. Issue not raised in the pleadings but in evidence. — A relief not founded on the pleadings should not ordinarily be granted But as has already been pointed out, there is nothing irregular in a Court granting relief on matters not set forth in the pleadings where they are comprised in the issues and have been put into evidence[1]

Where a material point has not been raised in the pleadings and is not comprised in the issues originally framed, but appears for the first time in evidence, the Court may frame an issue on it and decide it[2] after giving the party affected an opportunity to meet it[3]

10. Variance between pleadings and proof. — *Vide* Note 9 under O 6 R 2

O. 14 R. 2

R. 2. [S. 146, cl. 6.] Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.

Issues of law and of fact.

[1877, S. 146, cl. 6; 1859, S. 139. *Cf.* R. S. C., O. 25 R. 2.]

Synopsis

1. Legislative changes
2. Scope and applicability of the Rule.
3. Revision

Other Topics (miscellaneous)

Court, whether bound to decide questions of fact where it can dispose of on issues of law only See Note 2
Disposal on issues of law See Note 2

1. Legislative changes. — The words "or any part thereof" are new

2. Scope and applicability of the Rule. — Ordinarily, a Court is not under any obligation as to the order in which it is to try the issues raised before it, and has the right to dispose of the issues in any way which it considers most likely to be conducive to the ascertainment of truth[1] There are however two reservations The *first* is that in appealable cases, the Court should as far as possible decide on all the issues joined, inasmuch as a piecemeal trial might lead to protracted litigation and

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Note 8

1 ('95) 22 Cal 324 (331) 22 Ind App 4 (PC)
2. ('38) AIR 1938 Cal 290 (293) (Issue on question of *locus standi* of objector must be framed before trial and tried and determined as preliminary proceeding)

Note 9

1. ('99) 21 All 53 (59) 25 Ind App 195 (PC)
('00) 12 All 556 (558)
2. ('71) 16 Suth W R 44 (45)
(1865) 2 Mad H C R 423 (426)
('73) 19 Suth W R 333 (334, 335) (Suit for possession)
('92) 16 Bom 583 (585)
3. ('96) 20 Bom 569 (570)

Order 14 Rule 2 — Note 2

1 ('75) 23 Suth W R 54 (55)
('33) AIR 1933 All 749 (751) (High Court will not interfere in revision to make a direction as to this)

repeated appeals in the same suit[2] The *second* is that containe l in this rule which prescribes that where issues of law going to the root of the case and capable of being decided without evidence arise the Court is bound to try those issues first[3] and may in its discretion postpone the settlement of the issues of fact until after the issues of law have been determined[4] The rule casts on the Court the duty of determining whether circumstances exist in each particular case for the exercise of the power conferred therein[5] Where a party suggests that the suit can be disposed of on the hearing of a preliminary issue the proper procedure is to set down the case for settlement of issues and on that day decide which if any of the issues can be decided in the above manner[6]

The present rule no doubt contemplates the procedure to be followed at the issue stage But O 15 R 3 empowers the Judge to proceed to determine issues of law at any subsequent stage also[7] so that even if issues of fact have been settled a Judge commits no irregularity if he proceeds to determine issues of law postponing the trial of the issues of fact[8]

At the hearing of a case on a preliminary issue the party by whom it is raised has the right to begin[9]

The trial of issues of fact will not be stayed pending appeal on the decision on law except upon very strong grounds[10]

An issue *requiring evidence* is not a preliminary issue which can be dealt with under this rule[11] Where all the issues are issues of fact the Court has no power to try only some of them and postpone the trial of the others save on the ground of embarrassment[12]

The decision on a preliminary issue cannot be re opene l in the trial Court[13]

3 Revision — Where the trial Court fails to consider whether a case or a part thereof may be disposed of on issues of law only but merely says that it is not desirable that the case be decided piecemeal the order is open to revision by the High Court[1]

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issue of law is clear)
3 (36) AIR 1936 Pat 250 (253)
4 (09) 3 Ind Cas 304 (306) (Cal) (Issue of l mita tion)

tr al on facts)
(39) AIR 1939 Lah 158 (158) (Prel min ary issue as to absence of cause of action should be tried first)

8 (16) AIR 1916 Cal 164 (165)
(29) AIR 1922 Mad 321 (329)
9 (88) 12 Bom 454 (459)
10 (1883) 22 Ch D 88 (89 90) Re Palmer s Appl cat on
11 (23) AIR 1923 Pat 344 (345)
(15) AIR 1915 Cal 87 (90)
(32) AIR 1932 Bom 128 (129) 56 Bom 224 (There is no power to frame a prel minary i sue of fact)
[*See* (32) 1932 Mad W N 331 (332) (Such an issue not to be tried before framing all nec sary i sue)]

Note 3

1 (36) AIR 1936 Pat 250 (53)

O. 14 R. 3

Materials from which issues may be framed

R. 3. [S 147.] The Court may frame the issues from all or any of the following materials:—

(a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders or such parties;

(b) allegations made in the pleadings or in answers to interrogatories delivered in the suit;

(c) the contents of documents produced by either party

[1877, S. 147, 1859, S. 139.]

Synopsis

1 Legislative changes
2 Scope and applicability of the Rule
3 Issue not to be inconsistent with the pleadings
4 Appeal

1. Legislative changes. — The word "pleadings in clause (b) has been substituted for the words 'in the plaint or in the written statement (if any) tendered in the suit which occurred in the corresponding portion of the old Section

2. Scope and applicability of the Rule. — In *Eshenchunder* v *Shamcharan* [1] their Lordships of the Privy Council observed that the determinations in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made' In order to provide against failure of justice upon technical rules of pleadings and to enable the Court to frame issues on correct points of dispute this rule prescribes that the Courts are to base the issues not on the pleadings only but on the other materials referred to in the rule as well [2] Owing to the infelicitous mode of drawing up pleadings prevalent in this country, the real points in dispute are often missed or obscured and therefore even if the pleadings are bad it is the duty of the Judge to ascertain these points clearly and frame issues accordingly [3] The proper materials that may be taken into consideration under this rule are —

(1) Allegations made on oath by the parties or any persons present on their *behalf and statements made by pleaders appearing for the parties*[4] [clause (a)]

(2) Allegations made in pleadings or in answer to interrogatories [clause (b)] and

(3) Documents filed by parties [clause (c)]

Order 14 Rule 3 — Note 2

1 (66) 11 Moo Ind App 7 (20 23) (P C)

2 (87) 10 Mad 375 (502)

3 (79) 3 Bom 210 (213)
(74) 8 Mad H C R 114 (125 139)
[*See also* (71) 15 Suth W R 286 (287)]

4 (81) 5 Bom 609 (614)
(1863) 2 Ind Jour (N S) 333
(67) 8 Suth W R 162 (162)
(71) 16 Suth W R 218 (219)
(79) 3 Bom 210 (213)
(84) 12 Ind App 52 (56) 11 Cal 318 (P C)
(85) 11 Cal 407 (410)

Under Rule 4 the Judge can summon witnesses and documents and examine them before framing issues In Rule 5 provision is made for amendment addition and striking out of issues in the course of the trial

These materials mentioned in the rule are only intended to enable the Court to ascertain the contentions of the parties with precision[5] i e to elucidate points which are *ambiguous or obscure*[6] They cannot *enlarge* the scope of the pleadings so as to enable the Court to raise an issue on a point not at all raised in the pleadings[7] But the Court cannot refuse to enquire into a plea raised by plaintiff s vakil in reply to question put to him by the Court even though such a plea has not been advanced in the original plaint[8] Also where a plaint has not set out the true facts a plea raised by a defendant in his examination cannot be refused on the ground that it is not found in the written statement[9]

The result of the exhaustive provisions contained in this rule is that if a point or plea has not been raised or agitated in the trial Court it will not ordinarily be allowed to be raised for the first time in second appeal[10]

The provisions of this rule do not apply where the defendant is *ex parte*[11]

3 Issue not to be inconsistent with the pleadings — The issue raised by the Court should not be *inconsistent* with the allegations contained in the pleadings[1] Thus on a plea of forgery of a document no issue can be raised as to whether it was executed under coercion or undue influence[2] But an issue as to undue influence is not *inconsistent* with a plea of fraud[3]

4 Appeal — An order refusing to frame an issue asked for by a party is not appealable either under the Code[1] or under Clause 15 of the Letters Patent as a judgment[2]

O 14 R 4

R. 4. [S 148] Where the Court is of opinion that the issues cannot be correctly framed without the examination of some person not before the Court or without the inspection of some document not produced in the suit, it may adjourn the framing of the issues to a future day, and may (subject to any law for the time being in force) compel the attendance of any person or the production of any document by the person in whose possession or power it is by summons or other process

Court may examine witnesses or documents before framing issues

[1877, S 148, 1859, S 140]

[*See* (88) 10 All 627 (630)]
11 (71) 15 Suth W R 145 (146)

Note 3

1 (88) 15 Cal 684 (692) 15 Ind App 81 (PC)

Note 4

1 (9) 4 Cal 591 (535)
2 (10) 8 Ind Cas 340 (313 349) 35 Mad 1 (FB)

O. 14 R. 4
Notes 1-2

Synopsis

1 Legislative changes | 2 Scope and applicability of the Rule

1. Legislative changes. —

1 The words "to be fixed by the Court" which occurred in the old Section have been omitted

2 The words "subject to the rules contained in the Indian Evidence Act' which occurred in the old Section have been substituted by the words "subject to any law for the time being in force"

3 The words "in whose hands it may be' which occurred in the old Section have been changed into "in whose possession or power it is"

2. Scope and applicability of the Rule. — Section 163 of the Evidence Act does not apply to a document produced under this rule by one party at the instance of the other party [1]

O. 14 R. 5

R. 5. [S. 149.] *(1)* The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.

Power to amend, and strike out, issues

(2) The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

[1877, S 149; 1859, S 141.]

Synopsis

1 Legislative changes
2. Scope and object of the Rule
3 Where an amendment of issues and the framing of new issues is obligatory.
4. Where an amendment of issues and the framing of additional issues is discretionary
5 "At any time before passing a decree"
6. Power of the appellate Court to amend the issues or frame additional issues
7. Sub-rule (2).

1. Legislative changes. — The word "controversy' which occurred in the old Section has been changed into 'matters in controversy'

2. Scope and object of the Rule. — This rule provides for amending issues, framing additional issues and striking out issues in the course of the trial of a suit A Court trying a civil action has inherent jurisdiction to take cognizance of questions going to the root of the subject matter in controversy between the parties at any stage of the trial [1] But before doing so, the Court should frame and record issues on such questions [2]

Order 14 Rule 4 — Note 2

1 (26) AIR 1926 Nag 60 (61)

Order 14 Rule 5 — Note 2

1 (12) 16 Ind Cas 250 (252) 35 Mad 607 39 Ind App 218 (PC)
(22) AIR 1922 Pat 514 (524) 2 Pat 52.
(16) AIR 1916 Mad 479 (479) (Invalidity of mortgage for want of proper attestation—Raised only at trial—Distinct issues to be raised and opportunity for evidence to be given)

2 (19) AIR 1919 Mad 471 (471)

This rule does not enable the re opening of issues already closed, in other words a permission to raise an additional issue will not empower the party to let in additional evidence on issues already closed [3]

A Judge who transfers a case to his own file can amend the issues already framed and frame additional issues [4]

3 Where an amendment of issues and the framing of new issues is obligatory — Where an amendment of an issue or an additional issue is *necessary* for determining the matter in controversy between the parties, it is obligatory on the Court under the second portion of sub rule (1) to make such amendments of issues or to frame such additional issues The principle underlying this provision is that Courts are bound to take into consideration all the rights of parties whether legal or equitable [1] Thus where the pleadings and proof necessarily lead to one or more particular issues, it is the duty of the Court if they do not come by surprise to the other side to raise such issues and give relief thereon [2] Similarly where a matter is fairly within the scope of the pleadings and important for the decision of the substantial dispute between the parties it is equally the duty of the Court to frame issue on it and decide it [3] For illustrations of this principle see the cases noted below [4] If the issues already framed do not clearly bring out the points in controversy between the parties [5] or if by inadvertence or other causes the recorded issues do not enable the Court to try the whole case on the merits [6] the issues should be amended or new issues framed in order to be able to give a decision on the *real points* in dispute Where a suit has been adjusted by a valid compromise and it is brought to the notice of the Court it is bound to raise an issue in respect of the compromise and proceed to determine it [7]

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(34) AIR 1934 All 273 (278) 56 All 428
3 (15) AIR 1915 Mad 1196 (1198) 39 Mad 456
4 (1865) 3 Suth W R 147 (150)

Note 3

2 (1862) 2 Hyde 263 (265)
3 (66) 1 Agra 46 (48) (FB)
4 (70) 14 Suth W R O C 11 (13 14) (Suit by several plaintiffs as partners — Some of them found to be not partners at the time of cause of action — Court should frame issue whether plaintiffs are or are not partners and give

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case in
he had been in possession of a part of the property but no issue had been framed as to the
ies had been taken the principal defendant asked for

joint possession)
(31) 11 All W N 4 (46) (Do)
(06) 30 Bom 563 (570) (Do — Provided a specific
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O. 14 R. 4
Notes 1-2

Synopsis

1. Legislative changes. | 2. Scope and applicability of the Rule.

1. Legislative changes. —

1. The words "to be fixed by the Court" which occurred in the old Section have been omitted
2. The words "subject to the rules contained in the Indian Evidence Act" which occurred in the old Section have been substituted by the words "subject to any law for the time being in force"
3. The words "in whose hands it may be" which occurred in the old Section have been changed into "in whose possession or power it is"

2. Scope and applicability of the Rule. —Section 163 of the Evidence Act does not apply to a document produced under this rule by one party at the instance of the other party [1]

O. 14 R. 5

Power to amend, and strike out, issues.

R. 5. [S. 149.] *(1)* The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.

(2) The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

[1877, S. 149; 1859, S. 141.]

Synopsis

1. Legislative changes.
2. Scope and object of the Rule.
3. Where an amendment of issues and the framing of new issues is obligatory.
4. Where an amendment of issues and the framing of additional issues is discretionary.
5. "At any time before passing a decree"
6. Power of the appellate Court to amend the issues or frame additional issues.
7. Sub-rule (2).

1. Legislative changes. —The word "controversy" which occurred in the old Section has been changed into "matters in controversy"

2. Scope and object of the Rule. —This rule provides for amending issues, framing additional issues and striking out issues in the course of the trial of a suit A Court trying a civil action has inherent jurisdiction to take cognizance of questions going to the root of the subject matter in controversy between the parties at any stage of the trial [1] But before doing so, the Court should frame and record issues on such questions [2]

Order 14 Rule 4 — Note 2

1. ('26) AIR 1926 Nag 60 (61)

Order 14 Rule 5 — Note 2

1. ('12) 16 Ind Cas 250 (252) 35 Mad 607 39 Ind App 218 (PC)

This rule does not enable the re opening of issues already closed in other words a permission to raise an additional issue will not empower the party to let in additional evidence on issues already closed [3]

A Judge who transfers a case to his own file can amend the issues already framed and frame additional issues [4]

3 Where an amendment of issues and the framing of new issues is obligatory — Where an amendment of an issue or an additional issue is *necessary* for determining the matter in controversy between the parties it is obligatory on the Court under the second portion of sub rule (1) to make such amendments of issues or to frame such additional issues The principle underlying this provision is that Courts are bound to take into consideration all the rights of parties whether legal or equitable [1] Thus where the pleadings and proof necessarily lead to one or more particular issues, it is the duty of the Court if they do not come by surprise to the other side to raise such issues and give relief thereon [2] Similarly where a matter is fairly within the scope of the pleadings and important for the decision of the substantial dispute between the parties it is equally the duty of the Court to frame issue on it and decide it [3] For illustrations of this principle see the cases noted below [4] If the issues already framed do not clearly bring out the points in controversy between the parties [5] or if by inadvertence or other causes the recorded issues do not enable the Court to try the whole case on the merits [6] the issues should be amended or new issues framed in order to be able to give a decision on the *real points* in dispute Where a suit has been adjusted by a valid compromise and it is brought to the notice of the Court it is bound to raise an issue in respect of the compromise and proceed to determine it [7]

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(34) AIR 1934 All 273 (?78) 56 All 428
3 (15) AIR 1915 Mad 1196 (1198) 39 Mad 456
4 (1865) 3 Suth W R 147 (150)

Note 3

1 (1863) 1 Mad H C R 471 (477)
(80) 5 Cal 64 (70 71)
(78) 1 Cal L Rep 415 (417)
(14) AIR 1914 Oudh 255 (257)
[*See also* (84) 1884 Pun Re No 63]
2 (186?) 2 Hyde ?63 (265)
3 (66) 1 Agra 46 (48) (FB)
4 (70) 14 Suth W R O C 11 (13 14) (Su t by several plaint ffs as partı ers — Some of them found to be not partners at the time of cause of act on — Court should frame issue whether plaint ffs are or are not partners and give

he had been in possession of a part of the property but no issue had been framed as to the

exclusive possession and proves a r ght to joint possessio ı only he is entitled to a decree for joint possess on)
(?1) 11 All W N 45 (46) (Do)
(?() 20 Bom ?6? (570) (Do — I rovided a spec fic

held it under a lease and mortgage deed On the day of the final disposal of the suit the plaint ff petitioned that he was the son of that person the lessor of the defendant *Held* upon the new allegations the Court should have allowed the defendant to make h s defence framed issues and given the defendant an opportunity to produce his evidence)
(05) 27 All ?66 (? 0 271)
(73) ?0 Suth W R ?08 (?08) (In a case in which after the evidence of both part es had been taken the principal defendant asked for *permiss on to file an amended wr tten statement* wh ch would in effect raise a new question as part of the defence *held* though the appl cat on was informal t was the duty of the Munsif if it appeared that this was the real quest on between the parties to amend the is ues)
5 (?5) 19 Bom 374 (3?6)
6 (1854 1857) 6 Moo Ind App 393 (410 411) (PC)
7 (37) AIR 1937 Mad ?00 (?07 20?)

O. 14 R. 5
Notes 4–6

4. Where an amendment of issues and the framing of additional issues is discretionary. — The first portion of sub rule (1) leaves it to the discretion of the Court to amend issues or frame additional issues in certain cases not falling within the obligatory provision Where no injustice would be done to either party, the Court, in the exercise of its discretion, under special circumstances, may allow issues to be raised upon matters which do not come within the proper scope of the pleadings [1] The same discretion applies in the matter of amendment of issues also [2] This discretion is however, subject to several restrictions Thus a party, having set up one case and *failed* in it, will not be allowed to ask for issues to be raised to suit the proof [3] Nor should a Judge take the case altogether out of the hands of the parties and make for them a case which they had no intention of making for themselves [4] Similarly, no amendment should be made and no new issues raised on points which are inconsistent with the original pleas,[5] or are wholly different from them,[6] or which will change the nature of the suit,[7] nor should a new issue be framed which would re open the whole case [8]

Where a Judge at the settlement of issues had decided not to raise a certain issue, the question cannot be re opened at the trial [9]

The exercise of the power under this part of the sub rule being discretionary, it is doubtful whether a revision would lie from an order declining to amend issues or frame additional issues [10] In any view, the exercise of the discretion will not be interfered with unless the discretion is shown to have been *abused* or perversely exercised [11]

5. "At any time before passing a decree." — The Court may amend issues or frame additional issues at any time before passing a decree [1] Thus, the power can be exercised even after the close of the arguments[2] unless the exercise of the power at such a late stage is likely to prejudice the fair trial of the case [3]

A Court acts irregularly in simply recording a proceeding declaring its intention to frame additional issues and postponing the actual framing of such issues till judgment [4]

6. Power of the Appellate Court to amend the issues or frame additional issues. — Where by inadvertence or other causes the issues recorded do not enable the Appellate Court to try the whole case on the merits, it should make the necessary

Note 4

1 (80) 5 Cal 64 (70)
(81) 5 Bom 609 (614)
(96) 19 Mad 419 (421) (The original Court has power to frame an additional issue to decide whether a lawful compromise has been effected between the parties subsequent to the institution of the suit)
(02) 25 Mad 367 (378) 29 Ind App 76 (PC)

-Not in

6 2 Ind Jur (N S) 118

(03) 27 All 1 (10) 31 Ind App 235 7 Oudh Cas 287 (PC)
7 (89) 13 Bom 664 (668)
[See also (70) 14 Suth W R 11 (14)
[illegible] -69]
(PC)

[illegible] Low

[illegible] 75

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2 Pat

amendments or frame additional issues[1] But a point not suggested in the pleadings and not raised in the first Court should not be put in issue for the first time by the Appellate Court[2] Where new issues are raised by the Appellate Court the parties should have an opportunity of producing evidence on them[3] and the proper course in such cases is to frame the issues and refer them for trial by the Court of first instance[4] O. 14 R. 5 Notes 6-7

As to the High Court's power in revision to frame an additional issue, see the undermentioned case[5]

7. Sub-rule (2). — Sub rule (2) empowers the Court at any time before passing the decree, to strike out any issue that appears to have been wrongly framed or introduced But if the issues have been framed by consent of both the parties they should not be struck out without the consent of both[1] Where the lower Appellate Court framed a wrong issue, but it appeared from its judgment that there was a finding on the point which would have been raised if the correct issue had been framed, the High Court refused to remand the case for a new finding on the point[2]

Questions of fact or law may by agreement be stated in form of issues

R. 6. [S 150.] Where the parties to a suit are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue, and enter into an agreement in writing that, upon the finding of the Court in the affirmative or the negative of such issue,— O. 14 R. 6

(a) a sum of money specified in the agreement or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability

(

the other of them, or as that other may direct; or

(c) one or more of the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute

[1877, S 150; 1859, S. 142. *Cf* O. 36 R. 1]

Note 6

1 ('72) 18 Suth W R 297 (297) (First Court framed wrong issue—Appellate Court framed right issue but was wrong in deciding without giving parties opportunity of adducing fresh evidence)
('82) 1882 All W N 93 (93)

2 ('72) 17 Suth W R 407 (408)
('74) 22 Suth W R 299 (300)
('74) 23 Suth W R 169 (170)
('75) 2 Ind App 87 (107) (PC)
('75) 23 Suth W R 332 (333)
('75) 23 Suth W R 404 (406) (Under special circumstances ... can be allowed)
('76) 25 Suth W R 145 (145)
('88) 10 All 697 ( )
(1859 1861) 8 Moo Ind App 170 (187) (PC)

3 ('69) 11 Suth W R 61 (61)
('72) 17 Suth W R 361 (362)
('72) 20 Suth W R 401 (402)

4 ('90) 13 Mad 157 (159)

5 ('36) AIR 1936 Pesh 157 (158) (Wherein revision the petitioner urged that a new issue which was already covered by the issues under consideration should be framed *Held* that he could not be granted a further opportunity to do that which with common care and attention he must have known he had to do from the start)

Note 7

1 ('28) AIR 1928 Mad 764 (770 771)

2 ( ) 21 Bom 325 (327)

O. 14 R. 6
Notes 1-2

Synopsis

1. Scope and applicability of the Rule | 2. Appeal

1. Scope and applicability of the Rule. — This rule may be compared with Order 36 which deals with the statement of a special case for the opinion of the Court, without bringing a suit This rule and Rule 7 deal with stating by consent, of *special issues in a suit*, and provide for what may be called an adjustment or compromise of a suit, not absolutely as under O 23 R 3 but contingently on the opinion of the Court on certain issues of fact or law submitted to it Upon the finding on those issues being given, the adjustment or compromise becomes absolute [1] As to the form of agreement for issues to be tried, see Appendix H, Form No 1

2. Appeal. — A decree passed under the terms of Rules 6 and 7 is appealable [1] But where the parties agreed to refer issues of fact to a commissioner and to abide by his findings, it was held that no appeal would lie against a decree passed on the report of the commissioner [2]

O. 14 R. 7

Court, if satisfied that agreement was executed in good faith, may pronounce judgment

R. 7. [S. 151.] Where the Court is satisfied, after making such inquiry as it deems proper,—

(*a*) that the agreement was duly executed by the parties,

(*b*) that they have a substantial interest in the decision of such question as aforesaid, and

(*c*) that the same is fit to be tried and decided,

it shall proceed to record and try the issue and state its finding or decision thereon in the same manner as if the issue had been framed by the Court;

and shall, upon the finding or decision on such issue, pronounce judgment according to the terms of the agreement; and, upon the judgment so pronounced, a decree shall follow.

[1877, S 151; 1859, S. 143]

Synopsis

1. Legislative changes | 2 Scope of the Rule

1. Legislative changes. — The word "may' which occurred in the two paragraphs of clause (c) of the old Section has been substituted by the word "shall" in the present rule

2. Scope of the Rule. — As has been seen in Note 1 to Rule 6 *ante*, that rule provides for the adjustment of a suit *contingent* upon the opinion of the Court on certain issues of fact or law, submitted to it by the parties Upon the findings on issues so submitted being given, the adjustment becomes absolute and the Court is bound to

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Order 14 Rule 6 — Note 1
1 ('12) 16 Bom 202 (216)
Note 2
1 ('56) 1956 All W N 233 (233) (Issue agreed upon by parties)
2 ('02) 29 Cal 306 (309 310)
[*See also* ('82) 8 Cal 455 (459)]

pronounce judgment according to the terms of the agreement[1] O. 14 R. 7 Note 2

As to appeals under this rule, *vide* Note 2 under Rule 6, *supra*

ORDER XV.

DISPOSAL OF THE SUIT AT THE FIRST HEARING

R. 1. [S. 152.] Where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce judgment. O. 15 R. 1

Parties not at issue.

[1877, S. 152; 1859, S. 144.]

Synopsis

1. First hearing, meaning of. See O 8 R 1. | **2. Disposal at first hearing.**

1. First hearing, meaning of. — See Order 8 Rule 1.

2. Disposal at first hearing. — Where the parties are not at issue upon any point of fact or law, the Court may, under this rule, at once pronounce judgment It has been seen in O 5 R 1 that no summons need be sent to a defendant who has appeared at the presentation of the plaint and admitted the plaintiff's claim In such a case and in cases where the defendant appears after summons at the first hearing and *confesses judgment*, the Court may proceed to give judgment[1] But the Court must be satisfied that the proper persons are before the Court and that the confession of judgment is *unconditional* Where the confession is conditional the Court must dispose of the suit on the merits[2]

A Court is not justified in disposing of a case two days before the date fixed for hearing and the decree so passed will be set aside[3]

R. 2. [S. 153.] Where there are more defendants than one, and any one of the defendants is not at issue with the plaintiff on any question of law or of fact, the Court may at once pronounce judgment for or against such defendant and the suit shall proceed only against the other defendants. O. 15 R. 2

One of several defendants not at issue.

[1877, S. 153.]

Order 14 Rule 7 — Note 2

1. ('92) 16 Bom 202 (216)

Order 15 Rule 1 — Note 2

1. ('69) 12 Suth W R 432 (434)
2. ('67) 2 Agra 77 (77 78)
3. ('24) AIR 1924 Lah 459 (460)

O. 15 R 2
Note 1

Local Amendment

MADRAS

Re number Rule 2 as sub rule (2) (1) and *insert* the following as sub rule (2)

(2) Whenever a judgment is pronounced under the provisions of this rule a decree may be drawn up in accordance with such judgment bearing the same date as the day on which the judgment was pronounced

1 Confession of judgment by one of several defendants — Where one of several defendants appears and confesses judgment, and judgment is pronounced against him it does not bar further prosecution of the suit as against the other defendants[1]

O. 15 R 3

R. 3. [S 154] *(1)* Where the parties are at issue on some question of law or of fact, and issues have been framed by the Court as hereinbefore provided, if the Court is satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith, the Court may proceed to determine such issues, and, if the finding thereon is sufficient for the decision, may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit ·

Parties at issue

Provided that, where the summons has been issued for the settlement of issues only, the parties or their pleaders are present and none of them objects

(2) Where the finding is not sufficient for the decision, the Court shall postpone the further hearing of the suit, and shall fix a day for the production of such further evidence, or for such further argument as the case requires

[1877, S 154, 1859, S 145]

Synopsis

1 Application of the Rule
2 Summons for settlement of issues only—Effect of
3 And shall fix a day '—Sub rule (2)

1 Application of the Rule — This rule and O 14 R 2 give power to the Court to try issues of law first The power under O 14 R 2 can be exercised at the issue stage[1] As to whether this rule gives power to the Courts to proceed to determine issues of law at a *stage subsequent* to the issue stage there is a difference of opinion

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Order 15 Rule 2 — Note 1
1 (01) 25 Bom 378 (390)

Order 15 Rule 3 — Note 1
1 (21) AIR 1921 Pat 467 (467)

The High Courts of Madras[2] and Patna[3] have held that it does, while the High Court of Calcutta[4] has held that it does not. **O. 15 R. 3 Notes 1-3**

But though this rule empowers a Court to dispose of a suit on preliminary issues, it should not ordinarily do so but should pronounce its opinion on all important issues[5] The reason is that piecemeal trial of a case leads to serious inconvenience and protracts litigation In *Tara Kant Banerjee* v *Puddo Monee Dossee*,[6] Lord Justice Turner, in delivering the judgment of the Privy Council, observed as follows ·

> "The Courts below, in appealable cases, by forbearing from deciding on all the issues joined, not infrequently oblige this Committee to recommend that a cause be remanded which might otherwise be finally decided on appeal This is certainly a serious evil to the parties litigant, as it may involve the expense of a second appeal as well as that of another hearing below It is much to be desired, therefore, that in appealable cases the Courts below should, as far as may be practicable, pronounce their opinion on *all* the important points

Where the suit is sought to be disposed of on a preliminary point of law, it must be done only on the assumption that the facts pleaded can be and are proved[7]

2. Summons for settlement of issues only—Effect of. — Where the summons has been issued for the settlement of issues only, the Court may proceed to hear and dispose of the case if the parties are ready and willing to proceed[1] If, however, one of the parties *objects* to the adoption of such a procedure, the Court has no jurisdiction to proceed to dispose of the case[2]

3. "And shall fix a day"— Sub-rule (2). —The object of the Code in requiring a day to be fixed for the hearing of the case and all the evidence to be adduced on that day is that parties may thus be confronted with each other and the whole evidence on either side be at one and the same time before the Court[1]

R. 4. [S. 155.] Where the summons has been issued for the final disposal of the suit and either party fails without sufficient cause to produce the evidence on which he relies, the Court may at once pronounce judgment, or may, if it thinks fit, after framing and recording issues, adjourn the suit for the production of such evidence as may be necessary for its decision upon such issues. **O. 15 R. 4**

Failure to produce evidence

[1877, S. 155; 1859, S. 145.]

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2. ('22) AIR 1922 Mad 321 (322)
3 ('21) AIR 1921 Pat 467 (467)
4. ('15) AIR 1915 Cal 87 (90)
('33) AIR 1933 Cal 559 (559 560) (Court has however such power irrespective of the provisions of the Code)
5. ('22) AIR 1922 P C 105 (108) 50 Cal 213 50 Ind App 247 (PC)
('30) AIR 1930 Cal 787 (790) 58 Cal 474
('26) AIR 1926 Lah 125 (127 128) 7 Lah 42
6 ('66) 10 Moo Ind App 476 (488) (PC)
7. ('66) 10 Moo Ind App 540 (553) (PC)

Note 2

1. 1 Ind Jour (OS) 14 1 Hyde 145
2 ('15) AIR 1915 Mad 319 (319)
('92) 16 Mad 198 (200)
('74) 22 Suth W R 426 (427)
('69) 1 N W P H C R 147 (148)

Note 3

1. ('71) 15 Suth W R 150 (151)

O. 15 R. 4
Notes 1-3

Synopsis

1. "The Court may pronounce judgment."
2. "Sufficient cause."
3. Appeal

Other Topics (miscellaneous)

Court can determine preliminary issues first See Note 1
Proviso to the Rule See Note 2

1. "The Court may pronounce judgment." — Even in a case in which the summons may have been issued for final disposal, the Court has a discretion to adjourn the case for the production of such evidence as may be necessary Thus, if, after the written statement is filed, the suit is found to involve issues of a less simple character than might have been anticipated at the outset, it is desirable, in the interests of justice, that the discretion given to the Court by this rule should be so exercised as to ensure a fair trial and not to deny, in effect, the trial to the parties [1]

Where a party fails, without sufficient cause, to produce his evidence on the date fixed for final disposal, and an adjournment is refused, the Court can at once pronounce judgment But it cannot *dismiss the suit for non-prosecution* [2]

2. "Sufficient cause." — Where the plaintiff and the defendants were endeavouring to settle their differences by arbitration, and the plaintiff was told by one of the defendants that he would inform the Court of what was going on, in consequence of which plaintiff did not appear with his evidence on the day fixed, it was held that there was sufficient cause for the plaintiff not to be ready with his evidence [1]

3. Appeal. — A pronouncement of judgment under this rule is a decree and is appealable as such [1]

ORDER XVI.

SUMMONING AND ATTENDANCE OF WITNESSES

O. 16 R. 1

Summons to attend to give evidence or produce documents

R. 1. [S 159.] At any time after the suit is instituted, the parties may obtain, on application to the Court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents.

[1877, S. 159; 1859, S. 149.]

Local Amendments

ALLAHABAD

The following proviso shall be *added*

"Provided that no party who has begun to call his witnesses shall be entitled to obtain process to enforce the attendance of any witness against whom process has not

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Order 15 Rule 4 — Note 1

1 [illegible]

Note 2

1 ('87) 1887 All W N 105 (105)

Note 3

1 (01) 31 Cal 150 (154)

('83) 1893 All W N 171 (171) (Dismissal of suit for failure to produce evidence must be taken to be one under this rule)

previously issued or to call any witness not named in a list which must be filed in Court before the hearing of evidence on his behalf has commenced without an order of the Judge made in writing and stating the reasons therefor O 16 R 1

LAHORE

Add the following proviso

Provided that no party who has begun to call his witnesses shall be entitled to obtain process to enforce the attendance of any witness against whom process has not previously issued or to produce any witness not named in a list which must be filed in Court on or before the date on which the hearing of evidence on his behalf commences and before the actual commencement of the hearing of such evidence without an order of the Court made in writing and stating the reasons therefor

Note — All the witnesses need not be named in the lists originally filed A party can file his list up till the moment when he actually commences to lead evidence [1]

N W F P

Substitute the following *for* Rule 1

1 (1) On such date as the Court may appoint and not later than 30 days after the settlement of issues the parties shall present in Court a list of witnesses whom they propose to call either to give evidence or to produce documents

(2) They shall not be permitted to call witnesses other than those contained in the said list except with the permission of the Court and after showing good cause for the omission of the said witnesses from the list the Court granting such permission shall record reasons for so doing

(3) On application to the Court or such officer as it appoints in this behalf the parties may obtain summonses for persons whose attendance is required in Court

OUDH

Substitute for Rule 1 the following

1 (1) The Court may in any suit or class of suits require any party to file by a date to be fixed by the Court a list of witnesses whom he proposes to produce and may if necessary direct that such list be kept in a sealed envelope for such time as the Court considers desirable

Where such a list has been called for from any party the latter shall not except for special reasons be permitted to summon or produce as witness any person whose name has not been entered in the list

(2) Subject to the provisions of sub rule (1) the parties may after the suit is instituted obtain on application to the Court or to such officer as it appoints in this behalf summonses to persons whose attendance is required either to give evidence or to produce documents

Synopsis

1 **Legislative changes**
2 **Scope of the Rule**
3 **When witness summons may be applied for**
4 **Summoning of a party as a witness**
5 **Refusal of summons**
6 **Remedy when summons is refused**
7 **Form of witness summons** See Form No 13 Schedule I Appendix B
8 **Second appeal** See Note 6
9 **Revision**

Other Topics (miscellaneous)

Application Time of See Note 3 a 1 o
May obta See Note 9

Order 16 Rule 1 (Lahore)

1 (35) AIR 1 35 Lah 488 (4)

O. 16 R. 1
Notes 1–4

1. Legislative changes. —

The words "at any time after the suit is instituted" have been substituted for the words "after the summons has been delivered or sent for service on the defendant, whether it be for the settlement of issues only, or for the final disposal of the suit . . . before the day fixed for such settlement or disposal"

For the effect of the change, see Note 3

2. Scope of the Rule. — This Order contains the necessary rules in the matter of enforcing the attendance of persons either to give evidence or to produce documents provided for in Sections 30 and 32, *ante* Though the Court is bound to help the parties in this behalf,[1] it is ordinarily for the parties to move the Court to take the necessary steps,[2] unless the Court chooses to act of its own motion under Rule 14, *infra*

The powers exercisable by Civil Courts under this Order have been conferred on the tribunals appointed under the undermentioned Acts [3]

3. When witness summons may be applied for. — Section 159 of the Code of 1882 was differently worded as is shown in Note 1, *supra* It was, however, held under that Code that an application under that Section could be made at any time before the party closed his case and not necessarily before the date of the first hearing [1] The present Code has clearly provided that an application under this rule can be made *at any time after the institution* of the suit

4. Summoning of a party as a witness. — The Code of 1859 had a special provision (Section 162) for summoning the opposite party as a witness in the case

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Note 2

1. (10) 5 Ind Cas 184 (185) (Cal)
(26) AIR 1926 Pat 545 (547) (Court may instead of summons send a Court peon with an order to Collector for production of documents)

2 (75) 23 Suth W R 83 (84)
('27) AIR 1927 Lah 845 (846)
[*See* (33) AIR 1933 Mad 821 (822) (Party desiring the presence of the opposite party for giving evidence should take steps under this order and apply under O 3 R 1)]

3 ...

Orissa Municipal Survey Act (I of 1920) S 7 The Bombay Land Revenue Code (V of 1879) S 192 The Bombay Local Boards Act (VI of 1923) S 128 (2) The Bundelkhand Encumbered Estates Act (I of 1903) S 34 The Burma Boundaries Act (V of 1880) S 15, The Burma Canal Act (II of 1905) S 74 , The Burma Forest Act (IV of 1902) S 9 (b) The Calcutta Improvement Act (V of 1911) S 70 (c) The Calcutta Survey Act (I of 1897) S 9 The Charitable and Religious Trusts Act (XIV of 1920), S 11 The Chota Nagpur Tenancy Act (VI of 1908), Ss 263 and 265 (3) , The Central Provinces Land Revenue Act (II of ...

... Orissa Tenancy Act (II of 1913), S 67 (10) The Provident Insurance Societies Act (V of 1912) S 19 (3) The Punjab Sikh Gurdwaras and Shrines Act (VI of 1922), S 24 (4) , The United Provinces Canal Drainage Act (VIII of 1873), S 69 , The United Provinces Land ... United ... f 1920), ... mprove ... e Work ... S 23

Note 3

1 (69) 9 Suth W R 530 (532)
(90) 1890 Bom P J 333 (333)
(93) 1893 Bom P J 419 (420)
(91) 15 Bom 86 (86)
[*See also* (81) 5 Bom 184 (185) (Defendant's side not closed)]

The Court had a *discretion* in the matter of such summons and had to be satisfied that such evidence was material[1] There is nothing in this rule to prevent a party from examining his opponent as his witness in the case[2] See also Rule 21, *infra*

5. Refusal of summons — The Court is bound to issue summons where application is made at *any time* after the institution of the suit and before its final disposal[1] provided the application made therefor is a proper one[2] It cannot be refused on the ground that such an application is *too late*, though it is within the discretion of the Court to refuse an *adjournment of the hearing* on the ground of want of diligence of the party[3] The reason is that it is possible that the hearing may for some reason be adjourned or the party may have his own facilities for the expeditious service of summons[4] Rule 9, *infra*, which provides that summons must be served on the witness in sufficient time, is only a rule in favour of the *witness* and intended to induce due diligence in the party but it does not empower the Court to refuse to issue a witness summons on the ground of late application[5] Nor can summons be refused on the ground that the evidence of a witness *may not be beneficial to the party*[6] or that the witness had not been summoned before[7] or that the party had undertaken to bring his witnesses[8] or that steps were not taken by the party within a time fixed by the Court for that purpose[9]

This rule does not, however take away the *inherent* power of the Court to refuse witness summons in order to prevent an *abuse of the process* of the Court[10]

Note 4

1 (66) 6 Suth W R 65 (66)
(1864) 1 Suth W R 297 (298)
(1865) 2 Suth W R 4 (4)
(72) 17 Suth W R 507 (508)
(74) 21 Suth W R 44 (44)
(67) 7 Suth W R 147(147)

2 (13) 20 Ind Cas 450 (451) 16 Oudh Cas 145
(69) 12 Suth W R 317 (318)
(75) 24 Suth W R 72 (73) (Ordinarily the Court must secure the evidence of the party if required before deciding the suit)
[*See also* (33) AIR 1933 Mad 821 (822) (The procedure to examine a party is to take steps under this Order and not to apply under O 3 Rule 1)]

Note 5

1 (24) AIR 1924 Cal 971 (972)
(33) AIR 1933 Lah 538 (539) (Court refusing to

not yet closed—Application a day before the hearing)
(37) 167 Ind Cas 169 (169) (Lah) (The word may in O 16 R 1 means it shall be lawful)
[*See* (69) 11 Suth W R 418 (419))]

2

frivolous and vexatious the Court has no

3

(79) 3 Cal L Rep 569 (571)
(76) 25 Suth W R 71 (71)
(81) 7 Cal 730 (731 732)

4

6

[*See* (04) 6 Beng L R App 10 (10)]

7 (27) AIR 1927 Lah 281 (281)
(10) 5 Ind Cas 184 (186) (Cal)
(23) AIR 1923 Nag 58 (59)

8 (82) 6 Bom 742 (743)

9 (31) AIR 1931 Lah 135 (136)

10 (70) 14 Suth W R 66 (67 68)
(05) 28 Mad 28 (33 34 36)
(24) AIR 1924 Lah 617 (619)
[*See also* (26) AIR 1926 Cal 1 (36)]

O 16 R 1
Notes 4-9

6 Remedy when summons is refused — An order refusing an application for witness summons is not open to appeal but its correctness can be questioned in an appeal from the decree in the suit and subject to the limitations prescribed in Sections 99 and 105 of the Code[1] The High Court may in a proper case interfere even in a second appeal[2] provided the appellant had insisted on his right in both the lower Courts[3]

7 Form of witness summons — See Form No 13 in Appendix B of the First Schedule

8 Second appeal — See Note 6 above

9 Revision — An order wrongly refusing an application may be a material irregularity in the exercise of jurisdiction and in that case will be open to revision[1]

Local Amendments

BOMBAY

The following shall be *added* as Rule 1A

O 16 R 1A (Bombay)

1A —(1) The Court may on the application of any party for a summons for the attendance of any person permit that service of such summons shall be effected by such party

(2) When the Court has directed service of the summons by the party applying for the same and such service is not effected the Court may if it is satisfied that reasonable diligence has been used by such party to effect such service permit service to be effected by an officer of the Court

SIND

Add the following as Rule 1A *after* Rule 1

O 16 R 1A (Sind)

1A — The Court may on the application of any party for a summons for the attendance of any person as a witness permit that service of such summons shall be effected by such party

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O 16 R 2

R. 2. [S 160] *(1)* The party applying for a summons shall, before the summons is granted and within a period to be fixed, pay into Court such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend, and for one day's attendance

Expenses of witness to be paid into Court on applying for summons

(2) In determining the amount payable under this rule, the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing

Experts

Note 6

1 (94) 16 All 218 (220)
(96) 1896 All W N 120 (120 121) (Refusal to summon some of the witnesses — Appeal from decree in suit—Order refusing to summon witness questioned)

2 (74) 22 Suth W R 296 (296)

3 (69) 11 Suth W R 418 (419)

Note 9

1 (85) 9 Bom 303 (310)
(21) 60 Ind Cas 656 (656) (Lah)
[*See also* (87) 167 Ind Cas 16) (170) (Lah)]

any work of an expert character necessary for the case. O. 16 R. 2

Scale of expenses.

(3) Where the Court is subordinate to a High Court, regard shall be had, in fixing the scale of such expenses, to any rules made in that behalf.

[1877, S 160; 1859, S. 151.]

Local Amendments

ALLAHABAD

To Rule 2, *add*

"(4) This rule shall not apply, in cases to which Government is a party, in the case of witnesses who are Government servants whose salary exceeds Rs 10 *per mensem* and who are summoned to give evidence in their public capacity at a Court situated more than five miles from their headquarters "

BOMBAY

Insert as proviso to sub-rule (1)

"Provided that where Government or a public officer being a party to a suit or proceeding as such public officer supported by Government in the litigation, applies for a summons to any public officer to whom the Civil Service Regulations apply to give evidence of facts which have come to his knowledge, or of matters with which he has had to deal, as a public officer, or to produce any document from public records, the Government or the aforesaid officer shall not be required to pay any sum of money on account of the travelling and other expenses of such witness "

CALCUTTA

Cancel clauses (1) and (2) and *substitute* the following

"(1) The Court shall fix in respect of each summons such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the persons summoned in passing to and from the Court in which he is required to attend, and for one day's attendance

(2) In fixing such an amount the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case

LAHORE

Add the following exception to Rule 2 (1)

"*Exception* — When applying for a summons for any of its own officers, Government will be exempt from the operation of clause (1) "

NAGPUR

Add the following as an exception to Rule 2 (1)

Exception — When applying for a summons for any of its own officers, Government will be exempt from the operation of sub rule (1) "

PATNA

Add the following proviso to Rule 2 (1)

" Provided that the Secretary of State shall not be required to pay any expenses into Court under this rule when he is the party applying for the summons, and the person to be summoned is an officer serving under Government, who is summoned to give evidence of facts which have come to his knowledge or of matters with which he has had to deal in his public capacity

O 16 R 1 Notes 4-9

6 **Remedy when summons is refused** — An order refusing an application for witness summons is not open to appeal but its correctness can be questioned in an appeal from the decree in the suit and subject to the limitations prescribed in Sections 99 and 105 of the Code[1] The High Court may in a proper case interfere even in a second appeal[2] provided the appellant had insisted on his right in both the lower Courts[3]

7 **Form of witness summons** — See Form No 13 in Appendix B of the First Schedule

8 **Second appeal** — See Note 6 above

9 **Revision** — An order wrongly refusing an application may be a material irregularity in the exercise of jurisdiction and in that case will be open to revision[1]

Local Amendments

BOMBAY

The following shall be *added* as Rule 1A

O 16 R 1A (Bombay)

1A —(1) The Court may on the application of any party for a summons for the attendance of any person permit that service of such summons shall be effected by such party

(2) When the Court has directed service of the summons by the party applying for the same and such service is not effected the Court may if it is satisfied that reasonable diligence has been used by such party to effect such service permit service to be effected by an officer of the Court

SIND

Add the following as Rule 1A *after* Rule 1

O 16 R 1A (Sind)

1A — The Court may on the application of any party for a summons for the attendance of any person as a witness permit that service of such summons shall be effected by such party

O 16 R 2

R. 2. [S 160] *(1)* The party applying for a summons shall, before the summons is granted and within a period to be fixed, pay into Court such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend, and for one day's attendance

Expenses of witness to be paid into Court on applying for summons

(2) In determining the amount payable under this rule, the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing

Experts

Note 6

1 (94) 16 All 218 (220)

(96) 1896 All W N 120 (120 121) (Refusal to summon some of the witnesses — Appeal from decree in suit—Order refusing to summon witness questioned)

2 (74) 22 Suth W R 296 (296)

3 (69) 11 Suth W R 418 (419)

Note 9

1 (85) 9 Bom 303 (310)

(21) 60 Ind Cas 656 (65) (Lah)

[*See also* (37) 167 Ind Cas 16) (170) (Lah)]

(5) *Witnesses following any profession such as medicine or law* — A special allowance according to circumstances which is not to exceed Rs 3 unless the witness is called to give expert evidence In determining the amount payable under this rule the Court may in the case of any person summoned to give evidence as an expert allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case **O 16 R. 2**

(6) *Lodging allowance* — In addition to the above a lodging allowance not exceeding except in special cases annas *thirteen* for persons in class (3) and Re 1 10 0 for persons in classes (4) and (5) may be allowed for each night necessarily spent away from home if the Court is satisfied that the witness had to pay for his night s lodging When an amount exceeding this scale is sanctioned as a special case it shall not exceed he actual amount spent and the Court must be satisfied that such expenditure was iecessary

Provided that —

(i) a servant of Government or of *a local authority* whose salary exceeds Rs 10 per mensem giving evidence in his official capacity in a suit to which Government or *the local authority* respectively is a party —

(a) when giving evidence at a place more than five miles from his headquarters shall not receive anything under these rules but shall be given a certificate of attendance

(b) when giving evidence at a place not more than five miles from his headquarters shall in cases where the Court considers it necessary receive under these rules actual travelling expenses but shall not receive subsistence special or expert allowances

(ii) a servant of Government or of *a local authority* whose salary does not exceed Rs 10 per mensem giving evidence in his official capacity shall receive his expenses from the Court

[*Note* — When the journey has to be performed partly by rail or steam boat artly by road or boat the fare shall be paid in respect of the former and the ge or boat allowance in respect of the latter part of the journey]

Railway servants summoned by a Civil Court as witnesses and travelling by attend the Court shall be paid the railway fare to which they are entitled under iles for the payment of witnesses without regard to the fact that they may have lled under a pass and not on actual payment of the fares

Insert the following as proviso to sub rule (1)

Provided that where Government or a public officer being a party to a suit or ing as such public officer supported by Government in the litigation applies for ions to any public officer to whom the Civil Service Regulations apply to give of facts which have come to his knowledge or of matters with which he has deal as a public officer, or to produce any document from public records the ment or the aforesaid officer shall not be required to pay any sum of money on of the travelling and other expenses of such witness

Synopsis

slative changes
l cability of the Rule to Chartered th Courts
enses of witnesses
emedy where the expenses are not paid
5 Effect of non service of summons owing to the default of process server
6 Government servants summoned as witnesses if entitled to salary during absence on summons

O. 16 R. 2 RANGOON

(1) Add the following to Rule 2 (1)

' Provided that in cases to which Government or a local authority is a party

(a) No payment into Court will be required for the travelling and other expenses of a servant of Government or of local authority who may be required to be summoned at the instance of Government or the local authority prospectively to give evidence in the official capacity ,

(b) The amount to be paid into Court for the travelling and other expenses of a servant of a Government or of a local authority whose salary exceeds Rs 10 and who may be required to be summoned at the instance of a party other than the Government or the local authority respectively to give evidence in his official capacity in a Court situated at a distance of more than five miles from his headquarters shall be equivalent to the travelling and halting allowances admissible under the rules applicable to him in his official capacity "

(2) For sub rule (3) *substitute* the following

'(3) Subject to provisions of sub rule (2), travelling and other expenses of witnesses, in Courts subordinate to the High Court other than the Court of Small Causes of Rangoon, shall be payable on the following scale

(1) *Ordinary labouring classes* —The actual fare to and from the Court by the lowest class for journeys which were or could have been performed by public conveyance as defined in Burma Travelling Allowance Rule 6 (12), or where the journey could not have been performed by public conveyance, actual travelling expenses reasonably incurred not exceeding Re 1 4 0 a day by boat and annas *two* a mile by road, and an allowance for each day's absence from home of annas *six* to those who are residents of places other than the place where the Court is held, and of annas *four* to those who are residents of the place where the Court is held

(2) *Petty village officers* — The same rates as above for journeys which were or could have been performed by public conveyance as defined in Burma Travelling Allowance Rule 6 (12), or actual travelling expenses reasonably incurred not exceeding Re 1 4 0 a day by boat and annas *two* a mile by road , and an allowance of annas *eight* for each day s absence from home

(3) *Persons of higher ranks of life, such as Clerks, Tradespeople, Village Headmen, Headmen of Circles and Members of Circle Boards* — Third class fare to and from the Court for journeys which were or could have been performed by public conveyance as defined in Burma Travelling Allowance Rule 6 (12), or where the journey could not have been performed by public conveyance, actual travelling expenses reasonably incurred not exceeding Rs 2 8 0 a day by boat and annas *two* a mile by road and an allowance not to exceed, except in special cases, Re 1 for each day s absence from home

Provided that the second class fare by public conveyance may be paid in any case in which the Court is satisfied that the witness is a person who ordinarily travels by second class and did actually travel by that class The Court should certify that it is so satisfied in all cases in which second class fare is paid

(4) *Members of District Councils, persons paying income tax on Rs 3000 per annum or more, and other persons of equal or superior status* — The actual travelling expenses reasonably incurred to and from the Court with an allowance according to circumstances, not to exceed, except in very special cases, Rs 2 for each day's absence from home

(5) *Witnesses following any profession such as medicine or law* — A special allowance according to circumstances, which is not to exceed Rs 3, unless the witness is called to give expert evidence In determining the amount payable under this rule the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case

(6) *Lodging allowance* — In addition to the above, a lodging allowance not exceeding, except in special cases, annas *thirteen* for persons in class (3) and Re 1 10 0 for persons in classes (4) and (5) may be allowed for each night necessarily spent away from home if the Court is satisfied that the witness had to pay for his night's lodging When an amount exceeding this scale is sanctioned as a special case, it shall not exceed the actual amount spent and the Court must be satisfied that such expenditure was necessary

Provided that —

(i) a servant of Government or of *a local authority* whose salary exceeds Rs 10 per mensem giving evidence in his official capacity in a suit to which Government or *the local authority* respectively is a party —

(a) when giving evidence at a place more than five miles from his headquarters, shall not receive anything under these rules, but shall be given a certificate of attendance ,

(b) when giving evidence at a place not more than five miles from his headquarters, shall, in cases where the Court considers it necessary, receive under these rules actual travelling expenses but shall not receive subsistence, special or expert allowances

(ii) a servant of Government or of *a local authority* whose salary does not exceed Rs 10 per mensem, giving evidence in his official capacity shall receive his expenses from the Court

[*Note* — When the journey has to be performed partly by rail or steam boat and partly by road or boat the fare shall be paid in respect of the former and the mileage or boat allowance in respect of the latter part of the journey]

Railway servants summoned by a Civil Court as witnesses, and travelling by rail to attend the Court, shall be paid the railway fare to which they are entitled under the rules for the payment of witnesses without regard to the fact that they may have travelled under a pass and not on actual payment of the fares'

SIND

Insert the following as proviso to sub rule (1)

"Provided that where Government or a public officer being a party to a suit or proceeding as such public officer supported by Government in the litigation applies for a summons to any public officer to whom the Civil Service Regulations apply to give evidence of facts which have come to his knowledge or of matters with which he has had to deal as a public officer, or to produce any document from public records, the Government or the aforesaid officer shall not be required to pay any sum of money on account of the travelling and other expenses of such witness

Synopsis

O. 16 R. 2
Notes 1-6

Other Topics (miscellaneous)

Considerations in fixing the scale of expenses See Note 3 — Party making due payment not responsible for service See Note 5

1. Legislative changes. — Sub rule (2) is new

2. Applicability of the Rule to Chartered High Courts. — This rule does not apply to Chartered High Courts See Order 49 Rule 3

3. Expenses of witnesses. — A witness is entitled to be paid his travelling and other expenses for his attendance in Court But except as provided for in sub rule (2), no witness is entitled to any compensation for *loss of time*[1] or to any special amount on the ground of *status*,[2] though the expenses may be claimed suitable to the rank or status of the witness [3] The right to claim expenses is not lost by the fact of the witness having attended and given evidence before making the claim,[4] or of his having been called by one party and examined by the opposite party [5] The Court must give the party a reasonable time for payment of the amount of expenses into Court [6]

4. Remedy where the expenses are not paid. — The remedy of the witness whose expenses are not paid is by an *application* to the Court and not by a separate suit [1] See also Rule 4

5. Effect of non-service of summons owing to the default of the process-server. — If the party duly pays the necessary fees into Court, he is not answerable for the non service of the summons owing to the default of the process server [1] A dismissal of the plaintiff s suit by reason of the plaintiff s witnesses not appearing owing to the default of the process server in serving the summons on them, is illegal [2] It is otherwise if the fees are not duly paid [3]

6. Government servants summoned as witnesses, if entitled to salary during absence on summons. — Government servants summoned as witnesses are not entitled to the payment of any salary as part of the expenses inasmuch as the Government does not deduct any salary for such absence [1]

O. 16 R. 3

R. 3. [S 161.] The sum so paid into Court shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally

Tender of expenses to witness

[1877, S. 161; 1859, S 151.]

Order 16 Rule 2—Note 3

1 (1865) 2 Hyde 236 (236)
(11) 12 Ind Cas 190 (190) (Chief officer of municipality—Summons to produce documents—Not entitled to search fee)
2. (22) AIR 1922 Bom 116 (117) 46 Bom 89 (Pleader as witness of facts — No expert — No claim on account of status)
3 (73) 19 Suth W R 78 (78)
4 (80) 4 Bom 619 (621)
(04) 28 Bom 647 (648)
5. (04) 28 Bom 647 (649, 650)
6 (24) AIR 1924 Nag 271 (275) 20 Nag L R 131
[*See* (68) 9 Suth W R 127 (128)]

Note 4

1 (66) 5 Suth W R S C C Ref 6 (7)
[See however (07) 17 Mad L Jour 143 (143, 144) (But a suit lies to recover money paid to a witness for expenses if he does not attend)]

Note 5

1 (71) 15 Suth W R 89 (89)
2 (25) AIR 1925 Lah 296 (296)
3 ('25) AIR 1925 Lah 457 (458)
(72) 18 Suth W R 16 (18 19)

Note 6

1 (23) 38 Cal L Jour 149 (149, 150)

Local Amendments

BOMBAY

Insert the proviso

"Provided that where the witness is a public officer to whom the Civil Service Regulations apply and is summoned to give evidence of facts which have come to his notice or of facts with which he has had to deal, in his official capacity, or to produce a document from public records, the sum payable by the party obtaining the summons on account of his travelling and other expenses shall not be tendered to him "

CALCUTTA

Substitute the following for Rule 3

"3 The sum so fixed shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally "

LAHORE

For Rule 3, *substitute*

Tender of expenses to witness

"3 (1) The sum paid into a Court shall, except in the case of a Government servant, be tendered to the person summoned, at the time of serving the summons if it can be served personally

(2) When the person summoned is a Government servant, the sum so paid into Court shall be credited to Government

Exception —(1) In cases in which Government servants have to give evidence at a Court situate not more than five miles from their headquarters, actual travelling expenses incurred by them may, when the Court considers it necessary, be paid to them

Exception — (2) A Government servant, whose salary does not exceed Rs 10 *per mensem* may receive his expenses from the Court "

NAGPUR

For Rule 3, *substitute* the following

"3 (1) The sum so paid into Court shall, except in case of a Government servant, be tendered to the person summoned, at the time of serving the summons, if it can be served personally

(2) When the person summoned is a Government servant, the sum so paid into Court shall be credited to Government

Exception —(1) In cases in which Government servants have to give evidence at a Court situate not more than five miles from their headquarters, the actual travelling expenses incurred by them may, when the Court considers it necessary, be paid to them

Exception —(2) A Government servant whose salary does not exceed Rs 10 *per mensem* may receive his expenses from the Court "

PATNA

Add the following as proviso

'Provided that when the person summoned is an officer of Government, who has been summoned to give evidence in a case to which Government is a party, of facts which have come to his knowledge or of matters which he has had to deal, in his public capacity, then—

(i) if the officer s salary does not exceed Rs 10 a month the Court shall at the time of the service of the summons make payment to him of his expenses as determined by Rule 2 and recover the amount from the Treasury

(ii) if the officer s salary exceeds Rs 10 a month, and the Court is situated not

O. 16 R. 4A (Madras)

Local Amendment

MADRAS

Insert the following as Rule 4A

"4A — (1) Notwithstanding anything contained in the foregoing rules, in any suit by or against the Secretary of State for India in Council, no payment in accordance with Rule 2 or Rule 4 shall be required when an application on behalf of Government is made for summons to a Government servant whose salary exceeds Rs 10 per mensem and whose attendance is required in a Court situate more than five miles from his headquarters, and the expenses incurred by Government in respect of the attendance of the witness shall not be taken into consideration in determining costs incidental to the suit

Special provision for public servants summoned as witnesses in suits to which the Government is a party

(2) When any other party to such a suit applies for a summons to such an officer, he shall deposit in Court along with his application a sum of money for the travelling and other expenses of the officer according to the scale prescribed by the Government under whom the officer is serving and shall also pay any further sum that may be required under Rule 4 according to the same scale, and the money so deposited or paid shall be credited to Government

(3) In all cases where a Government servant appears in accordance with this rule, the Court shall grant him a certificate of attendance "

O. 16 R. 5

R. 5. [S. 163.] Every summons for the attendance of a person to give evidence or to produce a document shall specify the time and place at which he is required to attend, and also whether his attendance is required for the purpose of giving evidence or to produce a document, or for both purposes; and any particular document, which the person summoned is called on to produce, shall be described in the summons with reasonable accuracy.

Time, place and purpose of attendance to be specified in summons

[1877, S. 163; 1859, S. 152.]

Synopsis

1. Contents of summons
2. Failure to specify the place of appearance.
3. Where the hearing is postponed See Note 3 to Rule 4 and Rule 16

1. Contents of summons. — A summons should contain the necessary particulars of time and place of attendance[1] and of the documents to be produced[2] In fixing the time for the attendance of public officers as witnesses, sufficient consideration must be given to the exigencies of public duties[3]

2. Failure to specify the place of appearance. — A witness cannot be held liable for non compliance with the summons where it is defective in particulars of time or place[1] See Rule 15, *infra*

Order 16 Rule 5 — Note 1

1. ('83) 5 All 7 (8)
2. (1864) 1864 Suth W R Gap No 164 (165) [*See also* (13) 12 Ind Cas 190 (190) 5 Sind L R 41 (Documents specified only need be produced)]
3. ('70 71) 6 Mad H C R App Side Ruling VI

Note 2

1 ('83) 5 All 7 (8)

3. Where the hearing is postponed. — See Note 3 to Rule 4, *supra* and Rule 16, *infra* O. 16 R. 5 Note 3

R. 6. [S. 164.] Any person may be summoned to produce a document, without being summoned to give evidence; and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same. O. 16 R. 6

Summons to produce document

[1877, S. 164; 1859, S 153; R. S. C., O. 37 R. 7.]

1. Scope. — It is open to a witness to produce documents at the hearing though he has not been summoned to produce them [1]

Where anything has to be done before a document can be produced under this rule, it must be done by the party and not the Court [2]

R. 7. [S. 165.] Any person present in Court may be required by the Court to give evidence or to produce any document then and there in his possession or power. O. 16 R. 7

Power to require persons present in Court to give evidence or produce document

[1877, S. 165.]

1. Scope. — This rule is subject to Sections 130 and 131 of the Evidence Act under which persons who are not parties to the suit cannot be compelled to produce particular documents [1] It is left to the discretion of the Court to act under this rule [2]

Local Amendment

CALCUTTA

Insert the following as Rule 7A:

"7A *(i)* Except where it appears to the Court that a summons under this Order should be served by the Court in the same manner as a summons to a defendant, the Court shall make over for service all summonses under this Order to the party applying therefor The service shall be effected by or on behalf of such party by delivering or tendering to the witness in person a copy thereof signed by the Judge or such officer as he appoints in this behalf and sealed with the seal of the Court O. 16 R. 7A (Calcutta)

(ii) Rules 16 and 18 of Order 5 shall apply to summons personally served under this rule, as though the person effecting service were a serving officer

(iii) If such summons, when tendered, is refused or if the person served refuses to sign an acknowledgment of service or if for any reason such summons cannot be served personally, the Court shall, on the application of the party, re issue such summons to be served by the Court in like manner as a summons to a defendant"

Order 16 Rule 6 — Note 1

of a message that passed through his office)

Order 16 Rule 7 — Note 1

1 (11) 11 Ind Cas 791 (795) (Cal)

2 (08) 4 Nag L R 129 (133)

O. 16 R. 4A (Madras)

Local Amendment

MADRAS

Insert the following as Rule 4A

"4A — (1) Notwithstanding anything contained in the foregoing rules, in any suit by or against the Secretary of State for India in Council, no payment in accordance with Rule 2 or Rule 4 shall be required when an application on behalf of Government is made for summons to a Government servant whose salary exceeds Rs 10 per mensem and whose attendance is required in a Court situate more than five miles from his headquarters, and the expenses incurred by Government in respect of the attendance of the witness shall not be taken into consideration in determining costs incidental to the suit

Special provision for public servants summoned as witnesses in suits to which the Government is a party

(2) When any other party to such a suit applies for a summons to such an officer, he shall deposit in Court along with his application a sum of money for the travelling and other expenses of the officer according to the scale prescribed by the Government under whom the officer is serving and shall also pay any further sum that may be required under Rule 4 according to the same scale, and the money so deposited or paid shall be credited to Government

(3) In all cases where a Government servant appears in accordance with this rule, the Court shall grant him a certificate of attendance "

O. 16 R. 5

R. 5. [S 163.] Every summons for the attendance of a person to give evidence or to produce a document shall specify the time and place at which he is required to attend, and also whether his attendance is required for the purpose of giving evidence or to produce a document, or for both purposes; and any particular document, which the person summoned is called on to produce, shall be described in the summons with reasonable accuracy.

Time, place and purpose of attendance to be specified in summons

[1877, S. 163; 1859, S. 152.]

Synopsis

1. Contents of summons
2. Failure to specify the place of appearance.
3. Where the hearing is postponed See Note 3 to Rule 4 and Rule 16

1. Contents of summons. — A summons should contain the necessary particulars of time and place of attendance[1] and of the documents to be produced[2] In fixing the time for the attendance of public officers as witnesses, sufficient consideration must be given to the exigencies of public duties[3]

2. Failure to specify the place of appearance. — A witness cannot be held liable for non compliance with the summons where it is defective in particulars of time or place[1] See Rule 15, *infra*

Order 16 Rule 5 — Note 1

1. ('83) 5 All 7 (8)
2. (1864) 1864 Suth W R Gap No 164 (165) [*See also* ('13) 12 Ind Cas 190 (190) 5 Sind L R 41 (Documents specified only need be produced)]
3. ('70 71) 6 Mad H C R App Side Ruling VI

Note 2

1. ('83) 5 All 7 (8)

service on a witness or witnesses, whose attendance is required by such party, may be delivered to such party or his pleader for service by a person employed by such party or his pleader, and the rules in Order 5 as to service and proof of service shall apply in such case as if the person employed by such party or his pleader to effect service were the officer of the Court whose duty it is to effect service of summons" **O. 16 R. 8**

R. 9. [S. 167.] Service shall in all cases be made a sufficient time before the time specified in the summons for the attendance of the person summoned, to allow him a reasonable time for preparation and for travelling to the place at which his attendance is required. **O. 16 R. 9**

Time for serving summons.

Local Amendment

RANGOON

Add the following :

"Where the person summoned is a public officer or servant of a Railway Company, sufficient time shall also be allowed in order to give the witness an opportunity of communicating with his departmental superior, so as to arrange for the discharge of his duties during his temporary absence from his post"

R. 10. [S. 168] *(1)* Where a person to whom a summons has been issued either to attend to give evidence or to produce a document fails to attend or to produce the document in compliance with such summons, the Court shall, if the certificate of the serving-officer has not been verified by affidavit, and may, if it has been so verified, examine the serving-officer on oath, or cause him to be so examined by another Court, touching the service or non-service of the summons. **O. 16 R. 10**

Procedure where witness fails to comply with summons

(2) Where the Court sees reason to believe that such evidence or production is material, and that such person has, without lawful excuse, failed to attend or to produce the document in compliance with such summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named therein; and a copy of such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides.

(3) In lieu of or at the time of issuing such proclamation, or at any time afterwards, the Court may, in its discretion, issue a

O. 16 R. 10
Note 1

warrant, either with or without bail, for the arrest of such person, and may make an order for the attachment of his property to such amount as it thinks fit, not exceeding the amount of the costs of attachment and of any fine which may be imposed under rule 12:

Provided that no Court of Small Causes shall make an order for the attachment of immoveable property.

[1877, S. 168; 1859, S. 159; R. S. C., O. 37 R. 8.]

Local Amendment

ALLAHABAD

In sub rule (1) *substitute* a colon for the full stop after the word "summons" and *add* the proviso

"Provided that the Court need not examine the serving officer if the person has been summoned only to produce a document and has attended and admitted receipt of the summons but has failed to produce the document "

In sub rule (2)

(a) between the word "proclamation" and the word "requiring," *insert* the words, "or, if he is present, an order in writing to be signed by him",

(b) for the words "and a copy of such proclamation" *substitute* the words, "and a copy of the proclamation if issued "

In sub-rule (3) between the word "proclamation" and the words "or at any time afterwards" *insert* the words, "or an order in writing "

Synopsis

1. Scope and applicability of the Rule. — This rule is intended to enable the Court to help the parties by *compelling* the obedience of recalcitrant witnesses [1] The rule becomes applicable only where the Court *finds* that the summonses have been *duly served*[2] as is indicated in sub-rule (1) It has no application where there has been no summons[3] or where the summons has not been returned[4] or where the witness attends or produces the document on the required date though he had refused the summons [5] The rule being of a highly penal nature, the procedure laid down in sub-rule (1) must be strictly followed before a Court finds whether the summons was served or not [6] The Nazir's report is not legal evidence on this point [7]

Order 16 Rule 10 — Note 1

1. ('66) 6 Suth W R 14 (15)
[*See* ('66) 5 Suth W R Act X, 49 (50)]
[*See also* ('67) 7 Suth W R 519 (520) (FB) (Court can even send them for trial before Magistrate)]
('37) AIR 1937 Mad 811 (813) (Purpose is to vindicate authority of Court)]
2. ('67) 7 Suth W R Cri Rul 60 (60)
3. ('16) AIR 1916 Cal 421 (422) (Duty of Settlement Courts)
4. ('69) 11 Suth W R 99 (99)
5 ('28) AIR 1928 Lah 469 (469)
6 ('99) 3 Cal W N 307 (310)
('17) AIR 1917 Lah 281 (281) (Issue of a warrant without an affidavit or examination on oath of the serving officer illegal)
[**See however** ('05) 27 All 491 (493) (A case of criminal revision)]
7 ('86) 6 Suth W R Act X, 92 (93)

As a general rule, it is for the party to move the Court to issue one or more of the coercive processes under this rule[8] though the Court is not precluded from taking action *suo motu*[9] In either case both the conditions precedent laid down in sub rule (2) must be satisfied before any coercive action is taken[10] If the conditions are not satisfied, the party is entitled only to a fresh summons[11] Even where both the conditions are satisfied it is left to the discretion of the Court to take coercive measures or not[12] but the discretion must not be *arbitrarily* exercised[13]

2 **"Without lawful excuse"** — The question of lawful excuse depends on the circumstances of each case[1] It is not necessary for the Court to institute a formal investigation and come to a decision on the evidence adduced in order to believe in the want of lawful excuse If the Court believes that the witness has knowledge of the summons and thinks that his evidence is material and if there is no one in Court to account for the witness s absence there is sufficient reason to act under this rule[2] Non payment or non tender of expenses to the witness is a lawful excuse for non attendance[3] Where the summons is returned unserved the party must be given reasonable time to make out the grounds for the coercive process[4]

3 **Issue of proclamation — Sub-rule (2)** — Delay caused by the office owing to the late payment of process fees for proclamation cannot be set up by the party as a ground for non production of witnesses[1]

4 **Issue of warrant of arrest — Sub rule (3)** — In requiring parties to take out warrants of arrest against recalcitrant witnesses the Court must have due regard to the practical difficulties felt by litigants in procuring the evidence of an important

(68) 10 Suth W R 3 (4)
(72) 18 Suth W R 197 (197)
(1864) 1864 Suth W R Gap No Misc 9 (9)
(81) 7 Cal 34 (38)
(1865) 3 Suth W R Misc App 11 (12 15)
[*See* (1865) 4 Suth W R Misc 4 (5)]
8 (69) 11 Suth W R 99 (99)
(70) 13 Suth W R 324 (324)

10 (29) AIR 1929 All 850 (853 854)
(70) 13 Suth W R 416 (416)
(66) 6 Suth W R 235 (235)
[illegible]

(10) 5 Ind Cas 184 (186) (Cal)

ing to appear — Warrant must issue though applied for late)
(1865) 3 Suth W R 97 (97) (Warrant returned not found a day before hearing — Application for attachment on date of hearing — Not to be refused)
(1865) 3 Suth W R 21 (23) (Case clearly falling within the rule—Refusal of coercive process illegal)
(20) AIR 1920 Mad 1014 (1017) 61 Ind Cas 967 (969)) (Witness appearing and stating documents not to be in his possession — Issue of warrant arbitrary)

Note 2

1 (72) 18 Suth W R 63 (64)
[*See* (35) AIR 1935 Mad 659 (660) (Absence of witness due to alleged illness—Certificate given by medical practitioner by itself is not evidence — Examination of doctor on oath or at least affidavit by him should be insisted on)]
[*See also* (72) 18 Suth W R 45 (47)
(39) AIR 1939 Pat 285 (287) (Witness—Non appearance on day of hearing—Order-sheet not clear as to direction to witness to appear—Witness *held* not guilty of wilful absence in defiance of order)]
2 (69) 5 Mad H C R 104 (105)
3 (95) 17 All 277 (279)
(72) 18 Suth W R 16 (18 19)
4 (66) 6 Suth W R 196 (196)

Note 3

1 (81) 7 Cal 730 (731 732)

O. 16 R. 10 Notes 4–5

witness by means of his arrest[1] The issue of a proclamation *subsequent* to the issue of a warrant of arrest is a contravention of the terms of sub-rule (3)[2]

A *panchayatdar* is not exempt from the coercive provisions of this rule[3]

4a. Order for attachment of property—Sub-rule (3). — A Court can order the attachment of the property of a witness under sub-rule (3) of this rule In applying for attachment under this sub rule, a party is not in the same position as a decree holder seeking to attach the property of his judgment-debtor The reason is that proceedings to enforce the attendance of a witness are the acts of the *Court* and the object of such proceedings is to vindicate the authority of the Court Hence, where the properties of a person other than the witness are attached by mistake, the party applying for attachment is not liable for damages[1]

5. Appeal. — An order for attachment under this rule is appealable under O 43, Rule 1, clause (g) of the Code

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O. 16 R. 11

If witness appears, attachment may be withdrawn

R. 11. [S. 169.] Where, at any time after the attachment of his property, such person appears and satisfies the Court,—

(*a*) that he did not, without lawful excuse, fail to comply with the summons or intentionally avoid service, and,

(*b*) where he has failed to attend at the time and place named in a proclamation issued under the last preceding rule, that he had no notice of such proclamation in time to attend,

the Court shall direct that the property be released from attachment, and shall make such order as to the costs of the attachment as it thinks fit.

[1877, S. 169; 1859, S 160.]

1. Scope. — This rule provides for a case where the person in default satisfies the Court that he had not intentionally failed to carry out the order of the Court[1]

O. 16 R. 12

Procedure if witness fails to appear.

R. 12. [S. 170.] The Court may, where such person does not appear, or appears but fails so to satisfy the Court, impose upon him such fine not exceeding five hundred rupees as it thinks fit, having regard to his condition

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Note 4
1. ('26) AIR 1926 All 103 (107)
[*See also* ('27) AIR 1927 Lah 424 (424)]
2. ('20) AIR 1920 Mad 1014 (1017) 61 Ind Cas 967 (969)
3. ('28) AIR 1928 Mad 299 (305) 51 Mad 1

Note 4a
1. ('37) AIR 1937 Mad 811 (813)

Order 16 Rule 11 — Note 1
1. ('20) AIR 1920 Cal 46 (47)

in life and all the circumstances of the case, and may order his property, or any part thereof, to be attached and sold or, if already attached under rule 10, to be sold for the purpose of satisfying all costs of such attachment, together with the amount of the said fine, if any:

Provided that, if the person whose attendance is required pays into Court the costs and fine aforesaid, the Court shall order the property to be released from attachment.

[1877, Ss. 170, 174; 1859, S. 160.]

Synopsis

1. Scope of the Rule
2. When fine can be imposed.
3 Appeal

1. Scope of the Rule. — Rule 11 deals with the case when the person served appears and shows proper cause for his failure to appear, the present rule applies to a witness who does not appear or on appearance, fails to show proper cause [1]

This rule does not affect the special jurisdiction of a Chartered High Court to proceed for contempt against a defaulting witness [2]

2. When fine can be imposed. — There is a conflict of opinion on the point as to when fine can be imposed and three different views have been expressed —

(1) The first view is that no fine can be imposed under this rule until the procedure laid down in Rule 10, sub rule (2) or sub rule (3) has been followed, i e, either a proclamation or a warrant of arrest or an attachment has been issued [1] A person to whom a summons has been issued and who fails to obey it cannot straightway be fined under this rule

(2) The second view is that the words "such person" in this rule refer to the "person to whom a summons has been issued" in sub rule (1) of Rule 10 and that the issue of a proclamation or an order for arrest or attachment are not *conditions precedent* to the imposition of fine, and that this rule deals with *all* cases of disobedience not covered by Rule 11 [2]

(3) Where a party is *present in Court* and is directed to produce a document, the Court can, on his failure to comply with the order, impose a fine upon him without going through the procedure in sub rules (2) and (3) [3]

Order 16 Rule 12 — Note 1

1 (20) AIR 1920 Cal 46 (47)
[*See also* (19) AIR 1919 Cal 474 (475) (Legal Practitioners Act — Non production of documents by pleader—District Judge can apply this rule—See S 141, C P C)]

2 (26) AIR 1926 Rang 188 (189 190) 4 Rang 257

Note 2

1. (16) AIR 1916 Cal 421 (422)
(20) AIR 1920 Cal 46 (47)
(20) AIR 1920 Cal 655 (655)
(29) AIR 1929 All 850 (853)
(28) AIR 1928 Lah 473 (474)
[*See also* (99) 3 Cal W N 307 (310) (Can only be fined after he has been arrested and brought before the Court)]

2. (25) AIR 1925 Mad 1247 (1247, 1248) 48 Mad 94
(28) AIR 1928 Lah 469 (469)
('28) AIR 1928 Lah 979 (980) *(Obiter)*

3. ('29) AIR 1929 All 99 (100)

O. 16 R. 12 Notes 2–3

It is submitted that the second of the above views is correct This rule, Rule 1 and sub-rules (2) and (3) of Rule 10 all refer to "such person" and must, therefore necessarily refer to some person referred to before, i e, "a person to whom a summons has been issued" in sub rule (1) of Rule 10

What is lawful excuse depends upon the circumstances of each case [4]

3. Appeal. — An appeal lies from an order imposing a fine under this rule *vide* Section 104 (1) (h) of this Code But there is no second appeal see S 104 (2)

As regards orders of attachment and sale under this rule, no appeal lay under the Code of 1882 [1] Rule 13 of the present Code makes applicable to such attachment and sale, all the provisions in the Code regarding attachment and sale in execution of a decree

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O. 16 R. 13

R. 13. [New.] The provisions with regard to the attachment and sale of property in the execution of a decree shall, so far as they are applicable, be deemed to apply to any attachment and sale under this Order as if the person whose property is so attached were a judgment-debtor.

Mode of attachment

O. 16 R. 14

R. 14. [S. 171.] Subject to the provisions of this Code as to attendance and appearance and to any law for the time being in force, where the Court at any time thinks it necessary to examine any person other than a party to the suit and not called as a witness by a party to the suit, the Court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce such document.

Court may of its own accord summon as witnesses strangers to suit

[1877, S. 171]

Synopsis

1. Scope of the Rule.
2. Cross-examination of a witness summoned by Court of its own accord

1. Scope of the Rule. — Ordinarily, it is for the party to summon the witnesses necessary for his case This rule is only intended to enable the Court to secure *suo motu* the attendance of a witness whose evidence appears to the *Court* to be

4. ('28) AIR 1928 Lah 979 (980) (Missing the train and intimating to Court by telegram—Lawful excuse)
('10) 5 Ind Cas 184 (186) (Cal) (Latitude to be given to busy professional men)
('68) 12 Bom 63 (64) (Summons to produce documents—Witness attends but pleads non possession of documents — Not liable to fine — Jurisdiction can be exercised only after arrest)

Note 3

1. ('10) 7 Ind Cas 100 (100) 33 All 68

necessary[1] But the Court cannot compel a party to summon such a witness or penalise him for his refusal to summon him[2]

The general powers under this rule are, in the case of Appellate Courts, circumscribed by the specific provisions of O 41 R 27[3]

2. Cross-examination of a witness summoned by Court of its own accord. — The parties cannot be refused the right to cross examine a witness examined by the Court under this rule[1]

O. 16 R. 15

R. 15. [S 172.] Subject as last aforesaid, whoever is summoned to appear and give evidence in a suit shall attend at the time and place named in the summons for that purpose, and whoever is summoned to produce a document shall either attend to produce it, or cause it to be produced, at such time and place.

Duty of persons summoned to give evidence or produce document

[1877, S. 172; 1852, S. 167.]

O. 16 R. 16

R. 16. [S. 173.] *(1)* A person so summoned and attending shall, unless the Court otherwise directs, attend at each hearing until the suit has been disposed of.

When they may depart

(2) On the application of either party and the payment through the Court of all necessary expenses (if any), the Court may require any person so summoned and attending to furnish security to attend at the next or any other hearing or until the suit is disposed of and, in default of his furnishing such security, may order him to be detained in the civil prison.

Local Amendment

LAHORE

Add the following sub rule (3)

"(3) In the absence of the presiding officer the powers conferred by sub rule (2) *may be exercised by the Senior Subordinate Judge of the first class exercising* jurisdiction at the headquarters of the district, or by any Judge or court official nominated by him for the purpose"

1. Direction to witness to appear on the adjourned date. — See Rule 4, Note 3

Order 16 Rule 14 — Note 1

1. ('93 1900) 1893 1900 Low Bur Rul 658
('09) 2 Ind Cas 347 (348) 5 Low Bur Rul 1 (Boundary dispute — Identity of land doubtful —This rule freely used)
[*See also* ('33) AIR 1933 Pat 306 (324 325) 12 Pat 359 (Lawyer present all through — He should not be examined as court witness)]

2. ('11) 10 Ind Cas 35 (36) (Lah).

3 ('95) 18 Mad 94 (98) (Per Shephard J)
[*See* ('33) AIR 1933 Pat 306 (325) 12 Pat 359 (Party having plenty of opportunities — Court would refuse to examine witness at appellate stage)]

Note 2

1 ('69) 11 Suth W R 110 (111) (Cross-examination refused—The evidence is no legal evidence)
('69) 11 Suth W R 468 (472) (Refusal—A serious mistake)

O 16 R 17

Application of rules 10 to 13

R. 17. [Ss 174, 175] The provisions of rules 10 to 13 shall, so far as they are applicable, be deemed to apply to any person who having attended in compliance with a summons departs, without lawful excuse, in contravention of rule 16

[1877, Ss 174, 175, 1859, Ss 168, 169]

1 **Jurisdiction of Court to punish** — See Rule 11, Note 2

2. **"Without lawful excuse"** — See Rule 10 Note 2

O 16 R 18

Procedure where witness apprehended cannot give evidence or produce document

R. 18. [S 174] Where any person arrested under a warrant is brought before the Court in custody and cannot, owing to the absence of the parties or any of them, give the evidence or produce the document which he has been summoned to give or produce, the Court may require him to give reasonable bail or other security for his appearance at such time and place as it thinks fit, and, on such bail or security being given, may release him, and, in default of his giving such bail or security, may order him to be detained in the civil prison

[1877, S 174, 1859, S 169]

1 **Non-attendance, when an offence** — Section 174 of the Indian Penal Code deals with the offence of non attendance in obedience to an order passed by a public servant No such offence is committed unless —

(*a*) there is summons to attend [1]

(*b*) such summons is specific as to the time and place of attendance [2] and

(*c*) the non attendance is legally found[3] to be intentional [4]

O. 16 R. 19

No witness to be ordered to attend in person unless resident within certain limits

R. 19. [S 176] No one shall be ordered to attend in person to give evidence unless he resides —

(*a*) within the local limits of the Court's ordinary original jurisdiction, or

(*b*) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five-sixths of

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Order 16 Rule 18 — Note 1

1 (68) 10 Suth W R Cri Rul 33 (31)

2 (83) 5 All 7 (8)
(72) 17 Suth W R Cri Rul 38 (38)

3 (70) 14 Suth W R Cri Rul 20 (20)

4 (68) 10 Suth W R Cri Rul 33 (31) (Superior officer refusing permission to attend — No intention to disobey)

the distance between the place where he resides and the place where the Court is situate) less than two hundred miles distance from the Court-house. **O. 16 R. 19 Notes 1-2**

Synopsis

1. Scope of the Rule. | 2. Revision.

1. Scope of the Rule. — When a party desires to examine himself on commission, in his own favour, the provisions of O. 26 R. 4 apply [1] This rule provides an exemption from personal attendance of a witness who resides outside the limits prescribed in the rule [2]

2. Revision. — The High Court of Lahore has held that an order in contravention of this rule is not open to revision [1]

R. 20. [S. 177] Where any party to a suit present in Court refuses, without lawful excuse, when required by the Court, to give evidence or to produce any document then and there in his possession or power, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit. **O. 16 R. 20**

Consequence of refusal of party to give evidence when called on by Court.

[1877, S 177; 1859, S. 170.]

Synopsis

1. Scope and applicability.
2. "May pronounce"
3. Appeal

1. Scope and applicability. — This rule applies to miscellaneous proceedings also [1] The provisions of this rule being highly penal in character, the rule must be strictly construed [2] Thus, a party is bound only *to produce* the document required and is not bound to *exhibit* it as evidence in the case [3] Again, the rule applies only when the party is *present* in Court and refuses to comply with the order [4] The failure in one suit to obey a requisition to produce or give evidence will not entitle the Court to give a judgment against the defaulter under this rule, in any *other suit* [5] Nor can the rule *be applied when the default has been once condoned*[6] *nor against all parties when only one* of them was affected by an obligation under this rule [7]

Order 16 Rule 19 — Note 1

[illegible]

summoned as defendant s witness)

Note 2

1. ('23) AIR 1923 Lah 301 (301)

Order 16 Rule 20 — Note 1

1. ('73) 19 Suth W R 183 (184) (Interlocutory application)
('67) 8 Suth W R 64 (64) (Execution proceedings)

[illegible] (Suits [illegible]

2. [illegible]
3. ('18) AIR 1918 Cal 145 (145)
4. ('11) 12 Ind Cas 719 (719) (Mad) (He is therefore, not bound to be present on the adjourned date)
5. ('69) 5 Mad H C R 269 (272)
6. ('68) 4 Mad H C R 231 (233) (Default overlooked — Case adjourned — Rule cannot be enforced on adjourned date)
7. (1864) 1 Suth W R 168 (169, 170)
(1864) 1 Suth W R 25 (25)

O. 16 R. 20
Notes 1-3

A party who is not guilty of *wilful* default is not liable to be visited with the consequences of this rule [8]

2 **"May pronounce"** — The rule is permissive and not mandatory and it is, therefore within the *discretion* of the Court to pronounce judgment against the defaulter [1] though such discretion must be exercised with caution and forbearance [2] It would be a wrong exercise of discretion if the Court penalises the party and prevents him from proving his case[3] merely by reason of the default Where for example there is sufficient evidence on his side[4] or where the opposite party has failed to give any evidence in support of his own case [5] or the claim of the opposite party is *prima facie* unsustainable [6] the Court need not act under this rule But the Court will be justified in acting under this rule against the defaulting party[7] where for example his evidence or his production of any document is material[8] or where there is evidence for the opposite party[9] or where the opposite party is unable to make out his case without compliance of the order by the defaulting party [10]

3 **Appeal** — A decision pronouncing judgment against a party under this rule is an appealable *order* and an appeal lies therefrom [1] See Order 43 Rule 1 (h)

O. 16 R 21

Rules as to witnesses to apply to parties summoned

R. 21. [S 178] Where any party to a suit is required to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as they are applicable

[1877, S 177, *cf* 1859, S 126]

Local Amendments

CALCUTTA

Cancel Rule 21 and *substitute* therefor the following

21 (1) When any party to a suit is required by any other party thereto to

8 (66) 6 Suth W R 247 (248)
(69) 11 Suth W R 110 (112)
(71) 15 Suth W R 253 (254)
(71) 15 Suth W R 269 (269)
(73) 20 Suth W R 165 (166)
[*See* (69) 12 Suth W R 359 (360)]
[*See also* (66) 2 Bom H C R 340 (341) (Refusal to answer — Not of any material question — Judgment not to be against party)]

Note 2

1 (66) 5 Suth W R 89 (89)
(66) 6 Suth W R Act X 86 (86)
(68) 10 Suth W R 174 (174)
(69) 11 Suth W R 5 (5)
(1864) 1864 Suth W R 133 (134)
(69) 1 Beng L R (S N) 10 (10 11)
[*See* (66) 3 Mad H C R 299 (300 301)
2 (68) 4 Mad H C R 231 (233)
(66) 6 Suth W R 247 (248)
(72) 17 Suth W R 563 (564)
3 (70) 2 N W P H C R 67 (68)
(75) 24 Suth W R 314 (314 315)
4 (72) 18 Suth W R 16 (18)
Marsh 467
5 (69) 12 Suth W R 242 (242)
(71) 15 Suth W R 253 (254).
(72) 17 Suth W R 563 (563)
(84) 9 Bom 241 (244) (Rule will not justify the judge in dispensing with proof of the execution of a will in probate cases)
6 (67) 7 Suth W R 46 (47) (A claim barred by limitation on the very face of it)
7 (76) 2 Cal 222 (225)
(71) 16 Suth W R 196 (197)
8 (68) 4 Mad H C R 142 (144) (Non production of a material document)
[*See* (1865) 2 Suth W R Act X 43 (43)]
[*See also* (71) 16 Suth W R 196 (197)]
9 (69) 12 Suth W R 369 (369)
10 (68) 10 Suth W R 158 (159)
(72) 17 Suth W R 550 (551) (The corresponding provision of the Code of 1859 i e S 1 0 does not contain the words present in Court and ...

Note 3

1 (66) 5 Suth W R 270 (270)
Marsh 568
[*See also* (72) 18 Suth W R 16 (18)]

give evidence or to produce a document the provisions as to witnesses shall apply to him so far as applicable **O 16 R 21 Note 1**

(2) When any party to a suit gives evidence on his own behalf the Court may in its discretion permit him to include as costs in the suit a sum of money equal to the amount payable for travelling and other expenses to other witnesses in the case of similar standing

MADRAS

Substitute the following *for* Rule 21

21 (1) When a party to a suit is required by any other party thereto to give evidence or to produce a document the provisions as to witnesses shall apply to him so far as applicable

Rules in the case of parties appearing as witnesses

(2) When a party to a suit gives evidence on his own behalf the Court may, in its discretion permit him to include as costs in the suit a sum of money equal to the amount payable for travelling and other expenses to other witnesses in the case of similar standing

1 Opposite party as a witness — This rule applies only to the case where a party to a suit has been called to give evidence by the other party The Court has therefore no power under this Code to order the travelling expenses of a party who has given evidence in support of his own case [1] See the amendment to this rule made by the Calcutta High Court

The practice of a party not examining himself as his witness and forcing the opposite party to summon him thereby hoping to obtain an opportunity of being cross examined by his own counsel [2] has been severely condemned by their Lordships of the Privy Council The High Courts of Bombay and Lahore have also held that the practice of summoning the opposite party as a witness is equally objectionable [3]

As regards the weight of the evidence of the opposite party summoned as a witness see the undermentioned case [4]

It is the duty of a party who has certain facts within his personal knowledge to appear before the Court at a very early stage of the case as a witness and to give evidence relating to these facts and submit himself to cross examination by the other side [5]

Local Amendment

ALLAHABAD

To Order 16 *add* the following rules

22 (1) Save as provided in this rule and in Rule 2 the Court shall allow travelling and other expenses on the following scale — **O 16 R. 22 (Allahabad)**

(a) in the case of witnesses of the class of cultivators labourers and menials six annas a day

(b) in the case of witnesses of a better class such as zamindars traders pleaders and persons of corresponding rank from eight annas to two rupees a day as the Court may direct and

(c) in the case of witnesses of superior rank including officers of Government in receipt of a salary of not less than Rs 200 a month from three to five rupees a day

Order 16 Rule 21 — Note 1

1 (35) AIR 1935 Mad 44 (44)

2 (10) 5 I L R s 543 (550) 3 Al 101 37 Ind App 1 (P C)

(09) 1 Ind C 1 (P C) 31 All 116 36 Ind App 9 (P C)

3 (09) 3 Ind Cas 45 (45 Bom)

(29) AIR 1929 Lah [illegible] (1)

4 (98) Cal W N (S N) 99 (99)

5 (33) AIR 1933 Lah 243 (244)

O. 16 R. 22 (Allahabad) (2) If a witness demands any sum in excess of what has been paid to him, such sum shall be allowed if he satisfy the Court that he has actually and necessarily incurred the additional expense

Illustration

A post office or railway employee summoned to give evidence is entitled to demand from the party on whose behalf or at whose instance he is summoned the travelling and other expenses allowed to witnesses of the class or rank to which he belongs and in addition the sum for which he is liable as payment to the substitute officiating during his absence from duty The sum so payable in respect of the substitute will be certified by the official superior of the witness on a slip which the witness will present to the Court from which the summons issued

(3) If a witness be detained for a longer period than one day the expenses of his detention shall be allowed at such rate, not usually exceeding that payable under clause (1) of this rule as may seem to the Court to be reasonable and proper

Provided that the Court may, for reasons stated in writing allow expenses on a higher scale than that hereinbefore prescribed

O. 16 R. 23 (Allahabad) 23 In cases to which Government is a party, Government servants whose salary exceeds Rs 10 per mensem and all police constables whatever their salary may be who are summoned to give evidence in their official capacity at a Court situated more than five miles from their head quarters, shall be given a certificate of attendance by the Court in lieu of travelling and other expenses

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ORDER XVII.

ADJOURNMENTS

O. 17 R. 1 **R. 1.** [S. 156.] *(1)* The Court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit.

Court may grant time and adjourn hearing

(2) In every such case the Court shall fix a day for the further hearing of the suit, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment :

Costs of adjournment

Provided that, when the hearing of evidence has once begun, the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded

[1877, S 156; 1859, S. 146.]

Local Amendments

ALLAHABAD

Add the following further proviso

" Provided further that no such adjournment shall be granted for the purpose of calling a witness not previously summoned or named, nor shall any adjournment be utilised by any party for such purpose, unless the Judge has made an order in writing under the proviso to Order 16 Rule 1."

LAHORE

Add the following as sub rule (3) ·

"(3) Where sufficient cause is not shown for the grant of an adjournment under sub rule (1), the Court shall proceed with the suit forthwith "

Synopsis

Other Topics (miscellaneous)

1. Scope of the Rule. — The rule vests in Courts a discretion to grant time to a party *at any stage* of the suit[1] But the application of the rule is limited to adjournments granted at the instance of *parties* and does not extend to those necessitated by rules of the Court[2] Thus, an order made on the settlement of issues fixing a day for the final hearing is not an order under this rule[3] Similarly, orders for adjournment necessitated by delay on the part of Court's officers in the performance of Court's duty are not governed by this rule[4] But the High Court of Allahabad has held in the undermentioned case[5] that this rule applies both to adjournments made at the instance of a party and to adjournments by the Court of its own motion

The rule speaks of the "hearing of the suit' There is a distinction between the hearing of the *suit* and the hearing of *evidence* Thus, the Court may adjourn the hearing of the suit and yet may, under O 13 R 2, refuse to accept documentary evidence which ought to have been but was not produced at the first hearing of the suit, though such hearing resulted only in an adjournment[6]

Neither this rule nor any other rule of this Order applies to execution proceedings[7] *Vide also* Notes under Rules 2 and 3

2. "May adjourn" — Discretion of Court. — The granting of an adjournment to a party to a suit is, under this rule, left to the *discretion* of the Court[1] The discretion is not subject to any definite rules, but should be exercised in a judicial and

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Order 17 Rule 1 — Note 1

1 (16) AIR 1916 Lah 175 (176) (Such time may be granted even at the stage of arguments)
(35) AIR 1935 All 476 (477)

2. (98) 2 Cal W N 490 (491)

3. (91) 14 Mad 88 (93)

4. (29) AIR 1929 Lah 620 (621) (It is the duty of Court to see that service of summons to witnesses is effected — Adjournment caused by non service of such summons on the part of the process department is not an adjournment under Rule 1)

5 (35) AIR 1935 All 210 (211)

6. (19) AIR 1919 Cal 800 (801)

7. (93) 15 All 84 (91) (F B)
(33) AIR 1933 Mad 418 (422) 56 Mad 490 (F B)

Note 2

1. (14) AIR 1914 Sind 105 (106) 8 Sind L R 275
(16) AIR 1916 Lah 175 (176)
(22) AIR 1922 Nag 81 (81) (This is a matter in the discretion of the first Court not in that of appellate Courts)
('21) AIR 1921 Pat 76 (78) 5 Pat L Jour 390 (Apart from an express provision of law the Court is not bound to grant an adjournment)
(11) 10 Ind Cas 748 (748) (Lom) (Parties to a suit cannot by consent obtain an adjournment of the case as a matter of course)
[See (30) AIR 1930 Pat 472 (472 473) 15 Pat 561 (S B) (Non appearance of defendant living at a great distance in another province— Adjournment for a month is proper)]

O 17 R. 1
Notes 2-3

reasonable manner,[2] and upon proper materials[3] It should be exercised after considering the party s conduct in the case[4] and the opportunity he has had of getting ready and the truth and sufficiency of the reason alleged by him for not being ready[5] Where the adjournment is refused reasons should be given for such refusal[6]

The main object of vesting the discretion in the Court is to enable it to prevent a party from improperly *delaying* proceedings and abusing the process of the Court[7] The Court should not therefore be too technical in such matters[8] and unless there is a pressing necessity for proceeding with the case or the application for adjournment is obviously frivolous the adjournment asked for should not be refused[9] But adjournment is improper when it is granted on the intervention of a third party without hearing the plaintiff or his pleader[10]

3. Sufficient cause must be shown — On the one hand an adjournment should not be refused where sufficient cause for the adjournment is shown[1] and on the other it should not be granted even on condition of payment of costs where no sufficient cause exists[2]

What is sufficient cause will depend upon the circumstances of each case[3] Speaking generally, where the necessity for the adjournment is not due to anything for which the party applying for it is responsible[4] or where there has been little or no negligence on his part[5] an adjournment should not be refused But where the party has been wanting in due diligence[6] or is guilty of negligence,[7] an adjournment can be refused

The following are some of the circumstances which have been held to constitute sufficient cause for adjournment —

2 (14) AIR 1914 Sind 105 (106) 8 Sind L R 275
3 (16) AIR 1916 All 138 (139)
(36) AIR 1936 Pat 472 (474) 15 Pat 561 (S B)
4 (16) AIR 1916 Pat 33 (33) 1 Pat L Jour 173
5 (27) AIR 1927 Lah 879 (879)
(28) AIR 1928 Cal 102 (102)

[illegible]

hardly called proper)
(29) AIR 1929 Rang 215 (216) (On the day fixed for hearing case not called until 2 p m —Six witnesses for plaintiff examined and forty witnesses for defendant present—Defendant s advocate appearing in other Court and defendant applying for adjournment but Court refusing—Though defendant has not shown sufficient cause for not being ready with his case Court could use its discretion in allowing adjournment)
9 (89) 1882 All W N 127 (127)

[illegible]

sound)

Note 3

(26) AIR 1926 Mad 944 (944)
(29) AIR 1929 Rang 215 (216)
(35) AIR 1935 All 476 (477)
4 (16) AIR 1916 All 138 (139)

[illegible]

for adjournment)
(72) 18 Suth W R 325 (325 326) (Court not sitting on date of hearing—No date fixed—Court taking it on a future date—Party not knowing the usual practice in such cases—Adjournment ought to be given)
(33) AIR 1933 Nag 336 (337) (Witnesses served but absent as wrong date given in processes—It is good ground for adjournment)
5 (26) AIR 1926 Mad 859 (860)
6 [illegible] 1 Lah 258

[illegible] witnesses not served owing to process fee being paid late)
(16) AIR 1916 Pat 33 (33) 1 Pat L Jour 173 (Do)
(13) 15 Ind Cas 584 (585) (Mad) (Do)
7 (11) 10 Ind Cas 554 (555) 5 Sind L R 49
(32) AIR 1932 Lah 591 (592) 13 Lah 458 (Do

(1) Where a party is not ready for the hearing by reason of his having been taken by *surprise* [8]

(2) Where he could not reasonably know of the date of hearing in sufficient time to get ready for the same [9]

(3) Where his witnesses fail to appear for the hearing owing to non service of summonses on them when such non service is not due to the fault of the party [10] In such cases an adjournment should be granted to enable the party to take steps again for their attendance [11] The mere fact that the process fees were paid late is no ground for refusing adjournment, if the witnesses are absent though served in sufficient time to attend [12] Where the absence of witnesses is due to a *bona fide* mistake on the part of the party, there is sufficient cause for adjournment [13]

(4) Where a party is not ready owing to his lawyer having withdrawn his appearance in the case under circumstances which do not give the party sufficient time to engage another lawyer and enable him to get ready [14]

For cases which have been held *not* to constitute sufficient cause for adjournment, see the undermentioned decisions [15]

Applications for adjournment should not be belated but should be sufficiently early so that no inconvenience may be caused to the Judge or the opposite party [16]

4 "The Court shall fix a day" — Sub-rule (2). — Where a suit is adjourned, the date to which it is adjourned should be fixed by order of Court [1] The date so fixed

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fendants aware of intended departure of witnesses — No steps taken to get them examined before they leave—Court can refuse to wait till their return)

nesses—Witnesses not appearing for no fault of defendant — Adjournment should be given for production of such witnesses)
('25) AIR 1925 Oudh 304 (304)
('33) AIR 1933 Mad 612 (613)
('96) 1896 Bom P J 220) (But not where the summonses could not be served owing to the party's dilatoriness)
('82) 1882 All W N 127 (127) (Where adjourn

for witness paid late — Witness important — Summons returned with report that witness could not be found — Adjournment should not be refused)]

13 (1900) 28 Cal 37 (52 53)
('25) AIR 1925 Bom 105 (108) (But when notice for the discovery and inspection of documents has been posted to the hearing of the suit but on the day so fixed no judgment is given on the notice adjournment of hearing of the suit may be refused)

14 ('08) 35 Cal 799 (802 806) (Two pleaders engaged — Senior ill on the hearing date — Another senior engaged not allowed to argue on ground of want of vakalatnama — Junior not

15 ('27) AIR 1927 Rang 258 (258) (Absence of

('21) AIR 1921 Pat 76 (78) 5 Pat L Jour 390

of pleader—No ground in appeal for adjournment)]

16 ('2?) AIR 1925 Nag 236 (237)

Note 4

1 ('82) 1882 All W N 171 (171) (A mere note by a clerk does not amount to a proper appointment of adjourned date for the hearing of a case)

O. 17 R. 1
Notes 4–6

should be communicated to the parties or their pleaders or to such of them as are present or represented in Court when the adjournment takes place[2] It is not, however, necessary to communicate it to an absent party,[3] for, it is the duty of the pleaders to get acquainted with the date of adjournment[4] See also the undermentioned decision[5]

5. Costs of adjournment — Sub rule (2). — In granting an adjournment under this rule, the Court may, if it thinks fit, direct the party asking for adjournment to pay costs to the other party[1] The sum so awarded should not, however, be in the nature of a penalty or punishment but should be commensurate with the costs which in the opinion of the Court, the party who is ready will have to incur,[2] and sufficient opportunity should be given to the party to obey the order[3] The rule gives the Court power to make an order as to costs only in respect of the costs occasioned by the adjournment and not the costs of the suit generally[4]

An order directing payment of costs can be executed under Section 36

The payment of costs may be made a condition precedent to the adjournment[5] Such a condition need not, however, be express if it is sufficiently obvious from the context[6] If the costs are not so paid a further adjournment may be refused[7] If a suit or appeal is adjourned on condition that it will *stand dismissed* if the costs of the adjournment are not paid within a certain date then on failure of payment of costs within such a date the suit or appeal will stand dismissed[8] Similarly, if the suit is adjourned on condition that if the defendant does not pay the costs ordered before the adjourned date, the defence will be struck off and the suit proceeded with *ex parte* the Court can in case of default strike off the defence[9] But the Court has no jurisdiction to pass such a conditional order of adjournment as to enable it, on default, to pass a decree without evidence, *when such evidence is necessary*[10]

No costs can be awarded against a party not at fault, in the matter of the adjournment[11]

6. Costs in pauper suits. — The High Court of Rangoon has held that even a plaintiff suing in *forma pauperis* may be ordered to pay costs as a condition precedent to his being granted an adjournment[1]

2 (23) AIR 1923 All 79 (80)
(25) AIR 1925 Pat 807 (809) 4 Pat 440 (Signature of the pleaders of both the parties should be by the opposite party)
5 (28) AIR 1928 Rang 306 (307) 6 Rang 561
6 (28) AIR 1928 Mad 786 (788)
(16) AIR 1916 Lah 162 (163)
(19) AIR 1919 Cal 111 (112)

1 (81) 7 Cal 177 (177)
(28) AIR 1928 Rang 306 (307) 6 Rang 561 (Costs

10. (08) 18 Mad L Jour 541 (542)

Note 6
1. (28) AIR 1928 Rang 306 (307) 6 Rang 561

7. Proviso. — Where the trial of the suit has once begun, it should ordinarily go on from day to day The Court has, however, a discretion to adjourn the trial of a part heard case to a day beyond the following day, but in such a case the Court should record its reason therefor [1] In exercising such a discretion the Court should act of itself and not ask for orders of the superior Court in the matter [2] **O. 17 R. 1 Notes 7-10**

8. Appeal — No appeal lies from an order refusing adjournment under this rule,[1] but such a refusal is liable to correction by an Appellate Court in an appeal from the decree in the suit [2] The refusal may be made a ground of attack in appeal, at whatever stage of the hearing of the suit the order of refusal may have been made [3] The exercise of discretion under this rule is not liable to be interfered with in second appeal [4] (*Vide* also Notes under Sections 100 & 101)

9. Review. — An order of adjournment once made cannot be rescinded in review unless for good and sufficient reasons and in the presence of the other side [1]

10. Revision. — An order of adjournment is not liable to revision [1] But where an adjournment is refused and the suit is either dismissed for default or decreed *ex parte*, a revision will lie from an order passed in appeal against an order refusing to set aside the dismissal for default or the *ex parte* decree as the case may be [2] Even in such a case the matter will not be interfered with except for strong reasons [3]

R. 2. [S 157.] Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit. **O. 17 R. 2**

Procedure if parties fail to appear on day fixed

[1877, S. 157; 1859, S. 147.]

Local Amendments

ALLAHABAD

Add the following

"Where on any such day the evidence, or a substantial portion of the evidence, of any party has been recorded and such party fails to appear, the Court may in its discretion proceed with the case as if such party were present, and may dispose of it on the merits

Explanation — No party shall be deemed to have failed to appear if he is either present or is represented in Court by an agent or pleader, though engaged only for the purpose of making an application "

Note 7

1. ('10) 8 Ind Cas 990 (991) (Low Bur)
2. ('15) AIR 1915 Mad 78 (78)

Note 8

1. ('17) AIR 1917 Nag 48 (49)

('35) AIR 1935 All 476 (477)

Note 9

1. ('73) 20 Suth W R 2 (3)

Note 10

O. 17 R. 2
Notes 6-7

failed to appear if he is represented by an agent or a pleader though engaged only for making an application (See also O 3 R 1 and Notes thereto) But, the mere fact that before the case is called on for hearing a pleader files a list of witnesses does not amount to the party being 'represented' at the hearing[3] But, where, however, on the day of the adjourned hearing the pleader reports that he has no instructions and the party is absent and a decree is passed in the suit, the Explanation (added by the Allahabad High Court) does not apply and the decree is an *ex parte* decree[4]

6. "Hearing." — The word "hearing" means the taking of evidence or the hearing of arguments or the consideration of questions relating to the suit which would enable the Judge to finally come to an adjudication upon it, and not the consideration of merely interlocutory matters[1] It refers, so far as this rule is concerned, to the commencement of the hearing on *each day* of the hearing, and cannot be considered to mean that the suit is in a continuous state of being called on for hearing so long as it is being heard[2]

The reader of a Court, when the presiding Judge is on leave, is not competent to pass an order e g, giving a further date which can bind the parties The non appearance of the plaintiff on a date so fixed should not entail the dismissal of the suit for default[3]

See also Notes to Order 9 Rule 9

7. One of the modes directed by Order 9. — As has been seen in Note 1, Order 9 refers to cases of default of appearance of parties at the *first hearing* of a case This rule makes the provisions of Order 9 applicable to cases of such default at *adjourned* hearings

In an old Calcutta case[1] it was held that there was a distinction between Order 9 and this rule and that the provisions of Order 9 relating to the restoration of suits and the setting aside of *ex parte* decrees did not apply to orders passed under this rule This view has however, been overruled and it has been repeatedly held that the said provisions of Order 9 will apply to orders passed under this rule on default of appearance of parties at adjourned hearings Thus —

(i) if the *plaintiff* fails to appear at an adjourned hearing, the Court may make an order dismissing the suit for default under this rule and Rule 8 of Order 9, and the plaintiff may thereupon apply for restoration of the suit under Order 9 Rule 9,[2]

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3 (36) AIR 1936 All 619 (620, 621) (Appearance is appearance at hearing and not before)
[*See also* (35) AIR 1935 Mad 210 (211) 58 Mad

4 (33) AIR 1933 All 652 (654)

Note 6

1 (20) AIR 1920 Pat 595 (597)
(22) AIR 1922 Pat 485 (487, 489) 1 Pat 188
(36) AIR 1936 Lah 280 (281) (Date fixed for return of Commissioner's report is not date of hearing)
2. (27) AIR 1927 Mad 799 (800)
3. ('32) 33 Pun L R 801 (805).

[*See also* (36) AIR 1936 Lah 1000 (1001) (If suit is dismissed it must be restored — 33 Pun L R 804, Foll)]

Note 7

1. (94) 21 Cal 269 (273 274) (Overruled by Full Bench decision in 23 Cal 738)
2 (07) 34 Cal 403 (417) (FB)
(84) 7 Mad 41 (42)
(07) 34 Cal 235 (240)
(09) 1 Ind Cas 741 (741, 742) 36 Cal 189
(22) AIR 1922 All 69 (69)
(38) AIR 1938 Cal 789 (790).

(ii) if the *defendant* fails to appear at an adjourned hearing the Court may pass an *ex parte* decree under this rule and Rule 6 of Order 9, and the defendant may thereupon apply under O 9 R 13 to set aside the *ex parte* decree[3]

(iii) if neither party appears at such hearing the Court may dismiss the suit under this rule and Rule 3 of Order 9, and the plaintiff may thereupon either file a fresh suit or apply to have the dismissal set aside[4]

But the provisions of this rule will not apply to proceedings after decree[5]

8 "Or make such other order as it thinks fit." — In the interpretation of these words three questions arise for consideration, *viz* —

(i) What is the meaning of the expression "such other order as it thinks fit?

(ii) Does the expression include the power to decide the case on the merits? And if so

(iii) When is the Court to proceed under Order 9 and when to proceed to decide the case on the merits?

On the first two questions the High Court of Allahabad[1] had held that the expression "such other order as it thinks fit only empowers the Court to grant an *adjournment* and not to decide the case on the *merits* The High Court of Lahore[2] has also taken the same view An earlier decision of the High Court of Madras[3] was also to the same effect But in a later decision of the same High Court, the power of the Court to give a decision on the *merits* in certain circumstances has been recognized[4] The High Court of Calcutta[5] also recognizes the power of the Court to give a decision on the merits The Allahabad High Court and the Chief Court of Oudh have recognized this power by adding a new clause to this rule

On the third question where the evidence has *not yet begun* it has been held that the Court should either proceed under Order 9 or adjourn the case[6] Where however, the case is *part heard* it would seem that the rule vests in the Court a discretion either to proceed under Order 9 or to give a decision on the merits[7] In cases

('33) AIR 1933 All 907 (908)
('34) AIR 1934 Cal 116 (117) 60 Cal 1331 (An application for review is not the proper remedy)
('94) 20 Bom 380 (382)
('33) AIR 1933 Nag 370 (373) 30 Nag L R 94
('97) 19 All 355 (357)
('98) 2 Cal W N 693 (694 695)
('14) AIR 1914 Cal 360 (361) 41 Cal 956
('37) AIR 1937 Mad 674 (674) (Defendant being

('33) AIR 1933 Nag 234 (235 236) 29 Nag L R 148

5 ('24) AIR 1924 P C 198 (200) 4 Pat 61 51 Ind App 321 (PC)
('32) AIR 1932 Mad 519 (522) (Preliminary decree passed in partition suit—Court cannot subsequently dismiss suit—Decree can be varied only in appeal)

Note 8

O. 17 R. 2
Notes 8-9

where the plaintiff has adduced *all his evidence* or has made out a *prima facie* case, but is absent at the adjourned hearing, the Court should proceed to give a decision on the merits and *not* dismiss the suit for default [8] Where the case *has been closed* but has been adjourned for the Court to refer to a document[9] or to pronounce judgment, and either of the parties fails to appear at the adjourned hearing, the Court should *not* proceed under Order 9 but give a decision on the merits

9. Appeal and revision. — No appeal lies from an order dismissing a suit[1] or appeal[2] for default under this rule It may, however, be open to revision [3]

No appeal lies from an order restoring a suit dismissed for default under this rule [4] Where a Court wrongly held that no application under O 9 R 13 lay against an order under this rule, it was held that it amounted to a refusal to exercise jurisdiction vested in it and hence liable to revision [5]

O. 17 R. 3

Court may proceed notwithstanding either party fails to produce evidence, etc.

R. 3. [S. 158.] Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith.

[1877, S. 158; 1859, S. 148.]

Local Amendments

ALLAHABAD

Amend Rule 3 :

"3. Where any party to a suit, to whom time has been granted fails, without reasonable excuse, to produce his evidence, or to cause the attendance of his witnesses, or to comply with any previous order, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, whether such party is present or not, proceed to decide the suit on the merits "

OUDH

Substitute the following

"3 Where any party *to a suit to whom time has been granted fails*, without reasonable excuse, to produce his evidence, or to cause the attendance of his witnesses, or to comply with any previous order or to perform any other act necessary to the

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8. [illegible]

9. ('71) Select Cases Part X, No 10
('11) 11 Ind Cas 842 (842) (Lah) (Pronounce judgment)

Note 9

1. ('14) 12 Mad L Jour 473 (474).
('34) AIR 1934 Mad 199 (199)
('02) 5 Oudh Cas 294 (296).

('16) AIR 1916 Cal 233 (233)
('25) AIR 1925 Pat 433 (434)
('39) AIR 1939 Nag 213 (213) ILR (1939) Nag 574.

2 ('96) 23 Cal 827 (829)

3. ('25) AIR 1925 Pat 433 (434)
('33) AIR 1933 Nag 234 (236) 29 Nag L R 326. (Conditions of S 115 not satisfied)

4. ('87) 10 Mad 270 (271)
('97) 19 All 355 (357) (No appeal was held to lie [illegible]

5 [illegible]

further progress of the suit for which time has been allowed the Court may notwithstanding such default and whether such party is present or not proceed to decide the suit on the merits

Synopsis

1 Scope and applicability of the Rule
2 Execution proceedings
3 Distinction between Rules 2 and 3
4 " To whom time has been granted "
5 When is party deemed to fail to do the act for which time has been granted
6 " Any other act necessary to the further progress of the suit
7 Remedy of a person aggrieved by an order under this rule

Other Topics (miscellaneous)

Applicability only to cases of default by party given time for acts specified See Notes 1 and 4
Applicability where time granted owing to non service of summons See Note 5
Decision under this rule is res judicata See Note 7
Default by non production of heirship certificate See Notes 3 and 7
Default contemplated by this rule See Note 1 and Notes 3 to 6
Default in payment of costs ordered as condition precedent See Note 7
Disposal to be not for default but on merits See Note 1
Inapplicability to default in filing amended plaint ordered See Note 1
Inapplicability to default in payment of court fee ordered See Notes 1 and 7
Inapplicability to default in supplying several stamps for partition decree as per award See Note 1
No revision See Note 7

1 Scope and applicability of the Rule — This rule does not apply unless time had been granted to a party at *his instance* [1] to do one or other of the three things mentioned in the rule *viz* to produce evidence or to cause the attendance of witnesses or to perform any other act *necessary for the progress of the suit* [2] and unless default had been committed by such *party in doing the act for which the time was granted* [3]

Order 17 Rule 3 — Note 1

1 (84) 1884 Pun Re No 139 p 367

ance of his witnesses the order was not one which could properly be made)

in ordinary course for defendants to file list of witnesses—Failure of defendants to appear and file list on day fixed — Court cannot pass *ex parte* decree under this rule)

2 (91) 1891 All W N 112 (113 114)
(33) AIR 1933 All 907 (909)
(75) 1875 Pun Re No 32 p 96 (When the adjournment was not granted for a party to do anything—Here adjournment was for inspection

by Court of spot)
(76) 1876 Bom P J 250 (251) (Where it did not

(13) 19 Ind Cas 472 (473) (Lah) (A plaint was

(15) AIR 1915 Lah 439 (440) 1915 Pun Re No 51
(17) AIR 1917 Mad 196 (197)
(21) AIR 1921 Bom 458 (458) 45 Bom 1181
(26) 27 Pun L R 714 (715)
(26) 27 Pun L R 592 (593)
(27) AIR 1927 Lah 484 (485)
(27) AIR 1927 Rang 148 (148 149) 5 Rang 839
3 (68) 4 Mad H C R 56 (59)
(08) 35 Cal 1093 (1097)
(15) AIR 1915 Mad 864 (865)
(15) AIR 1915 Lah 439 (439) 1915 Pun Re No 51
(21) AIR 1921 Bom 458 (458) 45 Bom 1181
(2) AIR 19 Pat 485 (488) 1 Pat 188
(28) AIR 1928 Rang 191 (192) 6 Rang 8?3

The rule is *permissive* and not mandatory as is shown by the words 'the Court *may* proceed to decide the suit forthwith'[4] The stringent provisions thereof should not be applied unless the facts do not admit of the application of any other provision of the Code[5] Where for instance there are no sufficient materials on record to give a proper decision the Court should grant a further adjournment of the case[6] Similarly if the facts of the case make the provisions of Rule 2 applicable the Court should act under that rule even though such facts come within the operation of this rule as well[7]

A decision forthwith should nevertheless be a decision on the merits i e on a consideration of such materials as may be necessary and available[8] and does not mean a *summary* decision[9] If in the case of the plaintiff such materials fail to substantiate the claim the suit will be dismissed on *that ground* and *not for the default* committed by him[10] Similarly, a decree passed against the defendant under this rule will not be an *ex parte* decree which can be set aside under O 9 R 13[11]

In a case where the defendant s prayer for adjournment was refused but some time was nevertheless given to him for his evidence and after plaintiff s evidence was over the Court passed a decree without waiting for the time fixed for the defendant s evidence the decree was held to be illegal[12]

The rule applies only *after the suit* has been instituted[13] but not to proceedings *after the decree*[14]

2. Execution proceedings — The provisions of this rule do not apply to execution proceedings[1]

4 ('93) 1893 All W N 84 (84)
('34) AIR 1934 Lah 560 (560)
('35) AIR 1935 All 210 (212)
('19) AIR 1919 Lah 344 (345) 1919 Pun Re No 150
('39) AIR 1939 All 524 (526) (Rule 3 confers d s cretion on Court — D cretion if not properly exercised High Court can interfere)
('39) AIR 1939 All 642 (643) 1939 All L Jour 627 (628)
5 ('04) 1904 Pun L R No 74
[illegible]

[illegible] R 11) contains clear d rect ons as to the procedure in such cases)
6 ('70) 1870 Pun Re No 20 p 65
('33) AIR 1933 Nag 234 (235) 29 Nag L R 3 [illegible]
7 ('93) 1893 All W N 84 (84)
('95) 1895 Pun Re No 87 p 391
('75) 1875 Pun Re No 39 p 96
('19) AIR 1919 Low Bur 139 (140) 9 Low Bur Rul 266

('38) AIR 1938 S nd 142 (144) (Dismissal of suit without reference to materials on record is against the provisions of the rule)
9 ('01) 23 All 462 (464)
('10) 8 Ind Cas 650 (650) (Mad)

('20) AIR 1920 Pat 600 (601) 4 Pat L Jour 2?7
('19) AIR 1919 Lah 344 (345) 1919 Pun Re No 150
('24) AIR 1924 Lah 404 (404)
('27) AIR 1927 Lah 388 (388)
('19) AIR 1919 All 252 (253) 41 All 663
('07) 17 Mad L Jour 81 (82) (A Court has no power to restore an *ex parte* decree once set as de —Where the Court is acting under S 158 the proper course for it is to decide the suit as it stood then before it if the Judge could do so and not to restore the *ex parte* decree once set asid by it)
10 ('27) AIR 1927 Mad 109 (110)
11 ('39) AIR 1939 All 642 (643) 1939 All L Jour 627 (6 9)
12 ('30) AIR 1930 Cal 251 (251)
13 ('25) AIR 1925 Mad 1045 (1046) (Where a plaint is rejected on the ground that the plaintiff has not filed an amended plaint as he was asked to do O 17 R 3 does not apply)
14 ('19) AIR 1919 All 269 (270) (Where an order has been made for preparation of a partition decree in terms of an award and the plaintiff fails to comply with an order of the Court to pay the stamp duty as distinct from court fee his omission to pay is no ground for dismissal of the suit)

Note 2

1 ('94) 18 Bom 429 (432)
('33) AIR 1933 Mad 418 (422) 56 Mad 490 (FB) (Still Court has inherent power to dismiss execu [illegible]

3 Distinction between Rules 2 and 3 — Rules 2 and 3 provide for distinct and different sets of circumstances —

(1) Rule 2 applies where an adjournment has been generally granted and not for *any special* purpose This rule applies where the adjournment has been given for one of the *purposes mentioned in the rule* [1]

(2) Rule 2 does not apply unless the party has *failed to appear* at the hearing Rule 3 will apply where the party is present and has committed the default referred to in the rule [2] A party appearing by pleader and asking for adjournment must in the absence of an effective withdrawal of appearance by the pleader be deemed to have appeared [3] And even if the pleader reports no instructions after refusal of the adjournment it may not under certain circumstances constitute a failure to appear [4]

There might be cases where a default under this rule is coupled with a default under Rule 2 as well Thus a party to whom time has been granted at his instance for doing one or other of the acts mentioned in this rule may not only commit default in the doing of the act but may not appear in person or by pleader In such a case what has the Court to do? On this question the authorities are not uniform It was held by the High Court of Allahabad in the undermentioned cases[5] that in such cases the procedure to be followed is under Rule 2 The decisions of the Oudh Court were

(93) 1893 All W N 12 (13) (Difficulty of applying the provisions to execution proceedings pointed out In this case it was assumed that the order was sake Relief ng different the second

is under O 17 R 2 and liable to be set aside under Order 9)

conduct of suit and towards progress of suit and

app es)

ex parte)]

[*See also* (35) AIR 1935 All 398 (401) (Plaint ff

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O. 17 R. 3 Note 3

conflicting[6] The rule has since been amended by the Allahabad High Court and the Chief Court of Oudh[7] giving a discretion to the Court to proceed to decide the suit on the merits The Bombay[8] and the Madras[9] High Courts are agreed that in such cases the Court should proceed only under Rule 2 The Rangoon High Court has also taken a similar view [10] On the other hand, the Calcutta,[11] Lahore[12] and Patna[13] High Courts take the view that the Court can proceed under this rule if there are materials on record to enable the Court to come to a decision on the merits and that otherwise the Court should proceed under Rule 2 Even according to the Patna High Court, this rule will apply only after the hearing of the case *has commenced* [14] For the views held by the other High Courts see the undermentioned cases [15]

Where the entire evidence is over and the case is posted to a day for the clearing up of a point or for the Court satisfying itself on a particular point before delivering judgment and the parties defaulted on that day and failed even to appear the Bombay

(25) AIR 1925 All 267 (269 270) 47 All 140
(15) AIR 1915 All 139 (140) 37 All 460
[But see (03) 25 All 194 (195)
(26) AIR 1926 All 729 (730) (On the ground of costs directed not having been paid R 3 was held to apply —Difficulty of avoiding Rr 2 and 3 —Recommended to Rule Committee for amendment)]

6 (23) AIR 1923 Oudh 18 (19) (Where the defendant absents himself on the date fixed for evidence in a case the proper procedure for a Court is to proceed under O 17 R 3 and not under O 9 R 6 C P C)
(25) AIR 1925 Oudh 278 (280) (Rule 3 applies where two elements exist viz (1) the adjourment must have been at the instance of the party (2) there must be materials on record to proceed to decide the suit)
(25) AIR 1925 Oudh 337 (346) 28 Oudh Cas 8 (When a plaintiff realising the weakness of his case absented himself on the date fixed for hearing and let the suit be dismissed for default the decision is one under O 9 R 3 even though the Court purported to act under O 17 R 3 and [illegible]

7 (33) AIR 1933 All 41 (41)
(35) AIR 1935 All 210 (212)
(34) AIR 1934 Oudh 171 (174) 9 Luck 586
[illegible]

9 (07) 19 Mad L Jour 473 (474)
(10) 5 Ind Cas 23 (24 25) 33 Mad 241
(18) AIR 1918 Mad 143 (146) 41 Mad 286 (F B) (Overruling 34 Mad 97)
(29) 109 Ind Cas 897 (897) (Mad)

10 (37) AIR 1937 Rang 437 (438) (Plaintiff absent at adjourned hearing—Failure to comply with Court s order to file list of witnesses—Suit dismissed for want of prosecution—Nevertheless dismissal is one under R 2 and can be set aside for sufficient cause)

11 (07) 34 Cal 235 (237 238)
(33) AIR 1933 Cal 412 (414) (Applicability of [illegible] rule)
(08) 35 Cal 1023 (1027)
(18) AIR 1918 Cal 330 (331)
(14) AIR 1914 Cal 360 (361) 41 Cal 956
(33) AIR 1933 Cal 73 (74) (Plaintiff part heard —Plaintiff absent—Dismissal — O 17 R 2 and not R 3 applicable)

12 (24) AIR 1924 Lah 545 (546) 5 Lah 218
(32) AIR 1932 Lah 477 (478)
(19) AIR 1919 Lah 419 (420) 1919 Pun Re No 48 (Where default takes place within the meaning of both Rr 2 and 3 and there is not enough material on record to enable the Court to proceed to judgment the Court should proceed under Rule 2)
(32) AIR 1932 Lah 477 (478) (Party absent—Decree—*Ex parte* decree and not an order under O 17 R 3)
[See however (80) 1880 Pun Re No 41 p 69]

13 (22) AIR 1922 Pat 2 (3) 6 Pat L Jour 313
(18) AIR 1918 Pat 256 (257) 3 Pat L Jour 491 (Rule 3 contemplates material for decision prior to default)
(20) AIR 1920 Pat 589 (590) 4 Pat L Jour 712

14 (28) AIR 1928 Pat 167 (167) 7 Pat 236

15 (10) 6 Ind Cas 851 (852) 3 Sind L R 205 (Where at any adjourned hearing there is no appearance of the plaintiff and there are no [illegible] view mentioned above)
(33) AIR 1933 Nag 234 (235) 29 Nag L R 396 (DB)
(19) AIR 1919 Sind 89 (90) 13 Sind L R 149 (When both the conditions laid down in O 17 Rr 2 and 3 coincide O 17 R 2 should have preference for the consequence of non appearance have a natural precedence over the merits)

and Madras High Courts have held that the Court should proceed under Rule 3 and not under Rule 2[16] **O. 17 R. 3 Notes 3-5**

4. "To whom time has been granted" — Where a party is ordered to be present at an adjourned hearing it does not amount to a granting of time to the party to do any *act* within the meaning of this rule[1] Nor is an adjournment on the joint application of *both the parties* within this rule[2] The rule will not also apply where time was granted not *to the party in default* but to the opposite party[3] Further, the time must have been granted for the doing of an act which it was not the *duty of the Court* to do[4]

Where a party applied for adjournment of the case for getting a transfer thereof and the application was refused but the case was fixed for further evidence, it was held that this rule did not apply as no time can be said to have been granted to the party within the meaning of this rule[5]

When a case comes within the meaning of the language of this rule, the mere fact that the date fixed is a holiday (when the date has been expressly agreed upon) will not prevent the Court from proceeding under this rule[6]

5. When is party deemed to fail to do the act for which time has been granted. — At the adjourned hearing of a case, the witnesses on behalf of a party were absent though served and the party applied for warrants of arrest against them The application was refused Thereupon the pleader reported "no instructions and the suit was dismissed It was held that the dismissal was not one under this rule[1] Where a party takes steps in time but the witnesses are not served owing to delay on the part of the Court s officers to serve them the party cannot be said to have committed default[2] Even if the steps are taken late but there is sufficient time to get the witnesses served the party cannot be said to be in default[3] He will be held to have committed a default if the steps are taken *too late* to get the witnesses served[4]

When a commission has been issued the non return of the commission is no failure on the part of a party[5]

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16 (31) AIR 1931 Bom 111 (113 114)
(14) AIR 1914 Mad 381 (38?)
[*See also* (14) AIR 1914 Mad 116 (116 117) (Where all the evidence has been adduced and an adjournment was granted for the production of a succession certificate for a portion of the claim but the plaintiff failed to produce the same suit ought not to be dismissed under O 17 R 2 but should be disposed of on the merits under Rule 3 in respect of that portion of the claim for which succession certificate was not necessary and in respect of that portion for which the certificate was necessary the suit should have been dismissed)]

Note 4

1 (06) 1906 Pun Re No 30 p 112
(27) AIR 1927 Lah 388 (388)
2 (87) 10 Mad 270 (271)

ments are made by a Court in order to give effect to its processes for compelling the attendance of the witnesses being thus made as much on its own motion as at the instance of the defendant or as at the instance of the plaintiff the case cannot be said to come under Act VIII of 1859 S 148 corresponding to O 17, R 3)
(24) AIR 1924 Lah 404 (404) (Do)
5 (23) AIR 1923 Lah 281 (281)
6 (06) 1906 Pun Re No 111 page 476

Note 5

1 (10) 5 Ind Cas 499 (499) (Cal) (34 Cal 235, Referred)
2 (24) AIR 1924 Lah 272 (272)
(25) AIR 1925 Lah 296 (296)
(17) AIR 1917 Lah 281 (281 282) (When once a party has given the address and other particulars of his witnesses and has also paid the expenses the Court is quite incompetent to proceed against that party if service of summons is not effected nor proceed under Rule 3 for party refusing to pay warrant batta when such order was passed illegally)
3 (25) AIR 1925 Oudh 304 (304)
4 (26) AIR 1926 Lah 27 (28)
5 (27) AIR 1927 All 749 (750)

O. 17 R. 3
Notes 6-7

When time is to be regarded as the essence of the default, the party should have distinct notice of the time within which the act should be done[6]

6. "Any other act necessary to the further progress of the suit." — The act contemplated by this rule is one which must be necessary to the *further progress* of the suit[1] An act which brings about a stay and thus *arrests* the further progress of the suit cannot be interpreted to be an act necessary to the further progress of the suit a Court cannot therefore dismiss a suit for non prosecution because the party failed to produce a stay order within the period allowed[2] As to what are such acts see the cases noted below[3] and as to what are not such acts, see the undermentioned decisions[4] When the act is one ordered without jurisdiction a default in doing it will not attract the provisions of this rule[5]

7. Remedy of a person aggrieved by an order under this Rule. — A decision under this rule is a decree It will operate as *res judicata* and bar a second suit for the same relief[1] *But if the decision is not one properly within the rule* there is no bar against a second suit[2]

The remedy of a party aggrieved by an order under this rule is by way of appeal[3] or review[4] and not revision.[5] It has however, been held in a case before the Lahore High Court that a decree passed under this rule may nevertheless be an *ex parte* decree to which the provisions of Order 9 will apply[6]

Where the order has been *expressly passed under this rule*, the remedy is by way of appeal only even though the Court had no power to proceed thereunder and

6 (90) 13 Mad 510 (511)

Note 6

1 (91) 3 Mad 259 (260)
(98) 21 Mad 403 (404) (*Held* that costs ordered to be paid was not a condition precedent to the hearing)
2 (28) AIR 1928 Nag 24 (26)
3 (12) 17 Ind Cas 294 (295) (All) (Summons to respondent returned unserved and time given to appellants to take further steps)
(30) AIR 1930 Oudh 351 (352) (*Ex parte* order set aside on condition of payment of costs—Costs not paid)
(19) AIR 1919 Low Bur 139 (140) 9 Low Bur Rul 206 (Failure of appellant to take steps for preparation of Bench copies and translations of vernacular documents)
(22) AIR 1922 Pat 252 (255) 6 Pat L Jour 650 (Where a date is fixed for appointment of a guardian of a minor defendant and the plaintiff takes no steps to get the guardian appointed the Court cannot dismiss the suit without giving the plaintiff an opportunity to adduce evidence at least against the original defendants in the suit)
4 (26) AIR 1926 Lah 571 (571) (A dismissal of suit for failure to amend plaint and pay costs of *adjournment cannot fall under O 17 R 3*)
(24) AIR 1924 Lah 608 (608) (Non production of document which ought to be produced in Court by the plaintiff when plaint is presented does not attract operation of O 17 R 3)
(25) AIR 1925 All 604 (605) (Parties agreeing to abide by oath affecting a third person to be taken in particular manner—Oath illegal under Oaths Act—Court fixing date for oath to be taken—Oath not taken on that day—O 17 R 3 does not apply)
5 (25) AIR 1925 Pat 316 (317) (Dismissal of suit for failure to supply defendant with copies in a specific language)

Note 7

1 (12) 13 Ind Cas 172 (173) (Lah)
(87) 10 Mad 272 (272)
(36) AIR 1936 Lah 385 (386)
2 (90) 13 Mad 510 (511) (The decision will not be *res judicata* if the dismissal was due to non payment of court fees when no date was fixed for its payment)
(95) 18 Mad 466 (467, 468) (The dismissal of suit for non production of a certificate of heirship is not a decision under this rule so as to bar a second suit on the same cause of action as *res judicata* as the want of succession certificate prevents an *adjudication on the merits*)
[But see (85) 1885 All W N 168 (169)]
3 (1900) 22 All 66 (78) (FB)
(12) 16 Ind Cas 159 (160) 36 Bom 536
(24) AIR 1924 Mad 43 (44)
(25) AIR 1925 Oudh 278 (280)
(27) AIR 1927 Rang 148 (149) 5 Rang 838
(35) AIR 1935 Mad 210 (211) 58 Mad 817
(33) AIR 1933 All 41 (42)
[*See* (35) AIR 1935 All 398 (402) (Same Court has no jurisdiction to restore the suit on the ground that there was no decision on merits)]
4 (18) AIR 1918 Mad 143 (145) 41 Mad 286 (FB)
(70) 6 Mad H C R 262 (264)
(98) 11 C P L R 94 (94)
(33) AIR 1933 All 41 (42)
5 (11) 12 Ind Cas 603 (604) 34 All 123
6 (23) AIR 1923 Lah 281 (281)

acted erroneously in doing so,[7] and even though Rule 2 may have been mentioned by mistake instead of Rule 3[8]

But, where the rule under which the order is passed is *not stated*, then the Court must go into the matter and decide whether the order is really one under Rule 2 or Rule 3[9] The *substance* of the order will be examined for determining under which rule it falls In such a case, the guiding principle has been laid down to be that unless the facts and circumstances of the case clearly indicate that the order was one under this rule, the order should be treated as one under Rule 2[10] For cases in which the order was treated as one under this rule, see the cases noted below[11] For cases where it was treated as one under Rule 2, see the undermentioned decisions[12]

As to the power of an Appellate Court in such cases, see the cases cited below[13]

As to the effect of an appellate order in such cases see the undermentioned decisions[14]

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8 ('25) AIR 1925 Oudh 495 (495)
9 ('28) AIR 1928 Lah 427 (428)

present)
('33) AIR 1933 Cal 73 (74) (Suit decided on

and no revision)
('26) AIR 1926 All 729 (730) (Date fixed for production of evidence — No evidence produced and costs ordered as condition precedent not paid — Pleader reported no instructions — Order 17 Rule 3)
('29) AIR 1929 All 432 (432) (When a case was called for hearing the plaintiff s pleader appeared

the merits *Held* that the dismissal was one on the merits and not one for default and the decree was appealable)
('20) AIR 1920 Pat 600 (601, 602) 4 Pat L Jour 277

12 ('15) AIR 1915 Mad 16 (17) (Dismissal

432) (Suit adjourned for plaintiff s witnesses—

14 ('07) 10 Oudh Cas 245 (246)

O. 18 R. 1

ORDER XVIII.

HEARING OF THE SUIT AND EXAMINATION OF WITNESSES

Right to begin

R. 1. [S 179 Expln] The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin

[1877, S 179]

Synopsis

1 Right to begin	4 Preliminary issue raised by defendant that the suit does not lie
2 Allegations	5 Preliminary issue that the appeal does not lie
3 Admissions	6 Applicability

Other Topics (miscellaneous)

Application for restitution of mesne profits See Note ?	Two sets of defendants — Counsel when to be heard See Note 1
Facts See Note 3	
Right to begin — Examples See Notes 1 and 2	Unless the defendant admits the facts alleged by the plaintiff See Note 3
Review application—Who is to begin See Note ?	

1 Right to begin — The right to begin follows the *onus probandi* as provided by Sections 101 to 114 of the Evidence Act (I of 1872) As a general rule the plaintiff has to prove his claim by positive proof for the Court has to see whether there is proof of claim before it need enquire as to the truth or otherwise of the defence [1] It is the duty of the parties to prove their case and the Judge has nothing to do with the getting up of a case [2] but the Court has jurisdiction on a proper occasion in the interest of justice to examine *de bene esse*, witnesses upon an *ex parte* application [3] It must be pointed out that evidence need not always be led by the party who has the right to begin and on whom lies the burden it is open to him to sustain the *onus* by facts which he may elicit in cross examination of the other party s witnesses [4] The *onus* is not in all cases and necessarily a question of law How much or what evidence will discharge the *onus* is a question which depends upon the weight attached to the evidence [5] In the case of two sets of defendants whose interests are the same both should address the Court before any evidence is taken [6] but the defendant supporting the plaintiff must begin before the other defendants If on the issue or issues of fact the burden of proof is on the defendant, he has the right to begin [8]

2 Allegations — Under Section 102 of the Evidence Act, the burden of proof rests on the party who would fail if no evidence at all were given on either side [1] Thus

Order 18 Rule 1 — Note 1

1 (’28) AIR 1928 All 688 (688)
(’29) AIR 1923 Lah 41 (49) (Suit to recover property alienated by father — Punjab Customary Law — Plaintiff must prove that his suit is within time)
2 (1910) 1 K B 327 (332) Enoch and Zaretzky In re (Per Moulton L J)
3 (’70) 5 Beng L R 252 (253)
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1 (’30) 13 Mys LJ 60 (65)

in all claim petitions it is the claimant to the attached property that must begin [2] Similarly it is the defeated attaching creditor who challenges the order in the claim petition that must begin [3] For other instances see cases under Sections 101 102 and 103 of the Evidence Act and the undermentioned decisions [4]

3 Admissions — Where the defendant *admits* the facts alleged by the plaintiff but contends that he is not entitled to any part of the relief which he seeks the defendant gets the right to begin Thus in suits on a settled account signed by the defendant [1] or on a bond the execution of which is admitted [2] or in a suit for restitution of conjugal rights by the husband where the marriage is admitted by the wife [3] the defendant has the right to begin But he will not get this right to begin unless *all the material facts* are admitted and not only *some* of them [4]

In a suit to recover possession of land from the tenant by the landlord it is not for the plaintiff to explain the possession of the defendant tenant but for such defendant to show that it necessarily leads to an inference of perpetual tenancy [5] Again where the defendant held certain lands admittedly some at least of which were rent paying the defendant ought to lead some *prima facie* evidence of the fact that the lands were rent free if he wants to plead such a fact [6]

4 Preliminary issue raised by the defendant that the suit does not lie — Where the defendant raises a preliminary objection that the suit does not lie as for instance where he pleads that the suit is barred by *res judicata* he has the right to begin [1] It must be remembered that for the purposes of the preliminary issue the pleadings are taken as true [2]

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2 (68) 11 Suth W R 8 (15) (FB)
(96) 18 All 369 (370)
(88) 16 Cal 473 (479)
(69) 11 Suth W R 422 (423)
3 (1900) 4 Cal W N 151 (152)
(93) 17 Bom 94 (99)

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(95) 19 Bom 803 (806 807) (Do)
(25) AIR 1925 Mad 145 (147) 47 Mad 600 (Applicant for mesne profits of property taken in execution of decree reversed on appeal must beg n)
(1865) 3 Suth W R M sc 25 (25) (Do)
(82) 9 Cal L Rep 1 (3)
(21) AIR 1921 Cal 40 (41) 48 Cal 161 (Refer

(69) 12 Suth W R 529 (531) (Suit for account—Plaintiff to show what sum is due on the account)
(

Note 3

1 (75) 24 Suth W R 202 (203)
2

7 Low
Low Rul 347
4 (80) 7 Cal L Rep 274 (275)
5 (88) 16 Cal 223 (3) 16 Ind App 6 (P C)
6 (81) 6 Cal 666 (668 669)

Note 4

1 (88) 12 Bom 454 (459)
2 (13) 18 Ind Cas 949 (950) 40 Cal 508 40 Ind App 56 (P C)

O 18 R. 1 Notes 5-6

5. Preliminary issue that the appeal does not lie. — Where the respondent in an appeal objects that the appeal does not lie, the appellant must show that he has a right of appeal and has therefore the right to begin[1]

6. Applicability. — The procedure in regard to trial of suits as laid down in this Order is to be followed in proceedings under the undermentioned local and special Acts[1]

O. 18 R. 2

R. 2. [Ss. 179, 180.] *(1)* On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

Statement and production of evidence

(2) The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case

(3) The party beginning may then reply generally on the whole case.

[1877, Ss. 179, 180.]

Local Amendments

ALLAHABAD

For the present Rule 2 *substitute* the following

"2 (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case, indicating the relevancy of each of the documents produced by him, and the nature of the oral evidence which he proposes to adduce and shall then call his witnesses in support of the issues which he is bound to prove.

(2) The other party shall then state his case in the manner aforesaid and produce his evidence (if any) "

MADRAS

At the end of Rule 2, *insert* the following "explanation

"*Explanation* —Nothing in this rule shall affect the jurisdiction of the Court, for reasons to be recorded in writing, to direct any party to examine any witness at any stage "

NAGPUR

Add the following as sub-rule (4) to Rule 2

"(4) Notwithstanding anything contained in this rule the Court may order that the production of evidence or the address to the Court may be in any order which it may deem fit "

Note 5

1. ('84) 8 Bom 287 (289)

Note 6

1. The Madras Survey and Boundaries Act (VIII of 1923), S 23, The U P Court of Wards Act (IV of 1912) S 57 (2) The Bengal Settled Estates Act (III of 1904), S 8 (2), The Bengal Tenancy Act (VIII of 1885), S 107, The Madras Railway Protection Act (IV of 1886) S 15 The Calcutta Rent Act (III of 1920), S 24, The Bengal Court of Wards Act (IX of 1879), S 66

OUDH

For the present Rule 2 *substitute* the following

"2 (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned the party having the right to begin shall state his case, indicating the relevancy of each of the documents produced by him and the nature of the evidence which each of his witnesses is expected to give and shall then produce his evidence in support of the issues which he is bound to prove

(2) The other party shall then state his case in the manner aforesaid and produce his evidence (if any) "

RANGOON

Add the following as a proviso to sub rule (2) of Rule 2

"Provided that the Court may, in its discretion, call upon the other party to proceed under this sub rule before the evidence of the party having the right to begin is complete if it considers that the other party will not be prejudiced by so proceeding and that unnecessary inconvenience and delay will thereby be avoided "

Synopsis

1 Scope of the Rule	3 "The other party."
2 Hearing	4 Arguments

1. Scope of the Rule. — On the day fixed for hearing the party having the right to begin must state his case, but this does not give him the right to introduce new pleas without the leave of Court He has only the right to state his case, as has already been put forward [1] It follows, as a consequence, that the Courts ought not to allow evidence to be given in regard to contentions not raised in the pleadings [2]

It is not the duty of the Court to determine what witnesses shall be examined [3] The parties must select their own witnesses and ask the Court to examine such of them as they tender [4] It is however, in the discretion of the Court to allow further evidence after the case has been closed [5] But in such cases it behoves the Court of first instance to take care that a party whose case has been finished is not permitted, without good reason, to mend that case by fresh evidence after his adversary has succeeded in impeaching it [6] But a document filed with the plaint when tendered after the close of the case, but before the other party began, can be admitted [7]

Where the *onus* is on the plaintiff and he has failed to sustain it successfully the Court will act rightly in dismissing the suit without insisting on the defendant to go into the witness box,[8] but where the burden of proving *some issues* lies on the defendant, the plaintiff is entitled to reserve his case, and produce rebutting evidence after the defendant s evidence on those issues has been recorded [9] Where a witness has been summoned and does not appear, the party calling him is entitled to call upon the Court to compel his attendance [10] but it is not only illegal but improper and unfair to

Order 18 Rule 2 — Note 1

1 ('27) AIR 1927 Lah 615 (615)
2 ('23) AIR 1923 Lah 363 (365)
3 ('70) 13 Suth W R 185 (188)
4 ('66) 6 Suth W R 231 (232)
('08) 4 Nag L R 129 (131)
('04) 1904 Pun Re No 61 p 175
('69) 11 Suth W R 218 (218)
('70) 13 Suth W R 185 (188)
[*See* ('34) AIR 1934 Lah 317 (317)
('69) 11 Suth W R 99 (99)]
5 ('69) 12 Suth W R 455 (456)
6 ('67) 8 Suth W R 461 (463)
('70) 14 Suth W R 493 (495 496)
7 ('06) 33 Cal 1345 (1348)
8 ('13) 21 Ind Cas 96 (102) (Mad)
[**But see** ('66) 5 Suth W R 179 (179)]
9 ('11) 12 Ind Cas 862 (864) 1911 Pun Re No 66
10 ('02) 6 Cal W N 548 (550)

O. 18 R 2
Notes 1-4

permit the defendant at the very outset of the case to be put into the witness box nominally as a plaintiff's witness It is certainly in accord with justice that a party who has to defend a suit should hear what his opponent has to say before he himself is called upon to answer [11]

Reasonable time must be given for either party to produce his evidence and the Court will exercise sound discretion if it allows the party to produce his evidence at any time before it proceeds to judgment [12] Thus when the defendant's request for time to produce his witnesses was refused but the defendant produced them on the day the case was posted for judgment, it was held that it was a wrong exercise of discretion not to examine the witnesses before proceeding to judgment [13]

A pleader is bound to call the witnesses his party wishes to examine and any threat on the part of the Court to report to the High Court the conduct of the pleader in examining such witnesses is highly improper [14] Where a counsel refrains from calling evidence in deference to some observations from the Bench the Appellate Court ought not to reverse the decree of the first Court without allowing such evidence to be given which the first Court thought unnecessary [15]

A Court is bound to allow the defendant to produce his evidence although it has already formed an opinion in favour of the defendant from the plaintiff's evidence itself The Court is not entitled to dispose of the suit without calling on the defendant [16]

2 Hearing — See Notes to O 8 R 1 and also the undermentioned cases [1]

3. "The other party" — The other party means the party other than the one who has the right to begin and has begun Where there are two sets of defendants and their interests are practically the same the rule is that after the plaintiff's case has been closed both the defendants should address the Court before any evidence is given by either set of defendants [1]

But where a defendant or a set of defendants support the plaintiff's case wholly or in part the former must immediately follow the plaintiff and call his or their witnesses and then only can the other set of defendants who differ from the plaintiff be called upon to address the Court and produce their evidence [2]

4 Arguments — It is in the option of the parties to argue their case when the evidence has been closed and it is for them to decide whether they will exercise that privilege or not[1] and a Court delivering judgment without hearing arguments is not acting irregularly where the parties having had the opportunity did not choose to make use of it [2] Where new cases are quoted in reply *the other party will be allowed* to address the Court on such new cases and on the points not argued before the Court previously [3]

A Judge who has not heard any part of the evidence and before whom no part of the proceedings has taken place is not justified in proceeding to judgment until

11 ('08) 1908 Pun Re No 110 p 528
[**See however** ('02) 26 Bom 392 (395 396)]
12 ('93) 20 Cal 740 (743 745)
13 ('93) 20 Cal 740 (743 745)
14 ('01) 3 Bom L R 562 (563)
[*See* ('33) AIR 1933 Bom 303 (304)]
15 ('33) AIR 1933 Bom 303 (304) (Judges ought not to stop the parties from calling such evidence as they think proper unless the evidence is manifestly unnecessary)
16 ('12) 17 Ind Cas 87 (87) 40 Cal 119

Note 2
1 ('25) AIR 1925 All 98 (99)
('20) AIR 1920 All 207 (208) 42 All 542

Note 3
1 ('02) 29 Cal 32 (32)
2 ('08) 32 Bom 599 (600 601 602)

Note 4
1 ('20) AIR 1920 Lah 246 (247)
2 ('24) AIR 1924 Lah 107 (107 108) 4 Lah 304
3 ('83) 9 Cal 14 (22)

he has given the parties an opportunity of appearing before him and stating their case, a judgment so pronounced is bad in law and must be set aside[4] **O. 18 R. 2 Note 4**

The practice of submitting written arguments by pleaders is not proper and in any case, must first be submitted to the other side and then to the Court[5]

A party must be represented by *one* pleader or set of pleaders and cannot be represented *severally* by different pleaders.[6]

Local Amendment

CALCUTTA

Insert the following as Rule 2A

"2A Notwithstanding anything contained in clauses (1) and (2) of Rule 2, the Court may for sufficient reason go on with the hearing, although the evidence of the party having the right to begin has not been concluded, and may also allow either party to produce any witness at any stage of the suit" **O. 18 R. 2A (Calcutta)**

R. 3. [S. 180.] **Evidence where several issues.** Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case. **O. 18 R. 3**

[1877, S. 180.]

Local Amendments

ALLAHABAD

For the present Rule 3, *substitute* the following

"3 (1) Where there are several issues the burden of proving some of which lies on the other party, the party beginning may, at his option, either state his case in the manner aforesaid and produce his evidence on those issues or reserve the statement of his case and the production of his evidence on those issues by way of answer to the evidence produced by the other party, and, in the latter case, the party beginning may state his case in the manner aforesaid and produce evidence on those issues after the other party has produced all his evidence

(2) After both parties have produced their evidence, the party beginning may address the Court on the whole case, the other party may then address the Court on the whole case, and the party beginning may reply generally on the whole case, provided that in doing so he shall not, without the leave of the Court, raise questions which should have been raised in the opening address'

OUDH

Same is that of the Allahabad High Court, above, except that sub-rule (2) is numbered as (3) and the following is inserted as sub rule (2)

4. ('04) 1904 Pun Re No 91, p 345 ('28) AIR 1928 Mad 1130 (1131)
5. ('21) AIR 1921 Cal 426 (428)
6 ('71) 8 Bom H C R A C 241 (244)

O. 18 R. 3
Note 1

"(2) The substance of the statement of the case provided for by Rules 2 and 3 (1) above shall be taken down by or under the personal direction and superintendence of the Judge and shall form part of the proceedings"

1. Scope of the Rule. — Where there are several issues the burden of proving some of which lies on the other party, the party beginning may at his option —

(1) produce his evidence on those issues, or

(2) reserve it by way of answer to the evidence produced by the other party

In the "latter' case, the party beginning may, after the other party has produced his evidence, produce his rebutting evidence [1] It is in the discretion of the Court to give adjournments for the purpose [2] A party trying to prove a point not raised in his pleadings cannot object to the opposite party tendering rebutting evidence as to that point [3]

O. 18 R. 4

R. 4. [S. 181.] The evidence of the witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge.

Witnesses to be examined in open Court

[1877, S 181; 1859, S. 172.]

Synopsis

1 **Examination of witnesses**
2 **Open Court**
3 **Power of the Appellate Court to examine witnesses**

Other Topics (miscellaneous)

Evidence of the witnesses in attendance See Note 1
Examination to be on oath See Note 2
Pardanashin woman and exempted persons — Examination in open Court See Note 2
Waiver of rules of procedure for examination See Note 2
Witnesses not examined properly — Court should interfere See Note 2

1. Examination of witnesses. — A party has a right to have *all* the witnesses tendered by him examined by the Court [1] The Court cannot ordinarily refuse to examine them[2] on the ground that their names do not find a place in the witness list,[3] or on the ground that they were not present at the previous hearing [4] But if it clearly appears that the object of summoning them is merely to obstruct or

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Order 18 Rule 3 — Note 1

1 [illegible]

2. (26) AIR 1926 Nag 486 (487)
3 (14) AIR 1914 Oudh 52 (65)

Order 18 Rule 4 — Note 1

1 ('67) 8 Suth W R 364 (365)
(71) 16 Suth W R 109 (110)
(73) 20 Suth W R 203 (204)
(75) 23 Suth W R 63 (64)
(88) 1888 Bom P J 210
('85) 9 Bom 146 (149, 150)

2. (67) 8 Suth W R 505 (505)
(1841) 2 Moo Ind App 424 (427) (P C)
(87) 9 All 339 (340)
(95) 17 All 29 (32)
(96) 19 Mad 375 (381) (Case under the Criminal Procedure Code)
(69) 12 Suth W R 229 (229)
('26) AIR 1926 Lah 450 (450)
('34) AIR 1934 Lah 317 (317)

3 (69) 12 Suth W R 455 (456)

4. (97) 10 C P L R 92 (93)
(93 1900) 1893 1900 Low Bur Rul 398.

delay justice the Court can refuse to examine them[5] and whenever it so refuses it must record its reasons for such refusal [6]

Where the witness to be examined is an infant or a person of advanced age the Court may hold an examination on the *voir dire* as to his competency to give evidence [7] But this examination must be held before the actual examination commences [8] Courts of course have always the power to examine any of the parties to the suit and compel their attendance [9] It is also in the discretion of the Court to allow a party to call further evidence after he has closed his case [10]

The examination of a witness is not complete without any opportunity being allowed for his cross examination by the other side [11] A court cannot fix any time limit for cross examination[12] though it has full power to prevent any abuse of the rights of cross examination [13] A co defendant who is represented by a separate vakil may cross examine another defendant in order to discredit the evidence given by him in plaintiff s favour [14] Refusal by the trial Court to examine the witnesses tendered by a party before delivery of judgment may amount to a substantial error or defect of procedure which may have affected the decision of the case on the merits and is a ground for second appeal under Section 100 clause (c) [15]

2 **Open Court** — The parties have a right to have the evidence of witnesses taken in *open Court i e publicly* [1] All witnesses should without distinction give their evidence from the witness box it is not desirable that anyone should give his evidence on the *dais* by the side of the Judge [2] The following may be deemed to be exceptions to the rule that the examination of witnesses should be in open Court —

(1) *Pardanishin* women and other persons who are exempted from personal appearance in Court should not be examined in open Court [3] See also Sections 132 and 133 *ante*

(2) Where witnesses are examined on commission [4]

The Court should not as a rule interfere in the examination of the witnesses except where it is found that they are not properly examined through the incompetency of those who have the management of the case [5]

The Oaths Act provides imperatively that no person shall testify except on *oath* or *affirmation* As to the effect of the omission to take the oath or affirmation see the Oaths Act and the undermentioned cases [6]

5 (72) 17 Suth W R 172 (173)
(74) 21 Suth W R 196 (198)
(1859) 6 Moo Ind App 237 (247) (P C) (Witnesses should not be examined in the absence of the parties)
(25) AIR 1925 Mad 381 (381)
8 (07) 11 Cal W N 51 (53)
[But see (14) AIR 1914 Cal 276 (279) 41 Cal 406]
9 (68) 10 Suth W R 280 (282)
10 (67) 8 Suth W R 461 (463)
11 (68) 9 Suth W R 587 (588) (Unless consented to)
(06) 30 Bom 523 (535 536)
(71) 16 Suth W R 257 (258)
12 (10) 8 Ind Cas 418 (421) (Oudh)
13 (22) AIR 1922 Oudh 124 (128)
14 (1863) 1 Mad H C R 456 (456)
15 (93) 20 Cal 740 (743 744)

Note 2

1 (28) AIR 1928 Pat 438 (439)
2 (21) 63 Ind Cas 461 (462) (Lah)
3 (83) 5 All 92 (94) (Case under the Criminal Procedure Code)
(94) 21 Cal 588 (589 590) (Do)
4 See Order 26 below
5 (68) 1 Beng L R (S N) 20 (c)
[See (36) AIR 1936 Lah 183 (185) (Court
[See also (36) AIR 1936 Lah 887 (890) (Judge can put questions to witnesses in order to get at truth)]
6 (88) 10 All 207 (21) (S 6 of the Oaths Act

O. 18 R 4 Notes 2-3 The parties may agree to the evidence being given in a *particular manner* and such consent will bind them[7] except where the evidence amounts to nothing or is *manifestly untrue*[8] or where the evidence is *legally inadmissible*[9]

3 **Power of the Appellate Court to examine witnesses** — Where the Court of first instance refuses to examine the witnesses tendered by a party, they may be examined by the Appellate Court[1] But the objection to the rejection of witnesses must be taken at the earliest possible opportunity and if not so taken, the High Court will refuse to interfere[2] It has been held that the procedure of an Appellate Court calling for an expert witness to prove the handwriting of the attestors is illegal[3] See also Order 41 Rules 27 and 33 *infra*

O. 18 R 5 ᵃR. 5. [S 182] In cases in which an appeal is allowed the evidence of each witness shall be taken down in writing, in the language of the Court, by or in the presence and under the personal direction and superintendence of the Judge, not ordinarily in the form of question and answer, but in that of a narrative, and, when completed, shall be read over in the presence of the Judge and of the witness, and the Judge shall, if necessary, correct the same, and shall sign it.

How evidence shall be taken in appealable cases

[1877, S 182, 1859, S 172]

a The provisions of Rules 5, 6 7, 8 9 11 13 14 15 and 16 of this Order so far as they relate to the manner of taking evidence do not apply to the Chief Court of Oudh *Vide* Oudh Chief Courts Act (U P IV of 1925) S 16 (2)

Local Amendment

RANGOON

The following shall be *substituted* for Rule 5

5 In cases in which an appeal is allowed the evidence of each witness shall be taken down in writing in the language of the Court or in English by or in the presence and under the direction and supervision of the Judge not ordinarily in the form of question and answer but in that of a narrative and when completed shall be read over

is imperative and not merely directory)
(78) 2 Cal L Rep 478 (479) (Refusal to make the oath or solemn affirmation in a particular manner — Presumption)
(92) 14 All 141 (145) (Do)
(98) 22 Bom 680 (683) (Do)
(74) 21 Suth W R Cr 31 (32)
(75) 14 Beng L R 294 (296 297)
(1864) 2 Mad H C R 246 (247) (Member of the Church of England is not exempted from taking an oath in a Court of justice in India)
(1862) 1 Mad H C R 99n (Mahomedan witness though suffering from a disease which disqualifies him from taking an oath on the koran must be sworn in the regular way or not at all)
(68) 10 Suth W R 294 (294)
(98) 22 Bom 281 (283) (Offer to be bound by oath)
(1900) 27 Cal 229 (231)
(96) 18 All 46 (49)
(99) 22 Mad 234 (236 237)
(08) 31 Mad 1 (3)
7 (06) 30 Bom 109 (112)
(15) AIR 1915 Mad 762 (763)
(15) AIR 1915 Mad 793 (794 795) 38 Mad 160
[See however (70) 13 Suth W R 108 (109)]
8 (69) 11 Suth W R 110 (111)
9 (1865) 2 Suth W R 252 (253 254)
(66) 5 Suth W R 234 (234)

Note 3

1 (81) 6 Cal 608 (611)
(98) 22 Bom 253 (254)
2 (0) 2 All H C R 209 (210)
(70) 2 N W P H C R 206 (206 207)
(82) 6 Bom 524 (527)
(66) 6 Suth W R 215 (215)
(66) 6 Suth W R 324 (324)
(69) 11 Suth W R 289 (290)
(69) 12 Suth W R 363 (364)
(71) 15 Suth W R 87 (89)
(70) 14 Suth W R 419 (420)
3 (68) 9 Suth W R 83 (89)

or translated to the witness by such person as the Judge may direct, provided that the Judge may, if he thinks fit, require the evidence to be read over in his own presence

Such person shall, after reading over the deposition to the witness, append a certificate at the foot of the deposition form as follows

Read over
——— by me in Burmese or (as the case may be) and acknowledged
Interpreted
correct

(Signature)
Interpreter or Clerk

The Judge shall, if necessary, correct the deposition and shall sign it

Synopsis

1. Scope and applicability of the Rule
2. Effect of evidence taken in the absence of parties.
3. "Shall be read over"
4. Signature of witness
5. Signature of Judge.

1. Scope and applicability of the Rule. — This rule applies to all proceedings[1] except that it does not apply to Chartered High Courts[2] and to the Chief Court of Oudh[3] in the exercise of their original jurisdiction and to Courts constituted under the Provincial Small Cause Courts Act[4] But it applies to proceedings conducted by commissioners for partition appointed by the original side of the High Court[5] See Order 26 Rule 17

An objection that the depositions of witnesses were not taken in the manner prescribed must be taken at the earliest possible opportunity and not in second appeal[6]

The notes by a Munsif as to the *age* or *description* of the witness in the heading of the deposition do not form part of the evidence[7]

2. Effect of evidence taken in the absence of parties — The examination of a material witness in the absence of the other party is a material irregularity which will vitiate the procedure if objection to the same is taken at the proper time[1] Where no opportunity was given to a party to examine his witness, or to rebut the evidence or cross examine the witness of the opposite party then that evidence is not admissible for or against him unless consented to[2] Where the defendant fails to appear without lawful excuse, the Judge may at once enter judgment against the defendant, but where the Court takes the evidence of the plaintiff, the defendant who has appeared is entitled

Order 18 Rule 5 — Note 1

1. ('34) AIR 1934 Cal 737 (739) 61 Cal 488 (Witness examined by a commissioner for partition appointed by the original side of High Court) ('71) 15 Suth W R O C 16 (18) (Insolvency proceedings) ('67) 5 Bom H C R O C 63 (64) (Witness examined the Land Acquisition Act) ('75) 21 Suth W R 162 (162) (Probate proceedings) ('23) AIR 1923 Oudh 119 (120) (Witness examined on commission)

Note The procedure of this rule is applicable to proceedings under the Bengal Land Registration Act II of 1906 (S 53A) and the Madras, Ganjam and Vizagapatam Act XXIV of 1839 (R 16)

2. See Order 49 Rule 3
3. See the U P (Oudh Courts) Act IV of 1925, S 16 (2) So also Rules 6 to 9 11, 13 to 16 of this Order are not applicable
4. See O 50 R 1 (b) [*See also* ('25) AIR 1925 Nag 412 (413, 414)]
5. ('34) AIR 1934 Cal 737 (739) 61 Cal 488
6. ('72) 18 Suth W R 112 (113)

Note For observations on the improper manner in which evidence is generally taken by the lower Courts *see* ('82) 4 All 249 (250 251)

7. ('19) AIR 1919 Cal 502 (503) ('04) 26 All 104 (118) 31 Ind App 38 (P C)

Note 2

O. 18 R. 5 Notes 2-5

to cross examine him[3] The admission of a fact dispenses with the proof thereof and such portion of the statement as is an admission can always be treated as evidence without the whole statement being treated as such[4]

3 **"Shall be read over"** — There is a conflict of opinion as to whether a deposition *not read over* to the witness is admissible in evidence against him in a subsequent *trial for perjury or forgery* The High Courts of Calcutta[1] Lahore[2] and Madras[3] have held that it is not while the Judicial Commissioner s Court of Nagpur has held that it is admissible[4] But the fact that the deposition was read over by the *witness himself*[5] or that the reading over of the deposition was not in the *presence* of the Judge[6] or that a certificate as to the reading over to the witness was not appended by the Judge[7] or the non observance of some other *formality*[8] will not render the *evidence inadmissible in evidence*

4 **Signature of witness** — There is *no obligation upon witnesses to affix their* signature or mark after their evidence is read over to them It is however generally the practice to have their signatures[1] But see Rule 16 *infra* where such signature is obligatory

5 **Signature of Judge** — It is essential that the Judge should sign the deposition so read over to the witness A prosecution for perjury on the basis of such deposition *cannot otherwise be sustained*[1]

O. 18 R. 6

R. 6. [S 183] Where the evidence is taken down in a language different from that in which it is given, and the witness does not understand the language in which it is taken down, the evidence as taken down in writing shall be interpreted to him in the language in which it is given

When deposition to be interpreted

[1877, S 183, 1859, S 172]

Synopsis

1 Applicability | 2 Shall be interpreted See Note 3 to Rule 5

1 **Applicability** —This rule does not apply to the Chartered High Courts (see O 49 R 3) *Nor does it apply to cases governed by* S 19 *of the Oudh Laws Act*[1] But it applies to proceedings conducted by commissioners for partition appointed by the Court on the original side of the High Court[2]

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3 ('69) 2 Beng L R App 12 (13)
4 ('71) 16 Suth W R 257 (258)

Note 3

1 ('24) AIR 1924 Cal 705 (707 709) 51 Cal 236 (Dissenting from the observations obiter in A I R 1918 Cal 289)
('14) AIR 1914 Cal 789 (790) 42 Cal 940
('81) 6 Cal 762 (763)
('08) 12 Cal W N 845 (847)
2 ('17) AIR 1917 Lah 192 (193) 1917 Pun Re Cr No 12
3 ('19) AIR 1919 Mad 45 (47) 42 Mad 561
('05) 28 Mad 308 (309 310)
4 ('23) AIR 1923 Nag 39 (40) 18 Nag L R 192
5 ('19) AIR 1919 Cal 514 (515) 46 Cal 895
6 ('10) 7 Ind Cas 414 (415) 34 Mad 141
('18) AIR 1918 Mad 834 (834)
7 ('05) 2 Cal L Jour 496 (497)
(See ('70) 2 N W P H C R 241 (243))
8 ('29) AIR 1929 Cal 78 (80) 55 Cal 1084 (Dictation to typist)
('19) AIR 1919 Lah 348 (349) 1918 Pun Re Cr No 28

Note 4

1 ('12) 16 Ind Cas 521 (521 527) 1912 Pun Re Cr No 8

Note 5

1 ('81) 6 Cal 762 (763)

Order 18 Rule 6 — Note 1

1 ('31) AIR 1931 Oudh 385 (385)
2 ('34) AIR 1934 Cal 737 (739) 61 Cal 468

2. "Shall be interpreted" — See Note 3 to Rule 5 above | O 18 R. 6 Note 2

Local Amendment

RANGOON

The following shall be *inserted* as Rule 6A

"6A Where there are no interpreters paid by Government, and it is found necessary to employ an interpreter in a civil case he shall be paid such fee ordinarily not exceeding Rs 2 *per diem* as the Court may fix The fee shall be advanced by the party at whose instance the interpreter is required and shall be treated as costs in the case All payments of interpreter s fees shall be made through the Court and duly entered in Bailiff s Register II | O 18 R 6A (Rangoon)

Evidence under Section 138

R. 7. [S 185A (3)] Evidence taken down under section 138 shall be in the form prescribed by rule 5 and shall be read over and signed and, as occasion may require, interpreted and corrected as if it were evidence taken down under that rule | O. 18 R. 7

Memorandum when evidence not taken down by Judge

R. 8. [S 184] Where the evidence is not taken down in writing by the Judge, he shall be bound, as the examination of each witness proceeds, to make a memorandum of the substance of what each witness deposes, and such memorandum shall be written and signed by the Judge and shall form part of the record | O. 18 R. 8

[1877, S 184, 1859, S 172]

Local Amendments

OUDH

Add the following proviso

"Provided that such memorandum shall not be necessary in the case of a Judge who has obtained the previous sanction of the Chief Court to dictate evidence in open Court

RANGOON

Rule 8 shall be deleted

Synopsis

1 **Applicability**
2 **Memorandum of evidence**
3 **Effect of non compliance**

1 **Applicability.** — This rule does not apply to Chartered High Courts see Order 49 Rule 3 For a local repeal of this rule and Rules 9 and 13 of this Order, see the undermentioned Act [1]

Order 18 Rule 8 — Note 1

1 The C P Laws Act (II of 18"9) Section 11

O. 18 R. 8
Notes 2-3

2. Memorandum of evidence — Where a Judge does not take down the whole of the evidence himself, he is bound to make a memorandum of evidence and record every material answer made by the witness in the examination in chief, in the cross examination and in reply to questions by the Court It should be written down in consecutive sentences[1] Where there is a conflict between the Judge s memorandum and the recorded deposition of a witness, the Court must be guided by the latter and not the former[2] In cases governed by this rule, there must be either one or two records of evidence If it is on record it must be in Judge's *own handwriting*, if otherwise, there must be a memorandum of evidence[3]

3. Effect of non-compliance — Failure to make a memorandum of evidence does not vitiate the proceedings if evidence is taken down *in the language* in which it is given[1]

O. 18 R. 9

R. 9. [S 185] Where English is not the language of the Court, but all the parties to the suit who appear in person, and the pleaders of such as appear by pleaders, do not object to have such evidence as is given in English taken down in English, the Judge may so take it down

When evidence may be taken in English

[1877, S 185, 1859, S 172]

1. Applicability — This rule corresponding to Section 185 of the Code of 1877, does not apply to enquiries under the Central Provinces Laws Act[1]

O. 18 R. 10

R. 10. [S 186] The Court may, of its own motion or on the application of any party or his pleader, take down any particular question and answer, or any objection to any question, if there appears to be any special reason for so doing

Any particular question and answer may be taken down

[1877, S. 186, 1859, S 172]

1 Scope of the Rule — This rule does not apply to Chartered High Courts see Order 49 Rule 3

Note 2

is necessary)
(72) 9 Bom H C R 307 (309 310)
(68) 5 Bom H C R O C 63 (64)

(86) 1886 Pun Re No 45 page 85

Note 3

1 (68) 9 Suth W R Cr 69 (69)

Order 18 Rule 9 — Note 1

1 See The Central Provinces Laws Act (XX of 1875) Section 11 inserted by Central Provinces Laws (Amendment) Act (II of 1879)

R. 11. [S. 187.] Where any question put to a witness is objected to by a party or his pleader, and the Court allows the same to be put, the Judge shall take down the question, the answer, the objection and the name of the person making it, together with the decision of the Court thereon. **O. 18 R. 11**

Questions objected to and allowed by Court.

[1877, S. 187 ; 1859, S. 172.]

Synopsis

1. Scope and applicability | 2 Objection, when to be taken

1. Scope and applicability. — This rule does not apply to Chartered High Courts see Order 49 Rule 3 When a question put to a witness is objected to, the proper course for the Court is to allow the question to be recorded and then give its ruling whether such question is allowed or disallowed It is improper for the Court to allow the question to be put to the witness subject to objection [1]

2. Objection, when to be taken. — Objection as to admissibility of evidence has to be taken in the Court of first instance and if not so done, the Appellate Court will not entertain any such objection[1] and where evidence of doubtful *admissibility* has been loosely received, the Privy Council will deal with the case as it appears to it just and will not allow any mere technical objection to prevail as to its admissibility [2] But an erroneous omission to object to irrelevant evidence will not make it relevant and will therefore be disregarded [3]

R. 12. [S 188] The Court may record such remarks as it thinks material respecting the demeanour of any witness while under examination **O. 18 R. 12**

Remarks on demeanour of witnesses

[1877, S 188; 1859, S 172]

1. Remarks on demeanour. — Under this rule the Court may record such remarks about the demeanour of a witness as it thinks fit and the same cannot be expunged under the cloak of an amendment [1] But where a witness stated his age to be 24 but the Judge made a note in his deposition that his age "appeared to be 18 or 19 it was held that the note could not be considered to be evidence in the case [2] The Court's belief that the evidence is biassed, is not a valid ground for refusing to record it [3] The evidence of a defendant called to give evidence on the plaintiff s side cannot be judged under different principles merely because he is a defendant [4]

Order 18 Rule 11 — Note 1

1 (36) AIR 1936 Lah 183 (185)

Note 2

1 (68) 10 Suth W R 90 (91)

(1846) 4 Moo Ind App 259 (284 285 286) (P C)

[illegible] P C)

(01) 31 Cal 155 (157 158)

(01) 28 Cal 14? (144 146)

(26) AIR 19?6 Cal 752 (754) (Final decision on objection must be recorded before Court proceeds [illegible]

[illegible]

Order 18 Rule 12 — Note 1

1 (2?) AIR 1922 All 107 (110) 44 All 401

2 (19) AIR 1919 Cal 502 (503)

3 (23) AIR 1923 Nag 58 (60)

4 (97) 2 Cal W N 99 [illegible]

O. 18 R. 13

R. 13. [S. 189.] In cases in which an appeal is not allowed, it shall not be necessary to take down the evidence of the witnesses in writing at length; but the Judge, as the examination of each witness proceeds, shall make a memorandum of the substance of what he deposes, and such memorandum shall be written and signed by the Judge and shall form part of the record.

Memorandum of evidence in unappealable cases.

[1877, S. 189; 1859, S. 172.]

1. Scope of the Rule. — A Judge is bound under this rule, to make a memorandum of the substance of what each witness deposes[1] A short abstract of the whole evidence[2] or a mere reference to the evidence in the judgment[3] is not sufficient compliance with the rule

This rule does not apply to Chartered High Courts see O 49 R 3 As to the applicability of this rule to enquiries under various local or special enactments, see the undermentioned Acts[4]

O. 18 R. 14

R. 14. [S. 190.] *(1)* Where the Judge is unable to make a memorandum as required by this Order, he shall cause the reason of such inability to be recorded, and shall cause the memorandum to be made in writing from his dictation in open Court.

Judge unable to make such memorandum to record reasons of his inability.

(2) Every memorandum so made shall form part of the record.

[1877, S. 190; 1859, S. 172.]

Local Amendments

OUDH

In sub rule (1), between the words "is" and "unable", *insert* "not authorized by the Chief Court to dictate and is"

RANGOON

In sub-rule (1) for the words "this Order" the word and figures "Rule 13" shall be substituted.

1. Applicability. — This rule does not apply to Chartered High Courts: see Order 49 Rule 3 (4)

Order 18 Rule 13 — Note 1

1. ('96) 1 Cal W N 223n (229n, 230n)
('21) AIR 1921 Cal 658 (558)
('16) AIR 1916 Mad 547 (548)
('38) AIR 1938 Pesh 46 (47) (Small cause suit)
2. ('05) 9 Cal W N 418 (419).
('05) 9 Cal W N 420 (421)
3. ('38) AIR 1938 Pesh 46 (47)
4. The Orissa Tenancy Act (II of 1913), Sec 193 (h), The C P. Laws Act (XX of 1875), Sec 11, The North West Frontier Province Law and Justice Regulation (VII of 1901), Sec 46 (2)

R. 15. [S. 191.] *(1)* Where a Judge is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum had been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it.

Power to deal with evidence taken before another Judge.

(2) The provisions of sub-rule (1) shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under section 24.

[1877, S. 191.]

Synopsis

1. **Applicability.**
2. **Scope of the Rule.**
3. **Sub-rule (2).**

Other Topics (miscellaneous)

New plaintiff substituted — De novo trial See Note 2

Successor, when bound to hear arguments de novo See Note 2

1. Applicability. — This rule does not apply to the Chartered High Courts see O 49 R 3

2. Scope of the Rule. — Under Section 191 of the Code of 1882, as it stood before 1888, it was held that the successor of the Judge who was removed was bound to fix a date for the *entire* hearing and trial of the case before himself and that such trial should proceed in the ordinary way except that the parties would be allowed to use the evidence already taken as evidence in the case[1] This view, however, was dissented from by a Full Bench in *Jadu Rai* v *Kanizak Hussain*[2] and it was held that Section 191 empowered the Judge to make use of the materials collected by the predecessor as evidence in the case without being bound to fix a day for commencing the trial *de novo* In order to give effect to this latter view, the old Section 191 was replaced by a new Section by Act VII of 1888, empowering the Judge to *proceed with the suit from the stage at which the predecessor* left it That Section has been substantially re enacted in this rule

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Order 18 Rule 15 — Note 2

1 ('85) 8 All 35 (37)
('85) 7 All 857 (859, 860)

2. ('86) 8 All 576 (591, 600, 611) (F B)

See also the following cases under the previous Codes

('74) 21 Suth W R 196 (195)
('70) 13 Suth W R 184 (185)
('70) 13 Suth W R 76 (77 78)
('71) 15 Suth W R 348 (349) (Where such an agreement has been entered into the witnesses should not be re examined without some good reason)
(1864) 1 Suth W R 309 (311) (Do)
('66) 4 Bom H C R A C 98 (100 101)
('87) 1887 All W N 13 (13) (Trial by Munsif completed except delivery of judgment — Transfer of suit by District Judge — Judgment delivered by Munsif who did not take evidence — Judgment must be set aside)
('69) 3 Beng L R A C 105 (106) (Judge dying after hearing and deciding a case — Only record of decision being entry in Court order book — Co ordinate Court cannot take up and re hear the case but High Court will on ground of want of record of reasons for the decision reverse the order and remand the case for rehearing)

O. 18 R 15 Notes 2-3

It is not competent for any *co ordinate Court* to hear the case under this rule[3] Thus an Additional Munsif has no jurisdiction to deliver judgment in a case in which the evidence was taken by the Principal Munsif[4]

An *opinion* reduced to writing by a Judge but not pronounced by him is not a judgment but a mere memorandum[5] and the successor is bound to hear arguments or give the parties an opportunity of being heard before the judgment is given[6]

Where a *new* plaintiff is added after the removal of the predecessor this rule has no application and the successor is bound to grant a *de novo* trial

3 Sub-rule (2) — See the undermentioned cases[1]

O. 18 R. 16

R. 16. [S 192] *(1)* Where a witness is about to leave the jurisdiction of the Court, or other sufficient cause is shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may, upon the application of any party or of the witness, at any time after the institution of the suit, take the evidence of such witness in manner hereinbefore provided

Power to examine witness immediately

(2) Where such evidence is not taken forthwith and in the presence of the parties, such notice as the Court thinks sufficient, of the day fixed for the examination, shall be given to the parties

(3) The evidence so taken shall be read over to the witness, and, if he admits it to be correct, shall be signed by him, and the Judge shall, if necessary, correct the same, and shall sign it, and it may then be read at any hearing of the suit

[1877, S 192; 1859, S 173]

Synopsis

1 Applicability of the Rule | 2 Scope of the Rule

1 Applicability of the Rule — This rule does not apply to Chartered High Courts see Order 49 Rule 3

2 Scope of the Rule — This rule provides for the *de bene esse* examination of a witness about to leave the jurisdiction of the Court[1]

The evidence taken under this rule should be *signed* by the witness after being read over to him

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3 ('69) 3 Beng L R A C 105 (106)
4 ('87) 1887 All W N 13 (13)
5 ('68) 9 Suth W R 1 (5 80)
('69) 12 Suth W R 254 (2 4)
6 ('8') 1886 Pun Re No 110 p 2'1
('04) 1904 Pun Re No 31 p 315
('0') 4 Low Bur Rul 2'6 (258 260 261)
('05) 1905 Pun Re No 3 p 19
('24) AIR 1924 Lah 107 (109) 4 Lah 364

Order 18 Rule 15 — Note 3 [14]

1 ('06) 10 Cal W N 12 (13)
('02) 26 Mad 595 (596)

Order 18 Rule 16 — Note 2

1 ('70) 5 Beng L R O C 252 (253) (Such examination must be taken by Court and not under commission)

R. 17. [S. 193.] The Court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit. **O. 18 R. 17**

Court may recall and examine witness

1. Scope of the Rule. — This rule provides for the recalling of witnesses after their examination has once been finished, but a witness examined by the plaintiff cannot be recalled as witness on the *defendant's* side without the leave of the Court [1] Nor can a witness dispensed with by the plaintiff be recalled under this rule [2]

R. 18. [New.] The Court may at any stage of a suit inspect any property or thing concerning which any question may arise. **O. 18 R. 18**

Power of Court to inspect.

1. Scope of the Rule. — This rule enables the Court to inspect any property or thing though it may issue a commission for that purpose [1] The object of this provision is to enable the tribunal to understand questions that are being raised and to follow and apply the evidence [2] But a judgment should not be based solely on the basis of such personal local inspection [3] So also, a Judge is not entitled to use the impression formed by him from the local inspection to contradict a witness[4] or to decide whether the plaintiff s evidence or the defendant's evidence is true [5] A Judge is not entitled to substitute his own view formed as a result of local inspection, for the evidence in the case [6] Though the Code nowhere lays down that it is obligatory on the Judge to record the result of the local enquiry,[7] yet it is desirable that the result of such inspection should be recorded in the proceedings and not left for notice till judgment [8]

[*See also* (32) AIR 1932 Bom 405 (405) (It should ordinarily be held in Court and preferably before the Judge who is ultimately to hear and decide suit)]

Order 18 Rule 17 — Note 1

1 (1863) 2 Ind Jur (N S) 160

2. (71) 15 Suth W R 348 (349)

Order 18 Rule 18 — Note 1

1. (21) AIR 1921 Mad 323 (323) 44 Mad 640

(97) 1 Cal W N 682 (685)

without putting points observed by him to the parties and eliciting their answers cannot be upheld)

('39) AIR 1939 Mad 61 (64) (Finding based mainly on local inspection not binding in second appeal)

(06) 33 Cal 133 (135)

(12) 14 Ind Cas 377 (378 379) (Cal)

(14) 24 Ind Cas 618 (620) (Cal)

(82) 9 Cal 363 (365 366)

(16) AIR 1916 Pat 334 (335)

[*See* (26) AIR 1926 Cal 660 (660)]

[*See also* (06) 30 Bom 109 (112) (Local inspection by consent of parties)]

O. 18 R. 18 Note 1 A Munsif is not bound to get the sanction of the District Judge before he makes an inspection Sanction is, however, necessary for the levy of money for the expenses of such inspection[9]

Where, at the instance of the plaintiff, a Munsif held a local inspection and, in the course thereof, at the instance of both the parties, he examined a person whose statements he used as *confirming* his impression *formed independently of them*, it was held that the parties could not turn round and say that the Munsif ought not to have used those statements.[10] But, it is not a justifiable procedure for a Judge at such local inspection to welcome the presence of crowds of anonymous villagers and indulge in informal inquiries amongst the people in those crowds for the purpose of guidance in deciding the rights of the parties[11]

Local Amendment

ALLAHABAD

Add the following rule at the end of O 18

O. 18 R. 19 (Allahabad) "19 (1) The Judge shall record in his own hand in English all orders passed on applications, other than orders of a purely routine character.

(2) The Judge shall record in his own hand in English all admissions and denials of documents and the English proceedings shall show how all documents *tendered in evidence have been dealt with from the date of presentation down to the* final order admitting them in evidence or rejecting them

(3) The Judge shall record the issues in his own hand in English, and the issues shall be signed by the Judge and shall form part of the English proceedings"

ORDER XIX.

Affidavits

O. 19 R. 1

Power to order any point to be proved by affidavit

R. 1. [S. 194.] Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable :

Provided that where it appears to the Court that either party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit

[1877, S. 194; *Cf.* R. S. C, O. 37 R. 1. *See* O. 11.]

Synopsis

9. ('14) AIR 1914 Mad 640 (640)

10. ('18) AIR 1918 Pat 633 (634) [*See also* ('28) AIR 1928 All 497 (498, 499)]

11. ('39) AIR 1939 Mad 61 (64) (Judge not to convert himself into an unofficial investigator and inquire of all and sundry regarding their views on the rights of the parties with the object of founding a judgment on what he has heard)

O. 19 R. 1 Notes 1-5

1. Affidavits, essentials of. — An affidavit is a declaration as to facts, made in writing and sworn before a person having authority to administer an oath [1] The officer authorized must be *on duty* at the time when the oath is administered [2] But the want of the seal of the Magistrate before whom it is sworn does not make it bad.[3] The deponent may, instead of signing his name, affix a mark or a stamp bearing his name [4]

Under the rules of the Supreme Court in England as also under the Rules of Practice framed by the High Courts in India, every affidavit should be drawn up in the first person and divided into paragraphs consecutively numbered, each paragraph dealing with a specific portion of the subject as nearly as may be [5] It should also state correctly the description, and true place of the abode of the deponent [6] Any person acquainted with the facts of the case may give the affidavit [7] An affidavit should not contain any *inferences* but only *facts* [8] The contents must be read over to the deponent in a language which he understands and vouched by him to be correct [9]

2. Stamp duty, if necessary. — An affidavit for the immediate purpose of being used or filed in any Court or before the officer of any Court, is exempt from stamp duty [1]

3. Court-fee, if necessary. — No court-fee is payable on an affidavit filed in Court See also Court-fees Act, Section 19 (xiv) Under Chapter 12, Rule 3 of the Appellate Side Rules of the High Court of Calcutta, a court-fee of Rs 2 is prescribed for an affidavit [1]

4. Cross-examination of deponent of affidavit. — Where the adverse party *bona fide* desires the production of the deponent for cross-examination, the Court has no power, under this rule, to order that the affidavit may be read at the hearing on proof of certain facts [1] The Court will refuse to act on an affidavit, when the deponent cannot be cross-examined [2]

On principle, no cross-examination is allowed on affidavits in support of a petition for sanction under Section 195 of the Criminal Procedure Code, and sanction should be given when the affidavit discloses materials for a *prima facie* case [3]

5. Agreement to take evidence by affidavit. — When parties agree to take evidence by affidavit, it does not preclude them from taking oral evidence for

Order 19 Rule 1 — Note 1

1. ('10) 8 Ind Cas 897 (897, 898) 4 Sind L R 88 (A statement before a foreign Court authorized to administer oaths—Affidavit in this case was not [illegible]

[illegible] what was argued in a case sworn by a person who did not know the language in which the argument was made is worthless)

8. ('01) 6 Bom L R 701 (711)

9. ('14) AIR 1914 All 197 (199) 36 All 13

Note 2

1. See Stamp Act (II of 1899), Sch 1, Art 4 [*See also* ('88) 12 Bom 276 (277)]

Note 3

1. ('32) AIR 1932 Cal 160 (160) 58 Cal 1389

Note 4

1. ('26) AIR 1926 All 161 (163) (Proof of documents by affidavit)

('39) AIR 1939 Mad 927 (928) (1939) 2 Mad L Jour 399 (400)

[*See also* ('21) AIR 1921 Mad 881 (882) (Showing answers to interrogatories)]

2. ('36) AIR 1936 All 671 (672) (Deponent not subjected to cross examination — Affidavit is not evidence)

[*See* ('10) 8 Ind Cas 897 (898) 4 Sind L R 88 [illegible]

3 [illegible]

O. 19 R. 1
Notes 5-7

supplementing the same except where the agreement specifies that the evidence is upon affidavits *alone*[1]

6. Necessity for affidavits on matters of record or questions of law.— An affidavit is of no weight when it is simply a party's opinion on a question of law[1] It is superfluous when the facts deposed to therein are already a matter of record[2]

7 Applicability.—This rule enables any Court to order that any fact may be proved by affidavit Therefore where on the day of the first hearing of a suit, the defendant does not appear though served, the execution of the document which is sued upon may be proved by an affidavit without calling a witness[1] The power to take affidavits in proof of facts is extended to enquiries under the undermentioned local or special Acts[2]

O. 19 R. 2

R. 2. [S 195] *(1)* Upon any application evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross examination of the deponent

Power to order attendance of deponent for cross examination

(2) Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court, or the Court otherwise directs

[*Cf* R S C, O 38 R 1 *See* Ss 132, 133 and O 11]

Synopsis

1 "May be given by affidavit"
2 Stay of execution
3 Rule to show cause
4 Application to declare a person a tout
5 Affidavit of documents

1 "May be given by affidavit"— When evidence by affidavit is given great care should be taken to see that they represent the real facts[1] Thus when contributories of a company in liquidation complain of misapplication of the funds by the liquidators and apply to make an officer of the company liable for such misappropriation they must definitely set out the sum misapplied and the grounds of the charge in the affidavit[2] In motions to vary a commissioner's report affidavits should be filed only when the Court orders them or for advancing a special fact with the permission of the Court[3] A party in a suit for dissolution of marriage is not entitled to give evidence by affidavit[4]

Legal practitioners are officers of the Court and when called upon to speak

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Note 5

1 (1878) 47 L J Ch 536 (536) Glossop v Heston and Isleworth Local Board

Note 6

1 (14) AIR 1914 Oudh 206 (207) (Whether a particular property is talukdari property)
2 (05) 32 Cal 146 (149)
(03) 8 Cal L Jour 303 (312) 31 Cal 146

Note 7

1 (33) AIR 1933 Mad 164 (165)
2 The Charitable and Religious Trusts Act (XIV of 1920) S 11 (1)
(35) AIR 1935 Nag 125 (125) (C P Land Revenue Act)
See also The Indian Elections Offences and Enquiries Act (XXXIX of 1920) S 5 and the Presidency Towns Insolvency Act (III of 1909) S 117

Order 19 Rule 2 — Note 1

1 (1910) 129 L T 263 Rammerns v Cecil (See remarks of Eve J)
2 (95) 19 Bom 88 (94)
3 (75) 1 Bom 158 (160 161)
4 (91) 1891 Pun Re No 13 p 89
(35) 62 Cal 541 (545)

to facts relating to the case in which they are engaged, should not be asked to file affidavits Their statements should be accepted [5] **O. 19 R. 2 Notes 1-5**

2. Stay of execution. — An application for stay of execution should be supported by an affidavit [1]

3. Rule to show cause. — An application for a rule to show cause must be supported by an affidavit [1]

4. Application to declare a person a tout. — Though it is open to a Court in an application under the Legal Practitioners Act to act on an affidavit to declare a person a tout, it is desirable that Courts should hear oral evidence [1]

5. Affidavit of documents. — The production of documents can be resisted by a party by claiming privilege and the grounds of privilege must be sufficiently disclosed in the affidavit of documents If the affidavit of documents does not sufficiently set out the plea, a party may supplement the same by a separate affidavit [1] Similarly, when a party claims to seal up a portion of a document on the ground that it is irrelevant to the issue, the affidavit of documents must clearly specify such portions and the grounds on which he claims to seal them [2]

R. 3. [S. 196.] *(1)* Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted: provided that the grounds thereof are stated. **O. 19 R. 3**

Matters to which affidavits shall be confined

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall (unless the Court otherwise directs) be paid by the party filing the same.

[1877, S. 196; R. S. C, O. 38 R. 3.]

Synopsis

1. *Statements as to belief must contain grounds thereof*
2. Scandalous and irrelevant matter.

1. Statements as to belief must contain grounds thereof. — The grounds of belief must be stated with sufficient clearness to enable a Court to judge whether it would be safe to act on the deponent's belief [1] Thus, where in an interlocutory application for injunction to restrain the publication of a libel the affidavit in support

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5. (28) AIR 1928 Mad 690 (692)

Note 2

1 (91) 15 Bom 536 (537)

Note 3

1 (69) 12 Suth W R 413 (419)
(80) 5 Cal 605 (611)

Note 4

1 (03) 26 Mad 596 (597)

Note 5

1 (95) 22 Cal 105 (110)
2. (93) 20 Cal 587 (589)

Order 19 Rule 3 — Note 1

1 (1900) 2 Ch 753 (754 755) Re J L Young Manufacturing Co
(1891) 2 Ch 269 (288) Bonnard v Perryman
(1901) 1 K B 532 (535 536) Lumley v Osborne

O. 19 R 3
Notes 1–2

of the application stated that the documents complained of were to the best of his knowledge information and belief, utterly untrue but no grounds for his belief were shown it was held insufficient[2] An affidavit is defective if the deponent does not say which part is based on information and which on belief or if he does not state the grounds of his belief[3] Though ordinarily, evidence on information and belief is admissible in interlocutory applications intended to maintain things in *status quo* till the rights of the parties are decided yet in England if the application is only interlocutory in form but really aiming at finally disposing of the rights of the parties it will be inadmissible[4]

2 Scandalous and irrelevant matter — If an affidavit contains scandalous and irrelevant allegations it may be ordered to be taken off the file or the particular passage may be expunged[1]

Local Amendments

ALLAHABAD

Add the following Rules

O 19 R 4 (Allahabad) 4 Affidavits shall be entitled *In the Court of* ——— *at* ——— *(naming such Court)* If the affidavit be in support of or in opposition to an application respecting any case in the Court it shall also be entitled in such case If there be no such case, it shall be entitled *In the matter of the petition of*

O 19 R 5 (Allahabad) 5 Affidavits shall be divided into paragraphs and every paragraph shall be numbered consecutively and as nearly as may be shall be confined to a distinct portion of the subject

O 19 R 6 (Allahabad) 6 Every person making any affidavit shall be described therein in such manner as shall serve to identify him clearly and where necessary for this purpose it shall contain the full name the name of his father of his caste or religious persuasion his rank or degree in life his profession calling occupation or trade and the true place of his residence

O 19 R 7 (Allahabad) 7 Unless it be otherwise provided an affidavit may be made by any person having cognizance of the facts deposed to Two or more persons may join in an affidavit each shall depose separately to those facts which are within his own knowledge and such facts shall be stated in separate paragraphs

O 19 R 8 (Allahabad) 8 When the declarant in any affidavit speaks to any fact within his own knowledge he must do so directly and positively using the words I affirm or I make oath and say

O 19 R 9 (Allahabad) 9 Except in interlocutory proceedings affidavits shall strictly be confined to such facts as the declarant is able of his own knowledge to prove In interlocutory

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(07) 9 Bom L R 540 (542)
(10) 6 Ind Cas 666 (667) 37 Cal 259
(09) 4 Ind Cas 380 (382) (Cal)
(19) AIR 1919 Cal 970 (971)
(14) AIR 1914 Mad 366 (367)
(24) AIR 1924 Pat 312 (313)
(26) AIR 19 6 Pat 51 (55)

davit))

2 (1882) 20 Ch D 501 (508) In Quarty Hill Consolidated Coll mining Co v Ball [*See also* (32) AIR 1932 Cal 255 (256) (Affidavit in contempt proceedings based on information —Source of information not given)]

3 (34) AIR 1934 Cal 694 (696) 61 Cal 814

4 (1878) 9 Ch D 259 (266 269) Gilber v Endean

Note 2

1 (1855) 3 W R (Eng) 633 Goddard v Parr
(1910) 1910 W N 128 In re Jessop (A case in which the C A refused to strike out extracts from letters marked without prejudice)
(1878) 1878 W N 101 (101) Osmastan v Association of Land Financiers
(1881) 1881 W N 69 (69) Warner v Mosses
(1879) 11 Ch D 1 (12 13) Cracknell v Janson
(09) 4 Ind Cas 380 (381) (Cal)

proceedings, when the particular fact is not within the declarant's own knowledge, but is stated from information obtained from others, the declarant shall use the expression "I am informed," and, if such be the case, "and verily believe it to be true," and shall state the name and address of, and sufficiently describe for the purposes of identification, the person or persons from whom he received such information When the application or the opposition thereto rests on facts disclosed in documents or copies of documents produced from any Court of justice or other source, the declarant shall state what is the source from which they were produced, and his information and belief as to the truth of the facts disclosed in such documents **O. 19 R. 9 (Allahabad)**

10 When any place is referred to in an affidavit, it shall be correctly described When in an affidavit any person is referred to, such person, the correct name and address of such person, and such further description as may be sufficient for the purpose of the identification of such person, shall be given in the affidavit **O. 19 R. 10 (Allahabad)**

11. Every person making an affidavit for use in a Civil Court shall, if not personally known to the person before whom the affidavit is made, be identified to that person by some one known to him, and the person before whom the affidavit is made shall state at the foot of the affidavit the name, address, and description of him by whom the identification was made as well as the time and place of such identification **O. 19 R. 11 (Allahabad)**

11A Such identification may be made by a person — **O. 19 R. 11A (Allahabad)**

(a) personally acquainted with the person to be identified, or

(b) satisfied, from papers in that person's possession or otherwise, of his *identity*

Provided that in case (b) the person so identifying shall sign on the petition or affidavit a declaration in the following form, after there has been affixed to such declaration in his presence the thumb impression of the person so identified —

FORM

I (name, address and description), declare that the person verifying this petition (or making this affidavit) and alleging himself to be *A B* has satisfied me (here state by what means, *e g*, from papers in his possession or otherwise) that he is *A B*.

12 No verification of a petition and no affidavit purporting to have been made by a *pardnanshin* woman who has not appeared unveiled before the person before whom the verification or affidavit was made, shall be used unless she has been identified in manner already specified and unless such petition, or affidavit be accompanied by an affidavit of identification of such woman made at the time by the person who identified her **O. 19 R. 12 (Allahabad)**

13 The person before whom any affidavit is about to be made shall, before the same is made, ask the person proposing to make such affidavit if he has read the affidavit and understands the contents thereof, and if the person proposing to make such affidavit state that he has not read the affidavit or appears not to understand the contents thereof, or appears to be illiterate, the person before whom the affidavit is about to be made shall read and explain, or cause some other competent person to read and explain in his presence, the affidavit to the person proposing to make the same, and when the person before whom the affidavit is about to be made is thus satisfied that the person proposing to make such affidavit understands the contents thereof, the affidavit may be made **O. 19 R. 13 (Allahabad)**

14 The person before whom an affidavit is made shall certify at the foot of the affidavit the fact of the making of the affidavit before him and the time and place **O. 19 R. 14 (Allahabad)**

O 19 R 14 (Allahabad) when and where it was made and shall for the purpose of identification mark and initial any exhibits referred to in the affidavit

O 19 R 15 (Allahabad) 15 If it be found necessary to correct any clerical error in any affidavit such correction may be made in the presence of the person before whom the affidavit is about to be made and before but not after the affidavit is made Every correction so made shall be initialled by the person before whom the affidavit is made and shall be made in such manner as not to render it impossible or difficult to read the original word or words figure or figures in respect of which the correction may have been made

RANGOON

Add the following Rules 4 to 12

O 19 R 4 (Rangoon) Mode of taking oath or affirmation by declarant of affidavit

4 The officer administering the oath to the declarant of an affidavit should first make the declarant take the oath or affirmation Then he should make the declarant repeat the whole of the statement written in the affidavit as coming from him Then the declarant should sign the affidavit Lastly the officer administering the oath should sign and date it

O 19 R 5 (Rangoon) Form of affidavit

5 Every affidavit to be used in a Court of Justice should be entitled In the ——— Court of ——— at ——— , naming the Court If there is a case in Court the affidavit in support of or in opposition to an application respecting it must also be entitled In the case of ——— If there is no case in the Court the affidavit should be entitled In the matter of the petition of

O 19 R 6 (Rangoon) Mode of writing affidavits

6 Every affidavit containing any statement of facts shall be divided into paragraphs and every paragraph shall be numbered consecutively and as nearly as may be shall be confined to a distinct portion of the subject

O 19 R 7 (Rangoon) Address of person making affidavit

7 Every person other than a plaintiff or defendant in a suit in which the application is made making an affidavit shall be described in such a manner as will serve to identify him clearly, that is to say by the statement of his full name the name of his father his profession or trade and the place of his residence

O 19 R 8 (Rangoon) Mode of speaking by declarant to fact within his own knowledge

8 When the declarant in any affidavit speaks to any fact within his own knowledge he must do so directly and positively using the words I affirm (or make oath) and say

O 19 R 9 (Rangoon) Mode of speaking by declarant to fact not within his own knowledge

9 When the particular fact is not within the declarant s own knowledge but is stated from information obtained from others the declarant must use the expression I am informed (and if such be the case should add and verily believe it to be true) or he may state the source from which he received such information When the statement rests on facts disclosed in documents or copies of documents procured from *any* Court of Justice or other source the deponent shall state what is the source from which they were procured and his information or belief as to the truth of the facts disclosed in such documents

O 19 R 10 (Rangoon) Identification of person making affidavit not personally known to commissioner

10 Every person making an affidavit if not personally known to the commissioner shall be identified to the commissioner by some person known to him and the commissioner shall specify at the foot of the petition or of the affidavit (as the case may be) the name and description of him by whom the identification is made as well as the time and place of the identification and of the making of the affidavit

11 If any person making an affidavit is ignorant of the language in which it is written, or appears to the commissioner to be illiterate or not fully to understand the contents of the affidavit, the commissioner shall cause the affidavit to be read and explained to him in a language which he understands If it is necessary to employ an interpreter for this purpose, the interpreter shall be sworn to interpret truly When an affidavit is read and explained as herein provided, the commissioner shall certify in writing at the foot of the affidavit that it has been so read and explained, and that the declarant seemed perfectly to understand the same at the time of making the affidavit When an interpreter is employed the commissioner shall state in his certificate, the name of the interpreter, and the fact that he was sworn to interpret truly **O. 19 R. 11 (Rangoon)**

Interpretation of affidavit when person making it is ignorant of the language in which it is written

12 In administering oaths and affirmations to declarants the commissioner shall be guided by the provisions of the Indian Oaths Act, 1873 ' **O 19 R. 12 (Rangoon)**

Administration of oath or affirmation

ORDER XX.

JUDGMENT AND DECREE

[a]**R. 1.** [S. 198] The Court, after the case has been heard, shall pronounce judgment in open Court, either at once or on some future day, of which due notice shall be given to the parties or their pleaders **O. 20 R. 1.**

Judgment when pronounced

[1877, S 198 ; 1859, S 183]

a The provisions of Rules 1 3 4 and 5 of this Order do not apply to the Chief Court of Oudh *vide* the Oudh Chief Courts Act (U P IV of 1925) Section 16 (2)

Local Amendment

MADRAS

The existing Rule 1 is re numbered as sub rule (1) and the following is added as sub rule (2)

'(2) The judgment may be pronounced by dictation to a shorthand writer in open Court, where the presiding Judge has been specially empowered in that behalf by the High Court

Synopsis

1 Scope of the Order
2 Chartered High Courts
3 'After the case has been heard "
4 "Shall pronounce judgment in open Court "
5 "Judgment," meaning of
6 When judgment may be pronounced.
7. Holiday
8 ' Or on some future day "
9 Notice to parties
10 Non-compliance with Rules 1, 2 and 3.

Other Topics (miscellaneous)

Judgment on evidence taken before another Judge See Note 3
Pronounce meaning See Note 4

1. Scope of the Order. — Rules 1 to 5 of this Order deal with judgments and Rules 6 to 19 with decrees Rule 20 enacts that the parties shall be entitled to obtain certified copies of the judgment and decree on application made by them and at their

O. 20 R. 1
Notes 9-10

judgment[7] But it is not necessary that the parties should be *present* at the time of the delivery of the judgment and a suit cannot be dismissed on the ground that the parties were not present at the time of the delivery of the judgment[8] Nor is a Court bound to communicate the result of a case to the parties[9]

Where there is nothing on the record to show that the notice was not given to the parties or their pleaders, it must be presumed that they did receive such notice[10]

The provisions of this rule apply also to cases where a judgment is pronounced by a successor under the next rule[11]

10. Non-compliance with Rules 1, 2 and 3. — A judgment not pronounced at all is not a valid judgment,[1] but the non compliance with this rule and with Rr 2 and 3 as to the *manner* in which it is to be pronounced, dated and signed is only an irregularity within the meaning of Section 99 of the Code and does not afford a ground for the reversal in appeal of the decree based on the judgment in the absence of prejudice[2] A decree that follows such a judgment is valid until set aside on appeal[3]

O. 20 R. 2

Power to pronounce judgment written by Judge's predecessor

R. 2. [S 199] A Judge may pronounce a judgment written but not pronounced by his predecessor

[1877, S 200, 1859, S 184]

Synopsis

Other Topics (miscellaneous)

1. Rule does not apply to Chartered High Courts — This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction see Order 49 Rule 3

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7 (38) AIR 1938 Lah 707 (708) (Limitation for appeal runs from such date—AIR 1925 All 293 Followed)

[illegible]) Oudh [illegible]

11 (12) 17 Ind Cas 278 (279) (Mad)

Note 10

1 (67) 9 Suth W R 1 (5 30) (Written opinions [illegible]

(34) AIR 1934 Lah 763 (764) (Omission to sign decretal order to be accidental and no prejudice)

[illegible] irregularity)

[*See* (35) AIR 1935 Lah 895 (896) (Non-compliance is irregularity only so far as an appeal on merits is concerned—For purposes of limitation non compliance cannot be regarded as mere irregularity and limitation for appeal from decree will not run until the judgment is announced to the parties)]

3 (25) AIR 1925 All 293 (295) 47 All 332

O. 20 R. 2 Notes 2-3

2. "Written but not pronounced by his predecessor."— The object of the Legislature in enacting this rule is that the judgment should be that of the Judge *who heard the case* though it may be delivered by another, in order, therefore, that this rule may apply, it is necessary that the predecessor must have *written* the judgment [1] There is a difference of opinion, however, as to whether it should also be *signed* by the predecessor According to the High Court of Calcutta, the judgment has, under the provisions of Rule 3, *infra*, to be signed at the time of pronouncing it by the successor and therefore it is not necessary that the predecessor should have signed it [2] The High Court of Patna has, on the other hand, expressed the view that Rule 3 applies only to cases where the judgment is delivered by the *very Judge who wrote it* and not to cases coming under Rule 2, where the judgment is written by one officer and is pronounced by another [3] It seems to follow from this that the predecessor must have written and also signed the judgment [4]

There is also a difference of opinion on the question whether it is necessary for the predecessor to have written the judgment at a time *when he had still jurisdiction over the suit* The general consensus of opinion is that it is not [5] Thus, when a District Judge retired from office on October 4, 1927, and the judgment was signed by him on October 9, 1927, and the same was pronounced in Court by his successor on October 17, 1927, it was held that the judgment was valid in law [6] A contrary view has however, been expressed in the undermentioned cases [7]

Can a judgment be pronounced by the *predecessor* after his transfer or after he has left his judicial post ? According to the Chief Court of the Punjab, there is no illegality in adopting such a course [8] According to the High Court of Rangoon the pronouncement of the judgment is a material part of the trial and cannot be performed by any person other than a *Judge of the Court in which the suit was tried* [9] It would seem to follow from this that a Judge who has ceased to be the Judge of the Court in which the suit was tried cannot pronounce a judgment therein though it had been written by himself

3 "May pronounce."— The rule is not mandatory and the successor is not bound in all cases to pronounce the judgment written by the predecessor, he may, if he sees reason to do so refuse to pronounce that judgment and may deliver a judgment according to his own view of the case [1] Where a judgment is signed and dated by the

Order 20 Rule 2 — Note 2

1 (85) 7 All 857 (859)
2. (04) 31 Cal 1057 (1064)
3. (20) AIR 1920 Pat 578 (581) 5 Pat L Jour 147
4 (85) 7 All 857 (859)
5 ('13) 19 Ind Cas 785 (786) 35 All 368
(04) 1904 All W N 131 (131)
(20) AIR 1920 All 332 (340) 42 All 362 (Arguments heard by acting Subordinate Judge subsequently reverted as Munsif—Judgment written after reversion)
(06) 30 Bom 241 (243) (Judgment written by a Judge after his transfer)
(08) 35 Cal 756 (761) (Judgment after Judge had left the judicial post)
(07) 31 Cal 203 (205) (Judgment written when Judge was on leave)
(72) 8 Beng L R 38 (Judgment written by a
(12) 14 Ind Cas 371 (372) (Lah) (Order on a particular issue pronounced by successor after he ceased to have jurisdiction)
(97 01) 2 Upp Bur Rul 246 (Judgment written by a Judge after making over charge of his office)
(36) AIR 1936 Rang 147 (147) 14 Rang 136 (FB) (Judgment written by an ex Judge after he has ceased to be a Judge is valid as a judgment)
6 (31) AIR 1931 All 90 (91) 53 All 133
7 (94) 7 C P L R 18 (19)
(19) AIR 1919 Lah 265 (269) 1919 Pun Re No 80 (Judgment written after transfer)
8 (16) AIR 1916 Lah 78 (78) 1916 Pun Re No 80 *(Judgment or order written and pronounced by Judge after he gave over charge of his office)*
9 (24) AIR 1924 Rang 358 (359) 4 Upp Bur Rul 171

Note 3

1 (24) AIR 1924 Rang 358 (359) 4 Upp Bur Rul 171
(11) 8 Ind Cas 1096 (1096) 33 All 229

O. 20 R. 2
Notes 3-4

predecessor himself and there is nothing to show that it was not pronounced by him, the successor cannot proceed to pronounce it for a second time[3]

4. Non-compliance with Rules 1, 2 and 3. — See Note 10 to Rule 1 above

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O. 20 R. 3

R. 3. [S. 202.] The Judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it and, when once signed, shall not afterwards be altered or added to, save as provided by section 152 or on review.

Judgment to be signed.

[1877, Ss. 201, 202 and 203; 1859, S. 185.]

Local Amendment

MADRAS

Substitute the following *for* Rule 3

"3 The judgment shall bear the date on which it is pronounced and shall be signed by the Judge and, when once signed, shall not afterwards be altered or added to, save as provided by Section 152 or on review, provided also that, where the presiding Judge is specially empowered by the High Court to pronounce his judgment by dictation to a shorthand writer in open Court, the transcript of the judgment so pronounced shall, after such revision as may be deemed necessary, be signed by the Judge"

Synopsis

1. Rule does not apply to Chartered High Courts
2. Applicability of the Rule.
3. "Shall not afterwards be altered or added to."
4. "Save as provided by Section 152 or on review."
5. Non-compliance with Rules 1 to 3.

1. Rule does not apply to Chartered High Courts. — This Rule does not apply to Chartered High Courts[1] or to the Chief Court of Oudh[2] in the exercise of the ordinary or extraordinary original civil jurisdiction

But, the principle underlying the rule applies, *viz*, that a decree once passed is immutable, subject to review or to any subsequent order or decree which may be passed on appeal and subject to the provisions of O 20 R 11, sub rule (2)[3]

2. Applicability of the Rule. — There is a conflict of opinion as to whether this rule, in so far as it requires the Judge to sign and date the judgment at the time of pronouncing it, applies to cases where the successor pronounces the judgment of the predecessor under the provisions of this rule See also Note 2 to Rule 2 above

3. "Shall not afterwards be altered or added to." — The jurisdiction of the Court to reconsider its order continues so long as the order has not been perfected

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de novo)
2. ('20) AIR 1920 Lah 288 (289)

Order 20 Rule 3 — Note 1

1. See O 49 R 3
2. See the U P Act IV of 1925, S 16 (2)
3. ('37) AIR 1937 Cal 222 (224) (Consent decree cannot be varied even by consent of parties AIR 1916 Mad 604 Followed)

under this Rule,[1] but ceases once the judgment is signed, except as provided by Section 152 or on review.[2] The Court cannot therefore, after the judgment is signed, alter it, or add to it, in any manner, except as provided by this rule, and this even with the consent of the parties.[3] Thus it cannot alter the grounds on which the judgment proceeded,[4] or add findings on issues omitted to be decided by the judgment.[5] Nor can a successor alter the judgment which had been pronounced by his predecessor on any point.[6] Where a Judge pronounces a judgment but suspends the drawing up of the decree till a succession certificate is produced by the plaintiff, he cannot, on the plaintiff's failure to produce the certificate, cancel the judgment and deliver a different one inconsistent with the former.[7]

The words "after such *revision* as may be deemed necessary" in the rule as substituted by the High Court of Madras, do not authorise the Judge to revise the transcript and to substitute fresh words for the words originally dictated, they do not contemplate a revision of the *effective part* of the judgment but should be of the nature referred to in Section 152, and one relating to clerical and arithmetical mistakes arising from any accidental slip or omission.[8]

Where, on an application to set aside an execution sale, a conditional order is passed providing that the sale would be set aside if the decretal amount is paid within a certain date and that otherwise, the application would stand dismissed, the order is final in itself and no further reference to the Court is necessary for the purpose of implementing it. Hence, after such an order is passed, the Court has no jurisdiction to alter the order except on review.[9] See also Notes to Section 148 *ante*.

4. "Save as provided by Section 152 or on review." — This rule recognises two exceptions to the general rule that a Judge cannot, after he has once signed the judgment, reconsider the matter over again :—

(1) Under Section 152 of the Code, *clerical or arithmetical mistakes in* judgments, decrees or orders or *errors due to accidental slips or omissions* can be corrected by the Court.[1] See also Note 2 to Section 152.

(2) Under O. 47 R. 1 the Court may grant a review of the judgment where the conditions of that rule are satisfied. See Order 47 Rule 1.[2]

Note 3

1. ('09) 4 Ind Cas 441 (442) (Cal)
2. [illegible]

('33) AIR 1933 Oudh 241 (242) : 8 Luck 502 (Order of Sub-Judge in appeal allowing plaintiff to amend plaint on payment of deficit court fee and costs—Court has no power to further extend time.)

[illegible]

3. (1900) 24 Mad 1 (10, 11, 13) : 27 Ind App 197 (PC)
('25) AIR 1925 Mad 457 (458, 459)
4. ('67) 7 Suth W R 286 (287)
5. ('02) 4 Bom L R 129 (132)
6. ('89) 16 Cal 749 (752) : 16 Ind App 104 (PC)
('25) AIR 1925 Pat 47 (47, 48) : 3 Pat 654
[But see ('18) AIR 1918 Low Bur 7 (8).]
7. ('09) 31 All 153 (155)
8. ('23) AIR 1923 Mad 663 (664)
9. ('39) AIR 1939 Cal 581 (581) : ILR (1939) 1 Cal 468

Note 4

1. See Note 3 to S. 152
('08) 1908 Pun L R No. 40
[*See also* ('99) 2 Oudh Cas 235 (237, 238);
('07) 6 Cal L Jour 22 (24, 25).]
2. ('10) 5 Ind Cas 443 (444) : 13 Oudh Cas 23
('31) 136 Ind Cas 253 (254) (Oudh)
('81) 1881 All W N 57 (57)
('81) 1881 All W N 95 (95) : 3 All 846

O. 20 R. 3
Notes 4-5

It has been held in the undermentioned cases[3] that where a Court has passed an order under a misapprehension of facts it is open to it under its inherent powers to set aside such order when the true facts are brought to light and that this rule has no application to such cases

As to whether and how far questions decided by an order of remand can be re opened at the hearing after return of the findings after remand see Rules 23 and 26 of Order 41

5. Non-compliance with Rules 1 to 3 — The failure to date an order is no doubt an irregularity but it does not invalidate the order and does not prevent it from having a legal operation from the date on which it is made the date can be proved by other evidence[1] Similarly, it has been held that an accidental omission to *sign* an order is only an irregularity[2] See also Note 10 to Rule 1

O. 20 R. 4

R. 4. [S 203] *(1)* Judgments of a Court of Small Causes need not contain more than the points for determination and the decision thereon

Judgments of Small Cause Courts

(2) Judgments of other Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision

Judgments of other Courts

[1877, Ss 201, 202, 203; 1859, S 185]

Synopsis

Other Topics (miscellaneous)

1. Rule does not apply to Chartered High Courts — This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary *original civil jurisdiction* see O 49 R 3 It has accordingly been held by the High Court of Bombay that though in an ordinary case a Judge in the exercise of such jurisdiction should give his reasons for his decision the absence of reasons would not detract from the legal validity of the decision[1] The rule would of course apply to Chartered High Courts in the exercise of their *appellate* jurisdiction[2] The rule does

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3 (34) AIR 1934 All 287 (288)
(34) AIR 1934 Nag 234 (235) 31 Nag L R 53

Note 5

1
2

has not been appealed against)

Order 20 Rule 4 — Note 1

1 (27) AIR 1927 Bom 113 (115) 51 Bom 267 [*See also* (33) AIR 1933 Mad 510 (11) (Petition is struck off is not legal disposal)]

2 (79) 2 Mad 67 (70) 6 Ind App 170 (P C)
(89) 11 All 460 (469 470) 16 Ind App 205 (P C)
(66) 5 Suth W R 63 (66) (P C)
(69) 11 Suth W R 33 (33) (P C)

not apply to the Chief Court of Oudh in the exercise of its ordinary or extraordinary original civil jurisdiction [3]

2. "Judgment," meaning of. — See Section 2, sub section (9), *ante*

3. Object of judgments. — The object of insisting upon a judgment in respect of a decision of the Court is to enable an appellate or revisional Court to find out whether the Judge has applied his mind to the case, and whether the decree or order is according to law

4. Personal knowledge. — A Judge cannot import his own private knowledge or opinion into a case but must decide it on the *evidence* before him [1] If he intends to use his personal knowledge, he is bound to give evidence like any other witness [2] A judgment based upon such knowledge without any reference to the evidence in the case is not one in accordance with law and is liable to be set aside [3]

5. Appreciation of evidence.— It is a fundamental principle that the decision of a Court rests, not upon mere suspicion, or surmises or conjectures, but upon legal grounds established by *legal testimony* [1] A judgment, therefore, based on the evidence of witnesses whom the opposite party had no opportunity to cross examine,[2] or based on evidence recorded in a different suit,[3] is not a judgment that can be maintained

An omission to make special mention of the oral evidence,[4] or to refer to every detail in the evidence,[5] does not warrant a presumption that the evidence has not been adequately or reasonably considered , but where a Judge makes only a colourable pretence of considering the evidence without really having done so, the judgment cannot be accepted as a proper one [6]

On questions of fact, a judgment of the Court of the first instance must, except as provided by O 18 R 15 be based upon an examination of the evidence taken before the Judge himself, who delivers the judgment [7] It must be based upon a consideration of the whole evidence on both sides and not merely upon some isolated piece of evidence [8] In considering the evidence, the following points may be usefully mentioned —

(1) It is not the proper way of appreciating the evidence to approach it with prejudice and suspect everything and everybody [9]

(2) The mere fact that a witness is related to a party or supports the party does not necessarily make his evidence interested or unreliable nor does the rejection of a portion of his testimony vitiate the whole testimony on that ground alone [10]

[*See also* (34) AIR 1934 Cal 571 (577)]
3. See the *U P Act IV of 1925, S 16 (2)*

Note 4

1 (76) 25 Suth W R 152 (153)

2 (1841 46) 3 Moo Ind App 245 (260) (P C)
(67) 7 Suth W R 189 (189)

3 (11) 10 Ind Cas 955 (955) 38 Cal 153
(23) AIR 19 3 Cal 311 (312)

Note 5

1 (66) 11 Moo Ind App 28 (44) (P C)
(32) AIR 1932 P C 202 (207) (P C)
(26) AIR 1926 P C 97 (100) 29 Oudh Cas 305
1 Luck 403 (P C) (Discussion about speculative theories built on medical books without any facts established by the evidence)
(25) AIR 1925 Oudh 171 (172)

2 (68) 9 Suth W R 587 (588)
3. (25) AIR 1925 Mad 230 (230)
4 (20) AIR 1920 Cal 869 (670)
5 (31) AIR 1931 All 210 (210)
(28) AIR 1928 Oudh 480 (480)
(17) AIR 1917 Pat 288 (289)
6 (17) AIR 1917 Pat 288 (289)
7 [illegible]

O. 20 R. 4
Notes 5-8

(3) The fact that a witness had given evidence in other cases is not always a legitimate objection to his credibility though it may be a legitimate objection to a man's credit that he is a professional witness [11]

(4) The testimony of a person who testifies that a certain conversation took place is of more value than that of one who says that it did not [12]

(5) When the oral testimony adduced in an action is directly conflicting and irreconcilable, the only safe guide for the Judge is that afforded by the conduct of the parties and the contents of the documents produced [13]

6. Contents of judgments — It is the duty of the Court to adjudicate on a claim as brought [1] A judgment is bad if it is based on a question neither raised in the written statement nor included in any issue,[2] though it is open to a Court to find that the case of a party lies somewhere between the cases of both the parties [3]

It is the duty of the Courts to write their judgments without unnecessary prolixity and repetition of pleadings [4] A judgment is unsatisfactory if it is a mere catalogue of documents without any consideration of their probative value,[5] or if it simply repeats the arguments of the counsel on both sides,[6] or if it is unintelligible [7] It is not desirable that Judges should make remarks against the character of a person who is neither a party nor a witness in the proceedings before them [8] nor should they give findings on matters which are unnecessary for the disposal of the suit [9] The statements or their findings must be specific and precise [10]

7. Construction of judgments. — As a general rule, where the language of a judgment is doubtful, the benefit of the doubt ought to go to the judgment debtor [1] All parts of the judgment should be read together and construed as a whole,[2] but where the previous part of the judgment cannot be reconciled with the conclusion ultimately drawn, the former should be rejected [3]

8. Judgments of Small Cause Courts. — A judgment of a Small Cause Court need not set out the *reasons* for the decision,[1] though as a matter of practice it is usual

11 ('72) 18 Suth W R 285 (285) (P C)
12 (1841 46) 3 Moo Ind App 347 (357) (P C)
13 ('09) 1 Ind Cas 128 (13?) 31 All 116 36 Ind App 9 (P C)

Note 6

1

2 ('12) 15 Ind Cas 159 (160) (Cal)
3 ('26) AIR 1926 Nag 48 (49)

'27

and if the parties or their pleaders press only one of the issues the Court is not bound to decide the other also)
10 ('17) AIR 1917 All 212 (21?)

Note 7

1. ('21) AIR 1921 Oudh 138 (138)
2 ('74) 22 Suth W R 202 (203)

3.

Note 8

1.

Small Cause Court Judge had given reasons which were held to be arbitrary—High Court held that although a Small Cause Court Judge is not

to give reasons except in unimportant cases [2] But the judgment must set out *the points for determination* and the decision on each of those points [3] A mere statement such as 'issue not proved, suit dismissed,' [4] or 'the plaintiff fails, suit dismissed, [5] or "claim decreed with costs' [6] or a general statement after setting out the points 'I find all the issues for the plaintiff' without dealing with each point separately [7] is not a valid judgment **O. 20 R. 4 Notes 8-9**

The judgment must also be sufficiently intelligible [8] and must indicate clearly that the Judge has applied his mind to the case and that the decree or order is according to law [9] The test whether this rule has been used or abused lies in fact in the answer to the question whether the judgment has been made intelligible When the Judge has to deal with a question of fact he need not give anything more than his actual decision on the question, namely his answer to it But in cases involving difficult questions of law or mixed questions of fact and law, the Judge should set out so much of his reasoning as will make clear the road by which he has reached the conclusion [10]

The mere fact that the judgment of a Small Cause Court does not set out the points for determination is however no ground for setting it aside, if otherwise the judgment is intelligible and the Judge has applied his mind to the case [11]

9. Other judgments. — Clause 2 of this rule requires that a judgment of a Court other than a Small Cause Court should contain —

(1) a concise statement of the case,

(2) the points for determination

(3) the decision thereon and

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bound to deal elaborately with the arguments etc in the case he is bound to state reasons for his decision and such reasons should not be arbitrary The view that Small Cause Court is bound to state reasons for decision is directly against the words of this rule and hence not correct)]

2 (23) AIR 1923 Rang 252 (252) 1 Rang 274
(33) AIR 1933 Sind 62 (65) (It is desirable

issues only does not necessarily indicate the points to be determined although in some cases it may well do so Each case must be judged by itself)

4 (28) 108 Ind Cas 386 (387) (Lah)
(13) 18 Ind Cas 216 (216) (Lah)
(99) 23 Bom 334 (337)

5 (30) 6 Mad L Jour 50 (51)

6 (25) AIR 1925 Oudh 283 (284)

7 (25) AIR 1925 Mad 1299 (1299)

8 (32) AIR 1932 Oudh 143 (144) 7 Luck 596
(22) AIR 1922 Pat 337 (337 338)

(28) 108 Ind Cas 386 (387) (Lah)
(30) AIR 1930 All 832 (832)
(13) 18 Ind Cas 216 (216) (Lah)
(01) 1901 Pun Re No 57 page 180
(91) 13 All 533 (536)
(99) 23 Bom 334 (336)
(28) AIR 1928 All 688 (688) (People must be

thereon there is sufficient compliance with the law)

10 (32) AIR 1932 Mad 336 (340 343) 55 Mad 671

record summary of evidence on which it relies in its judgment)]

11 (17) AIR 1917 Low Bur 34 (34)
(92) 1892 All W N 160 (160)

O. 20 R. 4
Note 9

(4) the reasons for such decision [1]

In writing judgments in appealable cases, the provisions of this rule should be strictly followed [2]

The judgment should state not merely the finding on the point raised, but must also state what the evidence consists of, and how it proves the plaintiff's or defendant's case [3] A judgment unsupported by reasons cannot be accepted as legally binding on the parties [4] But a judgment is not defective merely because specific issues were not framed, if all the points arising have in fact been determined [5] Nor is a judgment bad, merely because it does not fully state the reasons for its conclusion but states that it adopts the reasons given in a judgment in a previous suit between the same parties, the evidence being almost the same [6]

As to the judgments of Criminal Courts, see Sections 265 and 366 to 372 of the Criminal Procedure Code and the undermentioned cases [7]

O. 20 R. 5

Court to state its decision on each issue

R. 5. [S. 204.] In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit.

[1877, S. 204; 1859, S. 186.]

Synopsis

1. **Chartered High Courts.**
2. **Decision on each issue necessary.**
3. **Object of judgment** See Note 3 to Rule 4

Other Topics (miscellaneous)

Appealable cases—Findings on unnecessary points See Note 2

"Sufficient for the decision of the suit" See Note 2

Note 9

1 (05) 9 Cal W N 60 (66)

does not mean that Judge has not considered it)
(1864) 1 Suth W R 214 (215) (Decision under S 359 of Act VIII of 1659)
('71) 15 Suth W R 130 (131) (Do)
('26) AIR 1926 Cal 1221 (1221) (The rule will apply to *ex parte* cases also)
[*See* (34) AIR 1934 Mad 8 (8) (Order of a District Munsif under S 73 of the Madras Village Courts Act is not governed by this Code and therefore order is not defective if reasons are not stated)]

2. (07) 1907 Pun L R No 27.

3. (1865) 3 Suth W R 176 (177)
[*See also* (38) AIR 1938 Nag 204 (206) (Hotly contested suit—Trial Judge must deal with facts and evidence elaborately and arrive at proper findings on issues)]

4. (95) 19 Bom 323 (326)
('84) 8 Bom 368 (371)
(90) 14 Bom 452 (454)

(91) 1891 Bom P J 204 (205)
('96) 1896 Bom P J 260

5. (09) 4 Ind Cas 1124 (1124) (Mad)
(11) 10 Ind Cas 291 (291) (Mad)

6. (12) 15 Ind Cas 434 (434) (Mad)

7. (86) 13 Cal 110 (111)
(1865) 11 Cal 449 (450)
(91) 15 Bom 11 (12 13)
(93) 20 Cal 353 (357)
(95) 22 Cal 241 (243)
(96) 1 Cal W N 169 (170)
(97) 19 All 506 (508) (FB)

O. 20 R. 5 Notes 1-3

1. Chartered High Courts. — This rule does not apply to Chartered High Courts[1] or to the Chief Court of Oudh[2] in the exercise of the ordinary or extraordinary original civil jurisdiction

2. Decision on each issue necessary. — It is imperative upon the Court to pronounce its findings upon all such issues as may be necessary for the disposal of the suit[1] There should be a finding on each issue *separately* and not on all issues together[2] In appealable cases, it is always desirable that the Court should, as far as may be practicable, pronounce its opinion on all the important points which have been raised in the case (whether such findings are necessary or unnecessary for the decision of the case),[3] and this is ordinarily expected in cases where evidence has been allowed to be given on all the issues[4] The concluding words of the rule do not preclude the Judge from giving his findings on all the issues, though some of them may be unnecessary for the decision of the case,[5] though such findings should not form part of the Court's decree[6]

3. Object of judgment. — See Note 3 to Rule 4

O. 20 R. 6

R. 6. [S. 206.] *(1)* The decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.

Contents of decree.

(2) The decree shall also state the amount of costs incurred in the suit, and by whom or out of what property and in what proportions such costs are to be paid.

(3) [S. 221.] The Court may direct that the costs payable to one party by the other shall be set off against any sum which is admitted or found to be due from the former to the latter.

[1877, *Cf.* S. 257; 1859, S. 189; *Cf.* S. 206.]

Order 20 Rule 5 — Note 1

1. See Order 49 Rule 3
2. See the U P Act (IV of 1825), S 16 (2)

Note 2

1. (81) 4 Mad 134 (136)

[illegible]

(04) 26 All 231 (235)
(14) AIR 1914 Mad 685 (686)
('23) AIR 1923 Nag 322 (324)
(07) 8 Suth W N 481 (482)
(93 1900) 1893 1900 Low Bur Rul 1
(85) 1885 Bom P J 71
(26) AIR 1926 All 86 (93) 48 All 44 (Court must

[illegible] the [illegible] osed

[illegible]

(18) AIR 1918 Mad 1135 (1137) (Confining its decision to one issue after evidence recorded on all issues is improper)
(20) AIR 1920 Pat 271 (271 272) (Finding obligatory when a specific issue is raised and evidence is adduced by both parties)
5 (82) 4 Mad 131 (136)
(07) 1907 Pun Re No 141 p 550
(05) 9 Cal W N 60 (67 69)
(90) 1890 Bom P J 13
6 (03) 26 All 234 (236)

O. 20 R. 6
Notes 1-3

Local Amendments

LAHORE

After sub rule (1) *add* the following

(1A) In addition to the particulars mentioned in clause (1), the decree shall contain the addresses of the plaintiff and the defendant as given in O 7 R 19 and O 8 R 11 or as subsequently altered under O 7 R 24 and O 8 R 12 respectively

MADRAS

After sub rule (2) the following be *inserted* as sub rule (2A)

' (2A) In all cases in which an element of champerty or maintenance is proved the Court may provide in the final decree for costs on a special scale approximating to the actual expenses reasonably incurred by the defendant '

Synopsis

Other Topics (miscellaneous)

1. Chartered High Courts — This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction[1] (see Order 49 Rule 3)

As to the applicability of this rule to proceedings under certain Tenancy Acts see the undermentioned Acts[2]

2 Scope of the Rule — It is imperative that the decree should agree with the judgment[1] As has been seen in Note 6 to Section 152 *ante* where the decree does not agree with the judgment the Court has an inherent power to amend it so as to bring it into conformity with the judgment[2] Where however, the decree does agree with the judgment it cannot subsequently be altered or added to by the Court passing it except under Section 152 *ante* or under Rule 11 *infra*[3]

Where a decree or any part of a decree is passed by consent of parties it should always so appear on the face of the decree when drawn up[4]

Where a judgment is pronounced, the decree must automatically follow it and the Court has no power to direct that the preparation of the decree be stopped until the payment of deficit court fees[5]

3 Form and contents of decree — Decrees drawn up in suits should contain all the particulars required by this rule[1] and should use the forms prescribed in

Order 20 Rule 6 — Note 1
1 (88) 12 Bom 174 (185)
2 [illegible]

Note 2
1 (24) AIR 1924 All 818 (821) 46 All 864
2 [*See also* (23) AIR 1923 Rang 113 (114) 4 Upp Bur Rul 135)]
3 (04) 14 Mad L Jour 359 (367)
(85) 7 All 276 (280)
(10) 13 Oudh Cas 28 (30 31)
[*See also* (01) 4 Oudh Cas 82 (84)]
4 (31) AIR 1931 P C 107 (109) 27 Nag L R 139 (P C)
5 (32) AIR 1932 Pat 228 (231) 11 Pat 532

Note 3
1 (79) 2 All 342 (344)

O. 20 R. 6 Note 3

Appendix D to Schedule I, with such variations as the circumstances of each case may require [2] A decree properly prepared should indicate against whom and in favour of which of the parties it has been made and should state the names of all the persons against whom it has been passed and who will be affected thereby, where a defendant is not one of the persons against whom the decree is made, there is no decree against him [3] If, during the pendency of the suit, the plaintiff dies and his minor son is allowed to represent him, the decree must describe the new plaintiff as substituted plaintiff as representative of his father, the deceased plaintiff, and not as the minor plaintiff [4] In a suit against a legal representative, the decree should state that it is against the defendant in that character [5] As to the form of decrees in various other kinds of suits, see the undermentioned cases [6]

('17) AIR 1917 All 281 (283) 39 All 13
2 [*See also* ('73) 19 Suth W R 152 (153)]
3 ('17) AIR 1917 All 281 (283) 39 All 13
('71) 15 Suth W R 126 (126)
4. ('91) 18 Cal 111 (120) 17 Ind App 173 (P C)
5 ('85) 8 Mad 208 (213)
('87) 10 Mad 316 (318 319)
('89) 12 Mad 325 (329)
('04) 27 Mad 243 (248) (F B)
('87) 14 Cal 316 (320)
('84) 8 Bom 309 (310)
Marsh 611
6 *Suit against deceased person s estate*
('04) 29 Bom 96 (101)
Suit against Hindu widow
('03) 25 All 330 (332)
('94) 18 Bom 679 (683)
('94) 18 Bom 452 (454)
('64) 1864 Suth W R 250 (250)
('68) 9 Suth W R 107 (109 110)
('73) 20 Suth W R 187 (187)
('81) 6 Cal 479 (481)
Suit against Mahomedan widow
('70) 5 Beng L R 570 (575) (PC)
Suit against manager of family
('84) 7 Mad 201 (203)
('84) 7 Mad 328 (335)
('99) 22 Mad 166 (168)
('82) 4 Mad 96 (98) (FB)
Suit against karnavan
('84) 7 Mad 413 (416)
('87) 10 Mad 355 (356)
Suit against Uralars
('86) 9 Mad 473 (474)
Suit on Bill of Exchange
('89) 16 Cal 804 (806)
Suit for contribution
('04) 31 Cal 597 (611 612) 31 Ind App 94 (PC) (Joint decree not to be passed against all defendants)
(1865) 3 Suth W R 170 (171)
('71) 15 Suth W R 52 (54)
('75) 24 Suth W R 250 (251)
('70) 14 Suth W R 143 (143)
('71) 15 Suth W R 192 (192) (In a suit against [illegible] joint decree may be [illegible])
('71) 16 Suth W R 78 (79)
('66) 3 Mad H C R 187 (188)
('73) [illegible] N W P H C R 215 (216 217)

('67) 7 Suth W R 194 (194)
('67) 7 Suth W R 300 (301)
('67) 8 Suth W R 514 (515)
('69) 11 Suth W R 538 (539)
('75) 23 Suth W R 283 (283 284)
('75) 23 Suth W R 421 (422)
('98) 25 Cal 565 (569 570)
('08) 35 Cal 303 (309 310) 35 Ind App 32 (PC)
Suit for damages
('68) 9 Suth W R 299 (299)
('68) 10 Suth W R 299 (299) (Court cannot direct the amount of damages to be assessed in execution)
('70) 13 Suth W R 139 (140)
Suit to set aside deed for fraud or undue influence

Suit for ejectment
('94) 18 Bom 107 (108)
('75) 23 Suth W R 399 (399)
('99) 26 Cal 639 (644 645 646)

Suit relating to right of privacy
('04) 1 All L Jour 118 (120)
Suit for possession in which enquiry is to be made as to value of improvements
('81) 3 Mad 389 (384) (FB) (Enquiry must be made before decree)
Suit for maintenance
(1900) 24 Bom 386 (390)
('70) 2 N W P H C R 170 (172)
('81) 6 Cal 631 (633)
('74) 6 N W P H C R 41 (43) (Prospective decree is irregular)
('85) 9 Bom 108 (110)
('87) 9 All 33 (34)
('92) 19 Cal 139 (143) (FB)
('95) 22 Cal 903 (905)
('84) 7 Mad 80 (82)
('87) 10 Mad 283 (286) (FB)
('98) 22 Bom 669 (672)
('99) 26 Cal 441 (447 448 44)
('84) 6 All 632 (634)

The decree must be quite *distinct* from the judgment[7] and must be self contained and capable of execution without reference to any other documents[8] A copy of the judgment with the schedule of costs appended thereto does not constitute a proper decree[9]

In preparing a decree, Courts ought to clearly define and specify what their intentions are[10] The parties and their pleaders should also see that the decrees are properly drawn up[11]

Courts in India cannot make a decree of non suit[12] No decree need be drawn up in matters which are not civil suits,[13] or in cases of orders passed under Section 47 of the Code[14] But the Court will not be deterred from making a decree by the mere fact that there may be difficulties in carrying it out[15] or because there is no specific provision for passing a decree in the particular case[16]

In the case of appellate decrees, it will be always expedient expressly to embody in a decree of affirmance so much of the decree below as it is intended to affirm and thus avoid the necessity of reference to the superseded decree[17]

4 **Amendment of decree.** — See Section 152 *ante*, and the undermentioned cases[1]

Suit by co sharer or purchaser from co sharer for possession
(90) 12 All 556 (558) (Suit for joint possession)
(96) 20 Bom 627 (629)
(93) 15 All 412 (413) (Decree for joint possession may be given if the plaintiff asks for it and evidence shows that he is entitled to it)
(96) 20 Bom 569 (570) (Exclusive possession can only be awarded on proof of exclusive title)
(15) AIR 1915 Lah 310 (310)
(04) 26 All 588 (590 591) (FB)
(05) 27 All 88 (90)
(05) 27 All 153 (155)
(05) 2 All L Jour 481 (482)
(94) 1894 All W N 166 (167)
(77) 1 Bom 95 (96)
(96) 20 Bom 467 (468)
(78) 2 Bom 676 (678)
(95) 19 Bom 36 (40)

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(94) 18 Bom 452 (453)
(94) 18 Bom 679 (683)]
7. (20) AIR 1920 Lah 395 (396) 1 Lah 223 (Paragraph in judgment not in form of decree is not decree)
8 (12) 15 Ind Cas 735 (738) (Cal)
(79) 4 Cal 69 (72)
(82) 8 Cal 975 (979)
[*See* (69) 12 Suth W R 99 (99)]
9 (71) 15 Suth W R 326 (327)
10. (68) 10 Suth W R 96 (97)
(67) 7 Suth W R 2 (3)
(81) 6 Cal 319 (323) (Material findings should be embodied in the decree)
(75) 24 Suth W R 479 (479)
(14) AIR 1914 Cal 784 (784) (Meaning doubtful —Decree was set aside)

(96) 18 All 344 (347) (However, in this case reference was made to pleadings in the suit to ascertain meaning of the decree)
(68) 10 Suth W R 497 (488)
(See also (71) 15 Suth W R 154 (155)]
11 (68) 10 Suth W R 96 (97)
(72) 18 Suth W R 303 (304)
(73) 20 Suth W R 111 (112)
(86) 8 All 492 (495)
(82) 8 Cal 687 (699)
('14) AIR 1914 Bom 23 (24) 38 Bom 331
(**See however** (28) AIR 1928 Rang 215 (216) (Decree not properly drawn up—Party not responsible))
12 (87) 9 All 690 (697)
13. [*See* (88) 11 Mad 26 (35) 14 Ind App 160 (P C)]
14 (02) 6 Cal W N 283 (284)
15 (1863) 1 Mad H C R 415 (417)
16 (08) 30 All 290 (295 296) (Dismissal of appeal under O 41 R 11 is a decree)
17 (72) 14 Moo Ind App 465 (492)

Note 4

1 *No amendment where decree is in accordance with judgment*
('98) 20 All 337 (339) (Decree erroneous but in accordance with judgment)
(82) 1892 All W N 72 (73)
(06) 1906 All W N 220 (221)
No limitation for bringing decree in accordance with judgment
(85) 7 All 276 (280)
Decree not agreeing with judgment—Person

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Amendment should be after notice to parties—Decree affirmed on appeal—What decree should be amended

O. 20 R. 6
Notes 5–6

5 Construction of decree.— See Notes 76 and 77 to Section 47 *ante*, and the cases noted below [1]

6. Provision for costs—Sub-rule (2) —Ordinarily the judgment does not set forth the actual amount of the costs awarded in the suit [1] The *decree* must, however, state specifically the actual amount of costs, and by whom and in what proportions they are to be paid and no costs can be recovered unless they are so mentioned [2] A mere specification of the costs alone without any allotment of responsibility is not a sufficient compliance with the rule [3]

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(70) 14 Suth W R 96 (96) (Decree confirmed by High Court — Lower Court cannot make any alteration in it not even to correct a clerical error)
(97) 24 Cal 759 (762)
What Court can amend

1 *Decree must be construed on its own terms*
(87) 11 Bom 537 (539)
(32) AIR 1932 Oudh 77 (78) 7 Luck 421 (Language of decree plain — Court cannot look at its judgment to interpret decree)
(84) 6 All 30 (33)
(1865) 4 Suth W R Misc 20 (20)
(72) 17 Suth W R 19 (20)
(25) AIR 1925 Pat 291 (293)
(91) 18 Cal 108 (110) (P C)
(76) 1 Bom 158 (162)
(11) 12 Ind Cas 334 (335) (Mad) (Principle applies whether decree is declaratory or executory)
Where ambiguous reference may be made to the record
(91) 13 All 343 (344)
(94) 18 Bom 542 (545)
(92) 19 Cal 159 (172) 18 Ind App 165 (P C)

decided)
(12) 13 Ind Cas 82 (83) (Cal)
(71) 15 Suth W R 530 (530)
(73) 19 Suth W R 343 (344)
(90) 13 Mad 313 (315)
(91) 14 Mad 29 (30 32)
(98) 21 Mad 344 (361) 25 Ind App 102 (P C)
(16) AIR 1916 Mad 520 (521) (Mortgage decree drawn up as money decree by mistake — Decree can be amended)
(87) 11 Bom 177 (179)

in the jurisdiction of another Court)
(73) 19 Suth W R 251 (251 252)
(98) 20 All 5 3 (5 7) (F B)

(87) 9 All 418 (419 420) (A decree takes priority in respect of the date on which it was passed, and not in respect of the priority of the debt which it enforces)
(91) 13 All 288 (289 290) (F B)
Declaratory decree — Executability
(88) 12 Bom 416 (418)
(78) 4 Cal L Rep 97 (99)
(92) 15 Mad 286 (287)
Where the decree amounts to a money decree
(74) 21 Suth W R 150 (151 152)
(81) 3 All 216 (219 220 221)
(80) 2 All 345 (348 349)
(80) 2 All 342 (344)
(79) 5 Cal L Rep 176 (178) (Declaration that plaintiff is entitled to obtain possession on payment of a certain sum is not a money decree)
Miscellaneous

from lower Court's construction of decree)
(88) 12 Bom 23 (25 26) (Mention as to when a particular right is to become enforceable is not a condition precedent)
(16) AIR 1916 Mad 795 (798) (Courts are not bound to construe a decree in the mode in which the parties intended it to operate)
(86) 10 Bom 435 (437) (Doctrine of penalties does not apply to stipulations contained in decrees)
(15) AIR 1915 Cal 8 (8) (Direction in a mortgage decree to realize balance personally does not come within Art 182 (7) Limitation Act)
(73) 19 Suth W R 41 (42) (P C)
(72) 17 Suth W R 175 (175)

1 (1900) 24 Mad 25 (26) (Order determining costs must be treated as continuation or completion of the judgment)
2 (70) 13 Suth W R 23 (23 24)
(33) AIR 1933 Pat 135 (138 139) (Even when suit is dismissed decree ought to be prepared showing amount of costs and giving directions in respect thereto even if each party has to bear its own costs)
(70) 14 Suth W R 357 (358) (Costs are not consequential upon partial relief being granted in suit)
3 (71) 15 Suth W R 4 (5)

O. 20 R. 6
Notes 6-9

But it is not necessary in an *appellate* decree to state specifically the sums which go to make up the costs of the first Court [4]

Where, in a suit against a minor, the Court considers that the guardian should be personally ordered to pay the costs it should be so stated in the decree or order [5]

The usual practice is that unless the judgment awards separate costs to the several defendants in a suit, the decree should not award separate costs to them [6]

See also Section 35 *ante*

7 Decree not in accordance with the judgment — Where the judgment awards costs without specifying the actual amount the costs must be calculated according to law [1] Where therefore the assessment of costs is not according to law [2] or where the decree awards costs in a case in which the judgment is silent [3] or where the decree awards interest at a higher rate than that specified in the judgment,[4] the decree to that extent is at variance with the judgment and can be amended under the provisions of Section 152 of the Code or under the Court's inherent powers See Section 152 Note 6

As to whether interest which is inadvertently omitted in the decree though mentioned in the judgment can be awarded in execution see the case noted below [5]

8 Set-off of costs towards sums admitted or found due — Where in a suit by A against B a decree is passed against B for payment of a certain sum of money to A but A is ordered to pay the costs of B B can set off the amount of costs against the amount payable by him to A [1] It has been held that costs made payable under *different orders* in the same suit may be set off against each other [2]

A set off cannot be allowed for costs not *actually awarded*[3] nor for sums of money which one party might get from the other on the latter's applying for delivery of possession [4]

See also the undermentioned case [5]

9 Appeal — See Note 19 to Section 152 *ante*

('79) 18 Suth W R 280 (288) (But the Court need not go into particulars or append to the judgment a schedule setting forth different items of costs)

4 ('74) 21 Suth W R 74 (75)

5 ('74) 21 Suth W R 298 (298)
('76) 25 Suth W R 316 (316) (No expression of opinion in the judgment can import any such liability for costs into the decree)

6 ('35) AIR 1935 Pat 41 (41)

Note 7

1 ('04) 7 Oudh Cas 43 (45)

2 ('04) 7 Oudh Cas 43 (45)
('32) AIR 1932 All 327 (340) 54 All 490 (Decree taxing them improperly — Decree differs from judgment)
('01) 1901 All W N 94 (95) (Costs incorrectly assessed by the ministerial officers)

3 ('94) 4 Mad L Jour 260 (281)

4 [*See* ('05) 27 All 485 (486)]

5 ('30) AIR 1930 Cal 849 (850)

Note 8

1 ('14) AIR 1914 Oudh 416 (417) (Suit for sale on mortgage)
('93) 17 Bom 32 (34) (Suit for redemption)
('79) 4 Cal 749 (744) (Do)
('81) 6 All 351 (357) (Pre emption suit)
('12) 15 Ind Cas 327 (338) 34 All 596 (Do)
('06) 28 All 676 (677 678) (Do)
(1900) 3 Oudh Cas 323 (324) (Do)
('03) 6 Oudh Cas 23 (24) (Decree for possession on payment of a sum to defendant — Award of costs also to the plaintiff)

2 ('83) 9 Cal 797 (801 807) 10 Ind App 113 (PC)

3 ('71) 16 Suth W R 308 (309)

4 ('07) 11 Cal W N lxiv

5 ('30) AIR 1930 Bom 516 (517) 55 Bom 3[illegible] (Where the petitioning creditor's petition is ordered to be dismissed with costs no set off is permissible to the creditor against the money ordered to be paid to him at least to the extent of the lien for costs of the attorneys of the debtor)

10 Revision — See Note 20 to Section 152 Note 21 to Section 115 and also the undermentioned cases [1] **O 20 R 6 Note 10**

R. 7. [S 205] The decree shall bear date the day on which the judgment was pronounced, and, when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree **O 20 R 7**

Date of decree

[1877, Ss 204, 205, 206, 1859, S 189]

Synopsis

1 Chartered High Courts
2 Date of the decree
3 Limitation
4 Registration Act Section 77

1 Chartered High Courts — This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [1] but it has been held by the High Court of Madras[2] that even in cases of decrees passed on the original side of the High Court the practice is to make the decree bear the same date as the judgment

2 Date of the decree — The date of the decree and the date of the *signing* of the decree are two different things The date of the decree must correspond to the date on which the judgment is pronounced no matter what the date of the signing of the decree may happen to be [1] The reason is that it is on the date of the judgment that the Court must be deemed to have expressed what the decree is [2] The decree therefore though drawn up afterwards *relates back* to[3] and operates from[4] the date of the judgment Thus where one of the plaintiffs dies subsequent to the date of delivery of judgment but before the decree is actually drawn up this fact does not affect the validity of the decree [5] Where however a Court gives a judgment but refuses or is unable to give a decree till a condition is performed and draws up a decree after the performance of the condition it must be held that the judgment given is only a provisional one which does not become operative until the decree is prepared and that the latter date is the *date of the judgment* as well as of the *decree* [6] See also the undermentioned cases [7]

Note 10

1 (08) 11 Oudh Cas 208 (210) (Can interfere when lower Court declined to correct clerical error)
(94) 4 Mad L Jour 280 (281) (Misconstruction of a rule of practice is a ground for interference)

Order 20 Rule 7 — Note 1

1 See Order 49 Rule 3
2 (18) 21 Ind Cas 545 (545) (Mad)

Note 2

1 (80 A R 020 R 67

(21) 65 Ind Cas 650 (652) (Cal)
4 (05) 32 C 1 483 (491)
(91) 14 Mad 150 (152)
5 (0) 6 Cal W N 196 (196)
6 (16) AIR 1916 Sind (3) 9 S d L R 1 1
[*See also* (0) 3 Cal 4 3 (491)
(85) 8 Mad 13 (139)
(79) 4 Cal 6 9 (63 633)
(S 14 C 0 54)]
7 (33 AIR 1 33 Cal 33 (10) (Throu h mis-

Ic 11

O. 20 R. 7
Notes 3-4

3. Limitation. — Section 12 of the Limitation Act provides that, in computing the period of limitation for *appeal* or for review, the time requisite for obtaining a copy of the decree shall be excluded Suppose now that the decree is actually *signed* on a date subsequent to that on which the judgment is pronounced, and a party applies for copies of the decree and judgment after the date of the signing of the decree Can the period between the pronouncing of the judgment and the signing of the decree be excluded in computing the period of limitation, in addition to the period actually taken in obtaining the copies? On this point there has been a conflict of opinion According to the practice of the Calcutta High Court, such period should be excluded as being part of the time requisite for obtaining the copy[1] This practice has been followed by the High Court of Patna[2] All the other High Courts have, on the other hand, held that such period cannot be excluded in computing the period of limitation[3] In *Pramathanath Roy v William Arthur Lee*,[4] it was held by their Lordships of the Privy Council that no period can be regarded as requisite under the Limitation Act which need not have elapsed if the appellant had taken reasonable and proper steps to obtain an order, and that there is no warrant for the proposition that the time *actually consumed* in obtaining the decree must be deducted Their Lordships referred to the Calcutta view but did not decide as to the correctness or otherwise thereof

Section 12, sub section 2 of the Limitation Act does not apply to applications for *execution* of a decree and even according to the Calcutta[5] and Patna[6] High Courts, the period of limitation for an application for execution of a decree runs from the date of the judgment and not from the date on which the decree is drawn up and signed

4. Registration Act, Section 77. — It has been held by the High Court of Madras[1] that for the purposes of Section 77 of the Registration Act the period of 30 days is to be reckoned not from the time when the judgment is pronounced, but from the time when the decree is actually drawn up and signed

Local Amendment

ALLAHABAD

Add the following new Rule 7A

O. 20 R. 7A (Allahabad)

"7A A Court other than a Court subordinate to the District Court exercising insolvency jurisdiction passing an order under Section 47 or Section 144 of the Code of Civil Procedure or one against which an appeal is allowed by Section 104 or Rule 1

take of Court decree dated wrongly—Execution application in time from wrong date but barred from correct date—*Held* execution is in time and act of Court should not prejudice a party)
(35) AIR 1935 Cal 125 (126) (Decree not drawn up on non judicial stamp paper — Non judicial paper subsequently annexed defaced and names of parties and cause title of case put down—Decree is in order and can be executed)

Note 3

1 (86) 13 Cal 104 (107)
(72) 18 Suth W R 512 (512)
(05) 32 Cal 175 (177)
2 (16) AIR 1916 Pat 267 (267) 1 Pat L Jour 373 (FB)
(19) AIR 1919 Pat 506 (507)
3. (90) 12 All 461 (468 469 474) (FB)
(33) AIR 1933 Nag 125 (127) 29 Nag L R 220 (Dissenting from AIR 1924 Nag 271)
(99) 23 Bom 442 (446)
('95) 18 Mad 374 (376 377)
(15) AIR 1915 Mad 808 (808) (Even though time was granted for payment of entire court fees)
(1900) 13 C P L R 78 (79 80)
(26) AIR 1926 Nag 349 (349 350) 22 Nag L R 60 (Explaining AIR 1924 Nag 271)
(25) AIR 1925 Oudh 600 (601)
(05) 3 Low Bur Rul 62 (64, 65) (FB)
4. (22) AIR 1922 P C 352 (353) 49 Ind App 307 49 Cal 999 (PC)
5 (24) AIR 1924 Cal 351 (352)
(98) 25 Cal 109 (110)
(97) 1 Cal W N 93 (94)
(09) 3 Ind Cas 391 (392) (Cal)
(10) 5 Ind Cas 660 (662) (Cal) (Court has power to reconstruct a decree lost by fire)
(13) 19 Ind Cas 410 (410) (Cal)
[*See also* (17) AIR 1917 P C 85 (85) (PC) (A decision under S 48 C P C)]
6 (20) AIR 1920 Pat 111 (111) 5 Pat L Jour 490,

Note 4

1. (15) AIR 1915 Mad 865 (866) 38 Mad 291.

of Order 43, or an order in any case, against which an appeal is allowed by law, shall draw up a formal order embodying its adjudication and the memorandum of costs incurred by the parties" **O. 20 R. 7A (Allahabad)**

R. 8. [New.] Where a Judge has vacated office after pronouncing judgment but without signing the decree, a decree drawn up in accordance with such judgment may be signed by his successor or, if the Court has ceased to exist, by the Judge of any Court to which such Court was subordinate. **O. 20 R. 8**

Procedure where Judge has vacated office before signing decree.

1. Scope and applicability. — This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction see Order 49 Rule 3, clause 5

Where the decree was imperfect, and the Judge who pronounced it had left the district and it was impossible to draw up a decree from the judgment, it was held in the undermentioned case[1] that there is no alternative but to order a new trial

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R. 9. [S. 207.] Where the subject-matter of the suit is immoveable property, the decree shall contain a description of such property sufficient to identify the same, and where such property can be identified by boundaries or by numbers in a record of settlement or survey, the decree shall specify such boundaries or numbers. **O. 20 R. 9**

Decree for recovery of immoveable property

[1877, S. 207; 1859, S 190]

Synopsis

1. Scope of the Rule. | **2 Decree for possession of land**

Other Topics (miscellaneous)

Decree discrepant in area and boundaries, whether invalid See Note 1

Decree for possession of village — What passes under See Note 2

1. Scope of the Rule. — In suits relating to immovable property the decree should contain a description of the property *sufficient to identify* the same, and where it can be identified by *boundaries* or by *survey numbers*, the decree should specify such boundaries or numbers The reason is that otherwise the decree may in many cases become impossible of execution by reason of the indefiniteness of the property dealt with by it[1]

Order 20 Rule 8 — Note 1

1. (73) 19 Suth W R 267 (269)

Order 20 Rule 9 — Note 1

1. (76) 25 Suth W R 39 (40)
(75) 23 Suth W R 285 (285)
(73) 19 Suth W R 81 (82)
(69) 12 Suth W R 93 (99) (Evidence cannot be taken in the execution department to a certain what is decreed)
(72) 18 Suth W R 34 (3)
(7) 24 Suth W R 479 (479)
(78) 4 Cal 69 (72)
(84) 6 All 30 (33)

O. 20 R. 9
Notes 1-2

But the omission to comply with the strict letter of the rule does not render the decree invalid[2] The Court can ascertain the subject upon which the decree operates, from the acts and conduct of the parties[3]

2. Decree for possession of land. — A decree for possession of a village passes with it the village account books and other documents relating to the management of the village[1] Similarly, it will pass with it any buildings or other constructions erected thereon[2] except where the defendant is not a trespasser and is entitled under law to remove the building[3]

O. 20 R. 10

Decree for delivery of moveable property.

R. 10. [S. 208.] Where the suit is for moveable property, and the decree is for the delivery of such property, the decree shall also state the amount of money to be paid as an alternative if delivery cannot be had.

[1877, S. 208; 1859, S. 191.]

Synopsis

1. Scope of the Rule | **2. "Amount of money to be paid."**

1. Scope of the Rule.— A person entitled to the delivery of moveable property from another is not bound to sue for the *delivery of the property* itself, he may sue for the *value* thereof[1] Even if he *does* sue for the delivery of the property, the decree need not always be for the delivery of the property in the first instance, the Court may, in proper cases, decree only the value of the property as damages[2] Thus, where the defendant is not in possession of the property claimed, the Court need not decree delivery thereof but may pass a decree for the value of such property[3] But where the Court considers it proper to direct a restoration of the property, the decree should also state the amount of money to be paid as an alternative if delivery cannot be had.[4]

The giving of the alternative remedy does not, however, give the decree-holder any option of refusing to take delivery of the property and of insisting upon the money portion of the decree he cannot execute his decree without having recourse to the procedure prescribed by O 21 R 31[5] Nor can the judgment debtor claim any option

('68) 10 Suth W R 96 (97) (Decree for possession of a share of lands without specifying the share by boundaries is only a decree for an undivided share)
[See ('73) 20 Suth W R 142 (142)]

2. ('81) 5 Bom 208 (213)
('05) 1905 Pun Re No 74 p 237 (Decreed as the property in suit where plaint gives all the necessary details)
('71) 16 Suth W R 171 (172) (Boundaries described in the plaint no longer in existence — Evidence may be taken to ascertain their former position)
('99) 3 Cal W N 287n
('68) 9 Suth W R 94 (96)
[See ('10) 8 Ind Cas 911 (912) 4 Sind L R 194]

3. ('92) 19 Cal 312 (321 322) 19 Ind App 69 (PC)
('74) 22 Suth W R 330 (331) (12 W R 99 Explained)
('14) AIR 1914 Cal 775 (775)
('17) AIR 1917 Cal 407 (409) (There is no error in leaving the ascertainment of boundaries to be decided in execution proceedings)

Note 2

1. ('87) 11 Bom 495 (497)
2. (1865) 2 Suth W R 123 (125)
('82) 8 Cal 592 (590 591)
3. ('66) 6 Suth W R 228 (229) (FB)
('04) 27 Mad 211 (217)

Order 20 Rule 10 — Note 1

1. [See ('21) AIR 1924 Nag 176 (178)]
2. [illegible]

of either surrendering the property or paying the money decreed.[6]

The words "moveable property" in the rule mean *specific* moveable property such as is referred to in Articles 48 and 49 of the Limitation Act.[7] A suit for the recovery of a certain quantity of grain payable under a *karar* for maintenance is not one for specific moveable property within the meaning of this rule.[8]

No decree can be passed under this rule for delivery of property against *several defendants* jointly, unless there is a *combination* among them; if it is found that any one of them took possession of the property, the decree should be made against him only, and to the extent of the property taken by him.[9]

2. "Amount of money to be paid."— The money to be paid as an alternative is the value of the property together with damages for the time the plaintiff has been kept out of it.[1] Where the plaintiff valued the property claimed at Rs. 1360 and produced evidence to show that this was the value, but the defendant simply refused to accept the valuation and would not produce the articles, which he did not deny were in his possession, it was held that, under the circumstances, the valuation made by the plaintiff ought to be accepted by the Court.[2]

Where a decree is passed in terms of an award ordering delivery of moveable property, and a part of such property is lost subsequently before delivery, the decree cannot be modified by the Court by inserting in it an order to pay the value of the property so lost.[3]

If there is a dispute as to the property claimed the Court must, of course, determine it before passing the decree; it cannot leave the matter to be settled in *execution*.[4]

O. 20 R. 11

R. 11. [S. 210.] *(1)* Where and in so far as a decree is for the payment of money, the Court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

Decree may direct payment by instalments.

(2) After the passing of any such decree the Court may, on the application of the judgment-debtor and with the consent of the decree-holder, order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the

Order, after decree, for payment by instalments.

(35) AIR 1935 Cal 39 (51) : 61 Cal 711
('03) 13 Mad L Jour 444 (444)
6. ('03) 13 Mad L Jour 444 (444)
7. ('99) 22 Mad 476 (481)
8. ('24) AIR 1924 Nag 176 (178)
9. ('09) 1 Ind Cas 205 (206, 207) (Cal)

Note 2
1. ('73) 19 Suth W R 123 (125)
('71) 16 Suth W R 240 (243, 244)
2. ('07) 1907 All W N 227 (227)
1 Strange 505 : 1 Sm L C 356 (1903) Edn : 43 Eng Rep 664, Armory v. Delamirie
3. ('93) 17 Bom 657 (661)
4. ('75) 7 N W P H C R 75 (77)

O 20 R 11
Note 1

judgment debtor, or the taking of security from him, or otherwise, as it thinks fit

[1877, S 210, 1859, S 194]

Local Amendments

MADRAS

Substitute the following *for* Rule 11

11 (1) Where and in so far as a *decree* is for the payment of money the Court may for any sufficient reason at the time of passing the *decree* order that payment of the amount decreed shall be postponed or shall be made by instalments with or without interest notwithstanding anything contained in the contract under which money is payable

(2) After the passing of any such decree the Court may on the application of the judgment debtor and *after notice* to the decree holder order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to the payment of interest the attachment of the property of the judgment debtor or the taking of security from him or otherwise as it thinks fit

NAGPUR

In sub rule (2) *for* the words and with the consent of the decree holder the words and after notice to the decree holder shall be *substituted*

RANGOON

In sub rule (2) *for* the words and with the consent of the decree holder *substitute* the words and after notice to the decree holder

SIND

In sub rule (2) *for* the words and with the consent of the decree holder *substitute* the words and after notice to the decree holder

Synopsis

1 Legislative changes
2 Scope of the Rule
3 Decree must be for the payment of money
4 The Court
5 Postponement of payment
6 Order for payment by instalments
7 Sufficient reason
8 Notwithstanding anything contained in the contract under which the money is payable
9 With or without interest
10 Order for instalments after decree — Sub rule (2)
11 Taking of security
12 Limitation for application under sub rule (2)
13 [illegible]
14 [illegible]

Other Topics (miscellaneous)

Appeal — Court fee See Note 14
Decrees under O 34 R [illegible] — Applicability of rule See Note 3
Decree with a default clause — Limitation See Note 13
Default clause — Waiver See Note 13
Instalment decrees — When not to be passed See Note 7
Proper Court to act under this rule See Note 4
Rent decrees under the Bengal Tenancy Act — Applicability of rule See Note 2
Rule whether applies to mortgage decrees See Note 2

1 Legislative changes —

1 The words shall be postponed in sub rules (1) and (2) are new [illegible] the absence of these words in the old C [illegible] [illegible]

2 The words "notwithstanding anything contained payable are also new See Note 7 below

3 For the words ' in all decrees the words ' where and in so far as a decree have been substituted

4 The proviso in the old Section has been omitted

2 Scope of the Rule — Where a decree in a suit is for the payment of money, the Court may, under this rule order the payment of the decree amount to be postponed or to be made in instalments [1] If it decides to pass such order *at the time of passing* the decree, it may do so if there are sufficient grounds therefor [sub rule (1)] *After the passing of the decree* it can pass such an order only if the decree holder gives his consent thereto [sub rule (2)] [2]

The rule applies to decrees for the *payment of money* It does not apply to decrees for recovery of money by sale of property, as in the case of mortgage decrees [3] But, independently of this rule a decree may, in a suit on a mortgage or for partition, be passed on a *compromise* between the parties providing for payment by instalments and for sale of the mortgaged property in default [4]

This rule does not apply to cases coming under the Dekkhan Agriculturists' Relief Act[5] or rent decrees under the Bengal Tenancy Act [6] In a suit for arrears of rent under the Agra Tenancy Act against a person other than a permanent tenure holder or a fixed rate tenant the Revenue Court cannot make a decree payable by instalments under this rule [7] But it has been held that the provisions of the U P Agriculturists Relief Act relating to instalment decrees do not derogate from the provisions of this rule and that the Court can pass an instalment decree under this rule even where such decree would not be permissible under the provisions of the Agriculturists Relief Act [8]

This rule is not in any way controlled by the provisions of the Imperial Bank Act which limit the powers of the Bank in the matter of advancing loans on longer terms than six months and therefore a Court cannot refuse to exercise the discretion vested in it under this rule simply on the ground that such a course would postpone the realization of the dues by the Bank for over six months [9]

3 Decree must be for the payment of money. — A decree for deficiency passed under O 34 R 6 of the Code is only a decree for the payment of money within the meaning of this rule [1]

Note 2

1 *See also* (07) 31 Bom 348 (353)

2 (81) 3 All 809 (811) (Decree holder s remedy [illegible] Pecu[illegible]

3 (79) 2 All 370 (372)
(81) 5 Bom 604 (605)
(83) 7 Bom 332 (335)
(86) 1886 Bom P J 90
(87) 1887 Pun R No 49 p 105
(99) 2 All 649 (651) (Decree in suit to enforce a lien on an annuity [illegible])
[*See also* (79) 2 All 129 (132 133) *(Quære)*
(79) 3 Bom 202 (203) (Where it is not clear whether a decree was passed simply for recovery of money)]
[**See however** (13) 20 Ind Cas 8 (10) (Lah)]

4 (16) AIR 1916 All 331 (331) (Partition)
[*See* (07) 34 Cal 886 (890 891)
(25) AIR 1925 Bom 500 (500)]

5 [*See* (95) 19 Bom 318 (320)]

6 (07) 11 Cal W N 857 (859)

7 (37) AIR 1937 All 436 (437) 54 All 571

8 (38) AIR 1938 All 52 (57) (Instalments only over a period of 4 years permissible under the Agriculturists Relief Act — Courts can grant under this rule instalments over a longer period)

9 (33) AIR 1933 Nag 330 (331 33)

Note 3

1 (11) 11 Ind Cas 736 (736) (Cal)

O. 20 R. 11
Notes 4-7

4. "The Court." — It is the Court which *passed the decree* that can act under this rule [1] In cases coming under the Dekkhan Agriculturists' Relief Act, however, it is provided by Section 15B of that Act that the Court which *carries out the decree* can order the payment by instalments or extend the time for payment [2]

5. Postponement of payment. — Under Section 210 of the old Code, there was a conflict of opinion as to whether the Court could make an order *postponing* the payment under a decree [1] The introduction of the words "shall be postponed' in this rule makes it clear that such an order can be passed

A judgment-debtor who has enjoyed the benefit of the arrangement for delay in execution by virtue of an order passed under this rule cannot subsequently resile from such arrangement [2]

6. Order for payment by instalments. — A decree payable in instalments on a certain condition (*e g*, that the defendant should mortgage certain property by way of security) is not illegal on that ground [1] As to the construction of decrees for payment of money in instalments, see the undermentioned cases [2] See also Note 2 above

7. Sufficient reason. — The Court has a discretion, under this rule, to order payment of the decree amount in instalments But such discretion should, as in the case of the exercise of all discretions under the Code, be exercised in a *judicial* and not in an arbitrary manner [1] The onus is on the defendant to show that he is entitled to the indulgence under this rule [2] Where he has opposed the claim on frivolous grounds and effected a fraudulent conveyance of his property, subsequent to the institution of

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Note 4

1. (18) AIR 1918 Mad 1174 (1175) 40 Mad 283 (FB)
(34) AIR 1934 Rang 165 (166) 12 Rang 320 (Court to which decree is transferred for execution cannot pass instalment order under this rule)
(34) AIR 1934 Rang 197 (198) (Do)

1. (10) 5 Ind Cas 421 (422) (Mad) (Yes, under its inherent power)
('84) 7 Mad 152 (154, 155) (Order postponing period of payment is not a nullity)
(80) 2 All 649 (650) (No)
2. (12) 13 Ind Cas 204 (205) (Mad)

Note 6

Note 7

1. (10) [illegible] Ind Cas 552 (552, 553) (Cal)

(33) AIR 1933 All 90 (90) 54 All 539
('33) AIR 1933 Nag 330 (331)
(34) AIR 1934 Pesh 2 (3) (No special reason for special indulgence—Normal course should be followed)
(1862) 1 Hyde 98 (98)
2 Hay 68
(36) AIR 1936 Lah 51 (55) (Discretion of the Court is to be exercised within bounds and not in a manner so as to constitute a virtual denial of the creditors' rights)
(35) AIR 1935 Rang 495 (495) (The discretion to order payment of a decretal amount by instalments must never be exercised so as to constitute a virtual denial of the decree holder's rights)
('35) AIR 1935 Cal 550 (560) (Even a Small

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Court is not entitled to presume debtor's inability to pay in a lump sum)
(35) AIR 1935 Cal 559 (560) (Simply because instalment is prayed for and the claim is not contested, that does not entitle a debtor to get an instalment decree as a matter of course Con

the suit, he deserves no consideration at the hands of the Court, especially where the interest agreed upon between the parties is moderate[3] Nor should a decree be passed the effect of which is to stay execution unconditionally,[4] or to make the instalments extend over a long period without guaranteeing satisfaction or making any provision for the payment of interest[5] Again, the mere fact that the defendant is unable to pay or is hard pressed or embarrassed,[6] or that his estate is under the management of the Court of Wards,[7] or that he is expecting to get a cross decree against the plaintiff in a pending litigation which would enable him to claim a set off,[8] is not a sufficient reason to enable the Court to order payment by instalments or to postpone payment

Where, however, the rate of interest is exorbitant or unconscionable,[9] or where the decree for immediate payment will deprive the defendant of his means of livelihood,[10] or where the defendant has made payments towards principal and interest, which exceed the principal sum,[11] a decree for instalments can be properly passed Again, a lender who abandons his proper remedy in order to avoid the consequence of the original contract is not entitled to the relief prayed for under this rule, if it would be a hardship to the judgment debtor.[12]

8. "Notwithstanding anything contained in the contract under which the money is payable."—Where an instalment bond provided for payment by instalments, with a default clause to the effect that the whole sum would be due immediately on default, and a suit was brought for the whole amount on default, it was held by the Bombay High Court under Section 210 of the old Code, that the Court had no jurisdiction to ignore the express contract of the parties as to the consequences of such default and pass a decree for instalments[1] The introduction of the words 'notwithstanding anything contained in the contract under which the money is payable' in the present rule now makes it clear that the Court has a discretion to pass a decree for instalments notwithstanding the contract between the parties In their Statement of Objects and Reasons, the Special Committee observe as follows

"The Committee have added words to sub rule (1) of this rule in order to override the ruling of the Bombay High Court in the case of *Raghu Govind* v *Dipchand* (I L R 4 Bombay 96), as the practice inculcated by that ruling seems to prevail only in the Presidency of Bombay and not in the rest of India"

9. "With or without interest." — The granting or refusal of interest, and the rate at which it is to be granted on the instalments ordered to be paid, are in the

siderations which should guide the Court in allowing instalments stated)

3. *(23) 71 Ind Cas 903 (904) (Pesh)*
[*See also* (37) AIR 1937 Lah 16 (17) (A debtor making defaults in payment of instalments as provided by the bond executed by him is not entitled to a provision for payment of the decretal amount by instalments, more so when there is no evidence to show that he is unable to pay the amount)]

4 *(25) AIR 1925 Mad 908 (909)*

5 (06) 1 Agra 270 (271) (Instalments extending over 20 years)
(33) AIR 1933 All 90 (90) 54 All 539 (Court passing decree for Rs 684 and ordering that defendant should pay in six monthly instalments of Rs 60 each and allowing no future interest —It is not proper exercise of discretion)
(78) 2 All 129 (132) (Instalments extending over 10 years)
(66) 1 Agra 116 (117) (Instalments hardly sufficient to cover interest)
(35) AIR 1935 Cal 559 (560)

6. (25) AIR 1925 Mad 908 (909)
('33) AIR 1933 Nag 330 (331)
(78) 2 All 129 (131 134)
(06) 2 Nag L R 179 (187)
(10) 6 Ind Cas 552 (553) (Cal)
('82) 1882 All W N 102 (102)
(35) AIR 1935 Cal 559 (560)

7 ('23) AIR 1923 Lah 256 (256)

8 (26) AIR 1926 Lah 604 (605) 7 Lah 393

9 (07) 31 Bom 348 (353)

10 (25) AIR 1925 Rang 83 (83)

11 (11) 11 Ind Cas 891 (893) (Low Bur)

12 (1900 02) 1 Low Bur Rul 91 (91) (Equitable mortgage)

Note 8

1. (80) 4 Bom 96 (100)

2 Hay 30
[*See also* (01) 1901 Pun L R No 167]

O. 20 R. 11
Notes 9-11

discretion of the Court[1] Where no interest is provided for in an instalment decree, it must, under the provisions of Section 34 of the Code, be deemed to have been refused, and cannot be granted by the executing Court[2] Where, however, interest is provided for in the decree, but the *rate* is not mentioned, the Court can, in execution, grant the usual *court rate* of interest[3] The High Court of Rangoon has held in the undermentioned case[4] that where a decree allows interest, to disallow it in passing an order under this rule would be without jurisdiction

10. Order for instalments after decree — Sub-rule (2). — As has been seen in Note 2 *ante*, no order for instalments can be made after the passing of the decree under this sub rule, unless the decree holder gives his *consent* thereto But the consent need not be an express one It was held in the undermentioned case[1] that the non opposition by the decree holder after notice to him may amount to consent within this rule

An order for postponement or for instalments under this sub rule does not amount to a variation of the decree itself[2] and can be made in execution proceedings[3] or even when an appeal is pending from the decree[4] Nor does the rule direct the decree to be amended by virtue of such order[5] Where default is committed in the payment of instalments ordered to be paid, the Court can grant relief against forfeiture,[6] though it cannot alter the terms of the decree either with regard to the decretal amount or the rate of interest which is to be paid thereon[7]

Where parties agree after decree that the decretal amount should be paid by instalments and the Court, accepting the compromise, passes an order striking off the execution proceedings, the Court must be deemed to have passed an order under the provisions of this sub rule[8] But, unless recognized by the Court in some form, the arrangement between the parties will not, by itself, amount to a direction by the Court under this rule[9] and cannot be enforced in execution[10] Where the Court has recognized the compromise between the parties for payment by instalments, it cannot, on default of payment in any of the instalments, refuse to execute the decree and drive the plaintiff to a separate suit[11]

11. Taking of security. — The security that may be taken under sub rule (2) for the due performance of the decree can be enforced in *execution* and O. 34 R 14 is no

Note 9

1. (79) 3 Bom 202 (203) (Six per cent interest awarded — High Court refused to interfere)
2 See Note 17 to Section 34
[*See also* (70) 14 Suth W R 324 (324)]
3 See Note 17 to Section 34
[*See also* (80) 6 Cal L Rep 231 (232)]
4 (33) AIR 1933 Rang 323 (325)

Note 10

1. (84) 7 Mad 152 (154 155)
2. (78) 2 Cal L Rep 143 (146)
[**See however** (32) AIR 1932 All 273 (280) 54 All 573 (FB)]
3 (24) AIR 1924 Bom 118 (119)
4. (27) AIR 1927 Mad 416 (419, 420)
5. (17) AIR 1917 Mad 188 (188) (Such order, however was held in substance to be one amending the decree — This view it is submitted, is not correct—A decree cannot be varied or altered except under S 152 or on review)
6 (22) AIR 1922 Bom 170 (171) 46 Bom 463
(25) AIR 1925 Bom 404 (405)
7. (26) AIR 1926 Bom 368 (368)
8 (23) AIR 1923 Lah 381 (382)
(85) 11 Cal 143 (145)
(07) 5 Cal L Jour 25 (26 27)
(84) 6 All 16 (17)
(1900) 1900 Pun Re No 96, page 389 (Application after decree for an order for payment by instalments was treated as one under this sub rule)
[See (82) 4 All 240 (242) [illegible]
not an order under this rule)]
{*See also* (35) AIR 1935 Mad 17 (20)]
9. ('87) 14 Cal 348 (350)
10. ('81) 3 All 585 (588 589) (FB)
(84) 6 All 623 (625)
11. (33) AIR 1933 Lah 759 (759)
('37) AIR 1937 Cal 236 (237) (Decree holder can enforce terms by execution)

bar thereto [1] **O 20 R 11 Notes 11-14**

Where by an order under sub rule (2) the judgment debtor was to execute a mortgage to the decree holder the subsequent adjudication of the judgment debtor as an insolvent cannot affect the rights of the decree holder to have the mortgage executed in his favour [2]

12 Limitation for application under sub-rule (2) — An application under sub rule (2) for postponement or for payment in instalments of the decree amount should be made within six months of the decree under Article 175 Schedule I of the Limitation Act [1] But if an order for instalments is actually passed on a time barred application it is not a nullity [2] It must be assumed that the Court by oversight decided the question of limitation wrongly [3] Where there has been an appeal from a decree the time for the application for an order for instalments runs only from the date of the decree of the *Appellate Court* even though the latter confirmed the judgment of the lower Court and dismissed the appeal [4]

13 Limitation for execution of decree passed under this Rule — See the Authors Commentaries on the Limitation Act Notes to Article 182 clause 7

14 Appeal — An order passed under this rule *refusing* to allow the payment of the decretal amount in instalments is not appealable under O 43 R 1 It must be regarded as a matter separate from and not forming part of the decree [1] An order *granting* a decree for instalments or postponing the time for payment of the decretal amount under sub rule (1) will of course be incorporated in the decree itself and can therefore be attacked in an appeal against the *decree* [2] If however it is not so incorporated the order will not be appealable [3] An order for instalments made under sub rule (2) must necessarily be one made *after* the decree and on the *consent* of the decree holder No appeal can lie against such consent order [4] In Rangoon however by virtue of the amendment of sub rule (2) an order can be passed after decree for payment in instalments after *notice* to the decree holder and *without his consent* The order not being a *consent* order and being one in execution discharge or satisfaction of the decree within the meaning of Section 47 is appealable as a *decree* [5]

As to the court fee payable on a memorandum of appeal against an instalment decree see the undermentioned case [6]

Note 11

1 (26) AIR 1926 Mad 194 (197 200)
(25) AIR 1925 Bom 509 (510)
(70) 14 Suth W R 324 (324) (Sale of property in execution is to be preferred to realization through a receiver)
2 (25) AIR 1925 Rang 189 (190 191) 2 Rang 673

Note 12

1 [See also (8) 14 Cal 348 (350)
(4) AIR 1924 Lah 342 344)
(04 [illegible] Re No 20 [illegible])
2 (7) AIR 1937 Cal 936 (37) (The proper [illegible] be person who objects to the order [illegible] to take appropriate steps for getting that order set [illegible] as long as that order [illegible] not set [illegible] g on him)
3 (32) AIR 193 All [illegible] (91) 54 All 5 3 (FB)
4 (32) AIR 193 Rang 4 55)

Note 14

1 (28) AIR 19 8 Lah 931 (931)
(13) 20 Ind Cas 6 3 (673) Low Bur Rul 71
2 (31) AIR 1931 Rang 152 (15)
(33) AIR 1933 Pesh 31 (33)
(22) AIR 19 2 Lah 355 (355) (High Court will [illegible]
w ll
ch
47
47
6 14 AIR 914 Lah [illegible] 0 (3 0) 1915 Pun Re No 1 [illegible] court-fee payable [illegible] difference [illegible] [illegible] nents)

O. 20 R. 12

Decree for possession and mesne profits

R. 12. [Ss 211, 212] *(1)* Where a suit is for the recovery of possession of immoveable property and for rent or mesne profits,[2] the Court may pass a decree —

(a) for the possession of the property ,

(b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits ,

(c) directing an inquiry as to rent or mesne profits from the institution of the suit until —

(i) the delivery of possession to the decree holder,

(ii) the relinquishment of possession by the judgment-debtor with notice to the decree holder through the Court,[10] or

(iii) the expiration of three years from the date of the decree,[11] whichever event first occurs

(2) Where an inquiry is directed under clause *(b)* or clause *(c)*, a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry

[1877, Ss 211, 212 , 1859, Ss 196, 197 See Ss 2 (12), 144]

Local Amendment

MADRAS

Add the following sub rule (3)

(3) Where an Appellate Court directs such an inquiry it may direct the Court of first instance to make the inquiry and in every case the Court of first instance shall on the application of the decree holder inquire and pass the final decree

Synopsis

Other Topics (miscellaneous)

1. Legislative changes. —

1 The provisions of Section 244, clauses (a) and (b) of the Code of 1882, which enacted that any question relating to the ascertainment of mesne profits as to which the decree directed an enquiry, were to be determined by the *executing Court*, have been omitted under the present Code The result is that such an enquiry is no longer a proceeding *in execution* but is one *in suit*[1] The substantial change under the new Code is, as pointed out by Sir John Wallis, C J, "that the award of mesne profits in all cases is to be by a *preliminary decree* and that when ascertained, they are to be embodied in a *final decree*, whereas under Sections 211 and 212 (of the old Code) they were to be ascertained in execution"[2] In other respects this rule corresponds to Sections 211 and 212 of the old Code, except that sub-clause (ii) in clause (c) has been newly added for the benefit of the judgment-debtor

2 The Explanation to Section 211 of the old Code which contained the definition of 'mesne profits' has been re-enacted in Section 2 clause (12) of the present Code

2. Scope of the Rule. — This rule deals with the decree to be passed in a suit for *possession* of immovable property *and* for rent or mesne profits, past and future, against a person in *wrongful possession* of such property. It does not apply to suits for *mesne profits* alone[1] or for damages which are not *mesne profits*[2] But a suit for a declaration of title and in the *alternative* for possession and mesne profits is within this rule[3]

In so far as this rule enables the Court to pass a decree for *future* mesne profits (*i e*, profits accruing subsequent to the institution of the suit) it is an exception to the general rule that a Court has no jurisdiction to give the plaintiff a decree on a cause of action that had not accrued to him at the date of the suit[4] The object of enabling the Court to pass such a decree is to avoid multiplicity of suits[5] But the rule

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Order 20 Rule 12 — Note 1

1. ('31) AIR 1931 Pat 1 (4)
2. ('18) AIR 1918 Mad 494 (496) 41 Mad 188 (F B) (On reference)
('25) AIR 1925 All 588 (589) : 47 All 543
('26) AIR 1926 Pat 218 (228 229) 5 Pat 361 (F B)

Note 2

1. ('72) 9 Bom H C R 7 (9) (Decision under Ss 196 197 of Act VIII of 1859)
2. ('35) AIR 1935 All 186 (187) (Prospective damages on tort must be given in decree itself and cannot be determined in execution—Order of Court in decree that it will be determined in execution does not give executing Court jurisdiction to determine it —O 20 R 12 has no application)
('14) AIR 1914 Cal 579 (579) (Suit for injunction and damages)
('28) AIR 1928 Pat 565 (566) 7 Pat 491
('38) AIR 1938 All 445 (446) I L R (1938) All 678 (There is no provision in O 20, C P Code for the passing of a preliminary decree in a suit for damages in respect of [illegible]

[illegible] sion must be governed by the principle of *ejusdem generis*)
(*See* ('68) 1 Beng L R 167 (169) (Bengal Rent Act, X of 1859—Share in an *unauchothi jumma* [illegible])

3. [illegible]
[*See* ('11) 10 Ind Cas 117 (117) (Cal)]
4. ('28) AIR 1928 Pat 565 (566) 7 Pat 491
('26) AIR 1926 Nag 260 (262)
('30) AIR 1930 Mad 90 (93 97) 53 Mad 638
('21) AIR 1921 Lah 85 (88) 2 Lah 333
('37) AIR 1937 Mad 46 (48) I L R (1937) Mad 1254
5. ('26) AIR 1926 Pat 218 (228) 5 Pat 361 (F B)
('99) 21 All 425 (432)

O. 20 R. 12
Notes 2-3

is only a *directory* and not a mandatory one It does not compel the plaintiff to claim future mesne profits Nor is the Court bound to pass a decree for such *mesne* profits[6] (See Note 13 *infra*) Ordinarily, a decree for *mesne* profits can only follow a decree for possession and when the plaintiff fails to obtain a decree for possession, a claim for mesne profits should not be allowed[7] In cases falling within this rule, the Court may pass —

(1) a decree *for possession* of the immovable property, (this is a *final* decree and subject to just objections, is capable of being executed)

(2) either a final decree for *past mesne profits*, or rent[8] or a preliminary decree for such profits, directing an enquiry as to the amount thereof, and

(3) a preliminary decree, directing an enquiry as to the amount of *future mesne profits*

In the undermentioned case[9] it was held by the Madras High Court that in the case of past mesne profits, it is optional with the Court to direct an inquiry into such mesne profits and that the Court can at once pass a final decree without directing any enquiry but that in the case of mesne profits subsequent to the institution of the suit, it is obligatory on the Court to direct an enquiry and to pass only a preliminary decree in the first instance and then a final decree But the same High Court has in a later decision[10] dissented from this view and held that where it is unnecessary to have any enquiry, it is open to the Court to dispense with such enquiry even in the case of mesne profits subsequent to the institution of the suit, and at once pass a final and executable decree in respect of such profits

When a Court passes a preliminary decree under this rule and directs an enquiry as to *mesne* profits, it should, at the same time, decide the basis upon which the *mesne* profits are to be assessed[11]

Where an enquiry is directed as mentioned above, a *final* decree in respect of such mesne profits is to be passed in accordance with the result of such enquiry[12]

A decree ordering the delivery of possession and directing an enquiry as to mesne profits will thus be partly preliminary and partly final[13] Where a decree is passed for past and future mesne profits *without directing an enquiry*, the decree is not *preliminary* but *final*[14]

As to the proper way of framing a decree under this rule, see Form No 33, Appendix D, Schedule I[15]

3. Rule applies only where specific interest in land is claimed. — This rule applies only to suits for land or other property in which the plaintiff has a *specific*

[*See also* (21) AIR 1921 Lah 85 (88) 2 Lah 333 (Claim not contested—Must be granted)
(23) AIR 1923 Mad 108 (109) (Do Absence of

[illegible]

7 [illegible]

8 [illegible]
not necessary where the exact amount has been ascertained)

9. (37) AIR 1937 Mad 46 (48) . I L R (1937) Mad 284

10. (38) AIR 1938 Mad 727 (729) . I L R (1938) Mad 1050

11. (34) AIR 1934 Cal 503 (504)

12. (31) AIR 1931 Mad 717 (718) 54 Mad 9~0

13. (29) AIR 1929 Cal 383 (383, 384)
(14) AIR 1914 Cal 601 (801)
(14) AIR 1914 Mad 526 (532) . 18 Ind Cas 5~6 (591) 37 Mad 186
(14) AIR 1914 Cal 60 (63)
(16) AIR 1916 Mad 767 (767) (Decree for possession alone can be executed)

14. (25) AIR 1925 Mad 1276 (1276)

15. (18) AIR 1918 Cal 742 (743)

interest It will not apply, for instance to a suit by a member of a Hindu joint family, for a partition of the joint property inasmuch as the plaintiff has no specific interest in such property until decree,[1] and the defendants cannot be said to be in wrongful possession of any property of the plaintiff Where however the family has been living under a *clear arrangement* that the members are entitled, not as an ordinary Hindu family, but in specific and definite shares, the right to mesne profits will arise if the enjoyment of those shares is, in any way disturbed [2]

Apart from this rule however, a member of a joint Hindu family who is *excluded* from participation in the profits of the family property may be entitled to *an account* of the management of the property from the persons in possession and to a share of such profits Such a right is not a right to *mesne profits* received by a person in wrongful possession but is appurtenant to the plaintiff s right under Hindu law in his share of the lands [3] In fact a member of a Hindu family suing for partition and for profits is really suing *for an account of the profits received* by the manager or the persons in possession, so that the proceeds so received by the latter which are also divisible property, may be divided and his share therein also given to him [4]

4 Enquiry as to mesne profits is no longer a proceeding in execution — The assessment of mesne profits is under the present rule, a proceeding in the suit and it has nothing to do with the execution department [1] The enquiry is a continuation of the *suit* which results in a final decree [2] No application for the ascertainment of mesne profits can be entertained in the execution department under the present Code [3] But if the Court passing the decree erroneously gives a direction to the plaintiff to apply for the ascertainment of mesne profits in execution is such a direction *ultra vires* and is the executing Court bound to ascertain such profits? The High Court of Calcutta held in the undermentioned case[4] that such a direction is *ultra vires* and that the

Note 3

1 (86) 14 Cal 493 (509) 14 Ind App 37 (P C)
(75) 1 Bom 561 (570)
(13) 21 Ind Cas 590 (591) 9 Nag L R 145
[But see (19) AIR 1919 Mad 868 (868) (Where the point was conceded the suit does not seem to be one for partition between coparceners)]

2 (89) 16 Cal 397 (41?) 16 Ind App 71 (P C)

3 (23) AIR 19?3 Mad 147 (149 150) 46 Mad 47
(93) 17 Bom 271 (279)
(84) 7 Mad 564 (569) (Manager bound to account to infant plaintiff suing for partition)

4 (23) AIR 1923 Mad 147 (149) 46 Mad 47
(78) 2 Mad 128 (137)
(80) 5 Bom 589 (59?)
[See (95) 19 Bom 532 (536 53?) (The words mesne profits in this decision must be taken to have been used only in the sense of a right to account)]
[See also (82) 5 Mad ?36 (?38 239) 9 Ind App 125 (PC)]

Note 4

1 (31) AIR 1931 All 538 (539)
(31) AIR 1931 All 465 (467)
[illegible]

[illegible] not be contained in the decree)]

2 (25) AIR 1925 All 588 (58?) 47 All 543
(34) AIR 1934 All 465 (467)
(?8) AIR 192? Bom 36 (?37) 52 Bom 360
(09) 4 Ind Cas 1010 (1011) 33 Mad 78
(27) AIR 19?7 Mad 71 (7?)
(26) AIR 19 6 Cal 175 (175)
(10) 5 Ind Cas 272 (2?3) (Cal)
(17) AIR 1917 Pat 334 (335) 2 Pat L Jour 391
(25) AIR 19?5 P C 117 (117) 4 Pat 507 52 Ind App 168 (PC) (Under old Code one in execution)
(03) 25 All 385 (387)
(91) 13 All 53 (64 65) 17 Ind App 150 (PC)
(99) ?4 Bom 345 (349 350)
(8?) 8 Mad 137 (139)
(92) 19 Cal 13? (136)
(86) 14 Cal 50 (53 54)
(0) 6 Cal L Jour 462 (467)
(?9) 4 Cal 6 9 (632)
(76) 25 Suth W R 2?0 (??0)
(74) ?1 Suth W R 21? (13)
(14) AIR 1914 Cal 60 (63)
(38) AIR 1938 Bom 3 0 (3?1)

[illegible] under

4 (1?) AIR 191? C [illegible] (Second applica[illegible] [illegible] in the first [illegible] will not [illegible])

O. 20 R 12
Notes 4-5

executing Court can decline to carry out the direction But in a recent case[5] the same High Court has held that such a decree might be a wrong decree but is valid so long as it is not corrected by proper proceedings The High Courts of Bombay[6] and Madras[7] have on the other hand held that the decree is not a nullity but that the case was one of a mere irregularity in the *exercise* of jurisdiction and that the executing Court is bound to enquire into the mesne profits as per the direction in the decree It has been held by the Allahabad High Court[8] that a direction by the trial Court to the executing Court to ascertain mesne profits is a nullity

Applying the principle laid down by the Judicial Committee in *Lachminarain v Balmakund*[9] that when once a preliminary decree has been passed the suit cannot be dismissed unless and until the decree is varied or reversed in appeal the High Courts of Madras[10] and Patna[11] have held that a suit cannot be dismissed for default in prosecuting an application for the ascertainment of mesne profits under this rule

After a preliminary decree the practice is that the suit is adjourned to a definite date for further hearing[12]

5 Mesne profits —The expression mesne profits is defined by Section 2 clause (12) *ante* as

> The profits which a person in *wrongful possession* of property actually received or might with ordinary diligence have received therefrom together with interest on such profits but shall not include profits due to improvements made by the person in wrongful possession

The object of awarding a decree for mesne profits is to *compensate* the person entitled to be in possession for his having been kept out of possession and thus deprived of the profits of the property[1] Hence it is only a person who is entitled to actual possession that can claim mesne profits[2] On the other hand the very foundation of the cause of action for mesne profits is *wrongful possession* of the defendant[3] No decree

5

6

(The Court which is directed to make the inquiry in execution ought merely to determine the amount and not pass an order for its recovery It is for the trial Court to pass a final decree for recovery of the amount due)]

7 (30) AIR 1930 Mad 30 (31 35) 53 Mad 838

8 (38) AIR 1938 All 445 (446) ILR (1938) All 658

9 (24) AIR 1924 P C 198 (200) 4 Pat 61 51 Ind App 321 (PC)

The under mentioned cases before the decision

12 (28) AIR 1928 Mad 1165 (1168)

Note 5

1 (01) 23 All 252 (255)
(68) 11 Suth W R 83 (4)
(69) 11 Suth W R 2 (25)
(68) 9 Suth W R 457 (458)

(16) AIR 1916 Mad 328 (330)
(94) 21 Cal 244 (247) (Trespasser liable to person entitled to possession though not owner)
(88) 12 Bom 416 (418) (Mesne profits is different from a periodical payment *in alternum* —Word mesne implies a *terminus ad quem* as well as *a quo* the terminus being usually the date of decree)
(35) AIR 1935 Lah 379 (380 381)
[*See* (35) AIR 1935 Pat 60 (81) (Mesne profit

2 (35) AIR 1935 Lah 379 (380)

as
rented

for mesne profits can therefore be passed against a person who is *not in possession* at all,[4] or who is in *rightful* possession [5] But possession through another such as a tenant is sufficient to create liability for mesne profits if such possession is wrongful [6]

The following cases are instances of *rightful* possession —

(1) The possession of a possessory mortgagee so long as the mortgage subsists [7]

(2) The possession of the defendant against whom a conditional decree has been passed to the effect that on payment of a certain sum the plaintiff is to get possession and such payment has not been made [8]

(3) The possession of a co sharer of joint property, in the absence of proof of ouster or exclusion of another co sharer [9]

(4) The possession of a person who has entered on the land as a trespasser, but from whom the owner has accepted rent [10]

The following cases are instances of *wrongful* possession —

(1) The possession of a mortgagor after the date of a foreclosure decree against him [11]

(2) The possession of a person declared by a decree to be in wrongful possession [12]

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(16) AIR 1916 Mad 497 (498)
(72 92) 1872 1892 Low Bur Rul 451
(67) 7 Suth W R 225 (226 228)
(66) 5 Suth W R 219 (220)
(67) 8 Suth W R 172 (174)
(39) AIR 1939 Nag 23 (26) (Plaintiff in claim suit establishing his title to property—Possession of auction purchaser becomes wrongful so far as mesne profits are concerned — Plaintiff is entitled to claim mesne profits from him)
(36) AIR 1936 Cal 629 (637) (Where a settlement

that possession in order to be wrongful for purposes of a claim for mesne profits must have been obtained in consequence of some improper act)

4 (17) AIR 1917 All 117 (118)
[*See* (36) AIR 1936 Mad 137 (137) (Plaintiff obtaining decree for possession against defendant — *Defendant* obtaining stay of execution is liable for mesne profits till possession is delivered although he may not himself be in

sion under revenue sale not wrongful — No liability for damages but to an account of stewardship)
(36) AIR 1936 Bom 276 (277) (Possession of person purchasing land with notice of prior contract for sale of land to another person is not wrongful)
[*See also* (06) 3 Cal L J [illegible] 182 (185 186) (Pos

session in execution of decree subsequently set aside)]

6 (36) AIR 1936 Cal 629 (637) (Where a settlement by the Government is *ultra vires* the possession of the person claiming under the Government is wrongful possession and the Government is liable for mesne profits to the person dispossessed)
(35) AIR 1935 P C 49 (50) 62 Cal 499 62 Ind App 53 (P C)

7 (30) AIR 1930 Rang 152 (152)

awarded though not mesne profits)
(71) 6 Beng L R App 70 (71 72)
(68) 3 Agra 11 (12)
(26) AIR 1926 Cal 860 (861)
(14) AIR 1914 Cal 209 (210) (Where there is ous

10 (24) AIR 1924 P C 213 (215) 46 All 728 51 Ind App 3 6 27 Oudh Cas 05 (P C)

11 (69) 12 Suth W R 35 (36)
(74) 22 Suth W R 533 (540)
(83) 12 Cal L Rep 479 (4 3 4 4)

12 (1865) 4 Suth W R Misc App 7 (7)

O. 20 R. 12
Note 5

(3) The possession of a defaulter after the confirmation of the sale of the property under the Bengal Revenue Sales Act [13]

(4) The possession of a person against whom a decree for possession has been passed [14]

(5) The possession of the vendee after the pre emptor has become entitled to possession that is, immediately on depositing the purchase money [15]

Where *A*, the manager of a joint Hindu family, alienates the family property for no necessity to *X*, and at the instance of *B*, another member of the family, the sale is held not binding on him, is *X* liable for any mesne profits and if so from what date? If, as has been seen in Note 3 *ante*, *B* can have no *specific interest* in the family property until partition and consequently cannot sue the manager for past mesne profits under this rule, it is conceived, he cannot also on the same grounds claim mesne profits from a purchaser from the manager until partition It will also follow that after the institution of a suit by *B* for partition and mesne profits, his share becomes a specified interest from that date and mesne profits can be awarded against the purchaser from that date This is the result arrived at in the undermentioned cases [16] but the *grounds* of the decision therein, it is respectfully submitted, are not correct These cases proceed on the view that possession under a voidable sale is rightful possession until set aside and that therefore mesne profits can be awarded only from the *institution of the suit* where the plaintiff repudiates the transaction Where a transaction is held not binding on a person and is therefore set aside against him, it must be deemed to be not binding on him from the *very beginning* of the transaction and not merely from the date of suit In *Satgur Prasad* v *Harnarain Das*,[17] where *A* sued *B* for setting aside a deed executed by *A* to *B* on the ground of undue influence and fraud, it was held by their Lordships of the Privy Council that if the document was set aside, the defendant would be liable for mesne profits from the date when he got into possession under the deed, and not merely from the *institution of the suit* It has been held by the Madras High Court[18] that, after the above decision of the Privy Council, it cannot be laid down as a general proposition that, where a person is in possession of property under a voidable transaction and a suit is brought against him to avoid the transaction and to get possession, there is no right to claim mesne profits prior to the date of the suit and that it must depend upon the circumstances of each case whether the plaintiff has been guilty of such conduct as to disentitle him to past profits

Extent of liability — The period for which mesne profits can be awarded is clearly confined to the period during which the defendant *was in possession*[19] or to the period during which he was active in keeping the plaintiff out of possession [20] Thus if the defendant is deprived of possession by virtue of an order of attachment under

13 ('31) AIR 1931 Cal 805 (806)

14 ('27) AIR 1927 Nag 9 (10) (Decree for posses [illegible]

16 ('17) AIR 1917 All 479 (480, 481) 39 All 61.
('24) AIR 1924 Mad 81 (83) 46 Mad 815
('18) AIR 1918 Mad 178 (180) (AIR 1917 All 479, Relied on)

17. ('32) AIR 1932 P C 89 (91) 59 Ind App 147 7 Luck 61 (P C)

18 ('36) AIR 1936 Mad 887 (893) I L R (1937) Mad 66

19. ('31) AIR 1931 Cal 663 (664)
('19) AIR 1919 Cal 167 (167)
('67) 8 Suth W R 450 (450)
('68) 10 Suth W R 486 (487)
('13) 21 Ind Cas 590 (592) 9 Nag L R 145 (As [illegible] back to [illegible] ction without dispossession not enough)
('69) 1 N W P H C R 273 (274)

Section 146 of the Code of Criminal Procedure[21] or is dispossessed by another trespasser[22] he cannot be held liable for the period during which he had no possession A transferee from the defendant *pendente lite* is liable for mesne profits[3] but his liability starts only from the time *he entered into possession*[24] Where a preliminary decree gives the plaintiff mesne profits before suit but does not specify the exact date from which the mesne profits are to be assessed the decree entitles the plaintiff to mesne profits before suit for such period as the *law* entitles him to *i e* for three years before the suit[25]

Principles relating to assessment — Mesne profits observed Lord Hobhouse in delivering the judgment of the Board in *Grish Chunder* v *Shoshi Shikreswar* [I L R 27 Calcutta 951 (967) P C] are in the nature of damages which the Court may mould according to the justice of the case[26] The assessment of mesne profits is therefore a matter for the exercise of *judicial discretion* in each case[27] The question to be decided is the amount of profits which the wrongdoer while in possession received or which without wilful default he *might* have received[28] *The test* is as pointed out

21 (24) AIR 1924 Cal 1010 (1012) 51 Cal 853
[*See also* (24) AIR 1924 Mad 224 (225) (Suit for mesne profits by party defeated in S 145 proceedings—Need not vacate Magistrate s order)]
22 (97) 24 Cal 413 (416)
(23) AIR 1923 Nag 103 (105) 18 Nag L R 195
(69) 11 Suth W R 444 (444) (Third party attach

with executor)
23 (11) 11 Ind Cas 939 (939 940) 39 Cal 220
24 (21) AIR 1921 Pat 102 (102) 6 Pat L Jour 166
25 (38) AIR 1938 Cal 563 (566)
26 (38) 40 Pun L R 443 (445)
[*See also* (38) AIR 1938 All 8 (10 11) I L R (1938) All 71 (Mesne profits is unliquidated damages—A claim for mesne profits is not a claim in respect of a debt within S 7 (1) (b) U P Encumbered Estates Act 1934)
(37) AIR 1937 Pat 568 (571)]
27 (31) AIR 1931 Mad 650 (651 652) 54 Mad 955 (F B)
(67) 8 Suth W R 447 (447)

a [illegible]rded)
(93) AIR 19 3 Nag 55 (56) (Co rt bound to en qu re)
(11) 1 M I L Jour 965 (968) (Re pect ve in come of pl t ff a d def ndant in one f isli s prima facie e [illegible] ce)
(75) 3 Suth W R 15 (16) (To be decided upon evidence)
(31) 7 C I I R 59 (1) (And not by strik ng

average)
(23) AIR 1923 Bom 37 (38 39) (No evidence to show receipt of profits — No decree can be passed)
(69) 12 Suth W R 104 (105) (Case of landlord dispossess ng ryot)
(71) 15 Suth W R 428 (428) (Do)
(03) 30 Cal 536 (538) (Do)
(23) AIR 1923 Bom 398 (398) (Tenant holding over)
(14) AIR 1914 All 1 (2) (Do)
(28) AIR 1928 S nd 173 (174) (*Held* tenant liable for mesne profits)
(91) 18 Cal 540 (544) (PC) (Mesne profits relating to alluv al land — Court can presume cultivation)
(89) 16 Cal 40 (60 61) 15 Ind App 195 (PC) (Minor liable for mesne profits)
(1864) 1 Suth W R M sc 20 (20)
(71) 16 Suth W R 294 (294)
(1865) 2 Suth W R Misc 50 (50) (Award l mited to the amount claimed in plaint)

(82) 8 Cal 295 (297) (Do)
(66) 5 Suth W R 197 (198) (PC) (Court cannot give mesne profits more than claimed although a greater amount may be proved)
(71) 15 Suth W R 61 (62) (Do)
(67) 7 Suth W R 140 (141)
(68) 9 Suth W R 217 (218)
(71) 16 Suth W R 302 (30)
(34) AIR 1934 All 465 (469)
[*See* (1837) ? Moo Ind App 72 (80 81 8) (PC) (For actual mode of calculation)]
[**But see** (70) 14 Suth W R 8 (83)]

(11) 11 I [illegible] s 504 (505) (Cal)
(84) 10 [illegible]al 85 (91) 11 Ind App 65 (PC)
(1) AIR 1921 Cal 963 (965)

O. 20 R. 12
Note 5

by their Lordships of the Judicial Committee, not what the plaintiff has lost by his exclusion but what the defendant has or *might* reasonably have made by his wrongful possession [29] What the plaintiff might have made, or the character of possession before trespass, can only be relevant as evidence of what the defendant might with ordinary diligence have received [30] A trespasser cannot say that he kept the land waste and that therefore he is not liable for mesne profits [31]

The principles by which the Courts should be guided in awarding and assessing mesne profits are that the possession which has been wrongfully retained should not be a source of profit to the wrongful possessor, and that the person wrongfully kept out of possession is put in the same position financially as if right had been done [32]

Where the trespasser is in actual possession, the mesne profits should be awarded on the basis of the *actual* profits received or which might have been received with ordinary *diligence less the deductions referred to in the undermentioned case* [33] Where, however, the trespasser is not in actual possession, but has himself leased the property to third persons, he will be liable only to the extent of the rent which he *actually* received from his lessee, unless it can be shown that he might, with ordinary diligence, have

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(69) 11 Suth W R 461 (461)
(72) 17 Suth W R 257 (258)
(68) 10 Suth W R 463 (463)
(99) 3 Cal W N 749 (749)
(69) 11 Suth W R 533 (53.)
(69) 12 Suth W R 52 (54)
(71) 7 Beng L R 175 (178)
(75) 24 Suth W R 271 (272)
(72) 17 Suth W R 348 (348)
(71) 16 Suth W R 21 (22)
(70) 13 Suth W R 37 (37, 38)
(95) 8 C P L R 58 (60)
(1862) 1862 Beng L R Sup Vol 1004n
(74) 22 Suth W R 126 (128)
(67) 8 Suth W R 101 (102)
(73) 19 Suth W R 125 (126)
(66) 5 Suth W R Misc 35 (35)

30. (30) AIR 1930 P C 82 (83) 9 Pat 621 57

value)
(08) 35 Cal 1000 (100.)

31. (16) AIR 1916 Mad 828 (830)

32 ('17) AIR 1917 Pat 421 (422)

Principle is correct)
(38) 40 Pun L R 443 (445) (But the application of this general rule to a particular case will

33 (26) AIR 1926 Cal 847 (847)
(34) AIR 1934 Cal 503 (505)
(02) 6 Cal W N 732 (734)
(87) 4 Cal 566 (569)
(28) AIR 1928 Cal 474 (475)
(23) AIR 1923 Nag 64 (64)
(00) 12 Oudh Cas 154 (155 15.)

received more rent[34] And *prima facie* it is fair to infer that a person in possession of land may by ordinary diligence get rent for it according to the prevailing rates for such land and that the true owner wrongfully dispossessed has been a loser by that amount[35] But the lessee himself will, it is conceived, be also liable, as a person in wrongful possession, to the extent of the *actual profit* realised by him[36]

Illustration

B trespasses upon the land belonging to *A* and subsequently lets it out to *C* for a rental of Rs 300 per annum *C* gets a gross profit of Rs 700 and the expenses of cultivation amount to Rs 150 *A* sues *B* and *C* for possession and mesne profits *B* will be liable to pay *A* Rs 300 the rent which he received from *C*, and *C* will be liable for Rs 250 the net profit realised by him after deducting the expenses of cultivation and after deducting the rent paid to *B* But *B* and *C* cannot be made liable *jointly* and severally, for the total of the profits realised by both of them together[37]

Where two or more persons are in wrongful possession of the plaintiff s land, a decree for mesne profits may be passed jointly and severally against all the trespassers who may have jointly kept the plaintiff out of possession for any particular period, leaving them to have their respective rights adjusted in a separate suit for contribution, or the respective liabilities of such trespassers may be ascertained in the plaintiff s suit against them, and a decree on the basis of such several liabilities may be passed as against the respective trespassers in plaintiff s favour[38]

Deductions — In awarding mesne profits it is proper that the following deductions should be made from the gross profits of the defendant in possession[39]

34 (29) AIR 1929 P C 300 (303) 56 Ind App 290 57 Cal 1 (PC)
(34) AIR 1934 Cal 503 (505) (Decree against Secretary of State and his tenants — As against Secretary of State basis is that of rent actually received by him)
(26) AIR 1926 Cal 1233 (1234 1235)
(26) AIR 1926 Cal 860 (861)
(27) AIR 1927 Rang 116 (117)
(68) 9 Suth W R 445 (447)
(1862) 1862 Beng L R Sup Vol 1004n (1001n)
(91) 18 Cal 99 (107) 17 Ind App 90 (PC)
[illegible]
(11) 10 Ind Cas 312 (313) (Cal) (Godown)
[illegible]
tenants—It is enough if taking account of both rent and premium if any a fair return has been realised from the land)
(35) AIR 1935 Cal 206 (207) 62 Cal 217
[**But see** (18) AIR 1918 Nag 89 (89) (Trespasser held liable to actual profits though he had leased the land to another — This is not good law)]

35 (33) AIR 1933 Mad 875 (825) 57 Mad 49 [illegible]

37. (29) AIR 1929 P C 300 (303) 57 Cal 1 56 Ind App 290 (PC) (Reversing AIR 1927 Cal 152 on this point)
(20) AIR 1920 Pat 747 (748)
(81) 9 Cal L Rep 1 (5 6)
(10) 6 Ind Cas 69 (72 73) 37 Cal 559 (Effect of release of some of the joint tort feasors considered)
(10) 8 Ind Cas 707 (707) (Cal) (No combination between the landlord and the tenure holder in dispossessing the plaintiff established—No joint liability)
(1865) 2 Suth W R Misc 51 (52) (The liability under the decree in this case was joint and several — However, it was held that the claim must be limited to the particular lands with which particular defendants were shown to have been connected)
(66) 6 Suth W R 113 (114 115)
(66) 6 Suth W R 230 (230)
[*See also* (70) 14 Suth W R 76 (77)]
(70) 14 Suth W R 175 (176 177)
(72) 17 Suth W R 148 (149) (Not only the zamindar but also the ijardar who took izara of the suit land pending litigation is liable for mesne profits)

The following cases are no longer good law

(69) 12 Suth W R 354 (355)
(80) 6 Cal L Rep 357 (359)
[*See also* (72) 17 Suth W R 148 (149) (Izardar liable with his zamindar)]

38 (32) AIR 1932 Cal 600 (617) [illegible]
(33) AIR 1933 Cal 554 [illegible]
[illegible]

39 (38) AIR 1938 P C 1[illegible] (142) 31 Sind L R 340 I L R (19[illegible]) B[illegible] 65 Ind App 215 (PC) [illegible]

O. 20 R. 12
Note 5

(1) Public charges such as Government rent, revenue or cesses which are made for the preservation of the estate[40]

(2) The cost of cultivation[41]

It was held in certain decisions[42] that the expenses of collecting rents and profits cannot be deducted unless the defendant entered upon the property under a *bona fide* claim of right This view, however, has been held by the Calcutta High Court in a recent case[43] not to be good law after the decision of the Privy Council in *Secretary of State for India v Saroj Kumar Acharjya*[44] So, it has been held by the Calcutta High Court[45] that even where the dispossession is wanton and malicious, in calculating the amount of mesne profits, collection charges are to be deducted from the the gross realization The Allahabad High Court[46] has held that it is only where there has been a gross and contemptuous trespass that no deduction should be allowed for collection charges, but that where the defendant is a tenant holding over after the expiry of the term of his lease under the mistaken impression that he was entitled to a renewal of the lease, he is entitled to claim a deduction on account of collection charges A deduction of 10 per cent, it has been held, can be allowed as collection charges where there is no specific evidence on the point[47] But where the defendant has elected to let in evidence as to the actual charges of collection and the result of such evidence shows that the collection charges were less than 10 per cent, the defendant is not entitled to a deduction of 10 per cent[48]

It has been held that in the case of endowed lands, the judgment debtor is entitled to a deduction of the expenses incurred by him in carrying on the worship of

40 (94) 21 Cal 142 (148) 20 Ind App 160 (PC) (Government revenue)
(34) AIR 1934 Cal 503 (505)
(11) 12 Ind Cas 385 (386) (Mad)
(02) 24 All 376 (380) (Tortious and malicious trespass—Expenses of collection of rents incurred by trespasser not allowed—1 All 518 Followed)
(01) 23 All 252 (255 256 259) (Ordinary trespassor—Trespasser is entitled to charges of collection—1 All 518 disting)
(80) 1 All 518 (521)

nue)

dissenting)
(88) 10 All 13 (15) (Possession tortious)
(1900) 22 All 262 (265 266) (Possession not *bona fide*)
(67) 7 Suth W R 230 (231)
(68) 9 Suth W R 473 (474) (Allowance should be made for expenditure of capital for extraordinary profits)

(71) 15 Suth W R 203 (203) (Expenses allowed at 10 per cent)
1 Hay 577
(29) AIR 1929 Oudh 55 (56)
(24) AIR 1924 Nag 427 (428) 20 Nag L R 112
(68) 7 Suth W R 78 (78, 79)
1 Hay 277 (Defendant cannot take credit for rent uncollected)
(02) 24 All 376 (380)
(01) 23 All 252 (256 259)
(68) 9 Suth W R 457 (458) (Surunjamee allowed)
(09) 2 Ind Cas 464 (465) (All) (Trespasser *bona fide*)
(98) 20 All 208 (209) (Expenses incurred in ob

allowed)
(68) 9 Suth W R 369 (370) (Principle accepted though percentage reduced)
[*See also* (21) AIR 1921 Cal 699 (707)
(08) 7 Cal L Jour 197 (200)]
43 (38) AIR 1938 Cal 563 (568)

46. (37) AIR 1937 All 328 (333)
47. (35) AIR 1935 P C 49 (52) 65 Ind App 53 62 Cal 499 (P C)
(37) AIR 1937 All 328 (333)
(38) AIR 1938 Cal 563 (568)
48 (38) AIR 1938 P C 139 (142) 32 Sind L R 492 (PC)

the idols[49] Under Section 2, clause 12 *ante*, mesne profits will not include profits due to the improvements made by the person in wrongful possession[50] See also the undermentioned case[51]

Onus of proof — It is for the plaintiff who comes into Court with a claim for mesne profits to establish first his right to immediate possession[52] The *onus* of proving the amount of profits actually received is on the person receiving them, but the burden of proving the profits that the person in occupation might with ordinary diligence have received therefrom, is on the person claiming them[53] If the plaintiff lets in *prima facie* evidence to show that the profits were somewhere about the sum he alleges, the burden of proving that they were less, shifts to the defendant[54]

6. Interest forming part of mesne profits. — There was no definition of 'mesne profits in the Code of 1859 The definition in the Code of 1877 did not include interest on mesne profits as part of mesne profits But the Code of 1882 as well as the present Code includes interest as part of mesne profits[1] But this does not mean that the Court is obliged, in every case, to award interest[2] It may refuse interest having regard to the circumstances of the case[3] The reason is that mesne profits are in the nature of damages which the Court may mould according to the justice of the case[4] Under the old Code, where mesne profits were left to be ascertained in *execution*, the executing Court could grant interest even though the decree was silent in respect thereof[5] Under the present Code, however, the executing Court is not empowered to ascertain the mesne profits and cannot award any interest where both the *preliminary* and the *final* decrees are silent on the matter[6] The reason is that the duty of the

49 (72) 17 Suth W R 208 (209) [illegible])
50 [illegible] in [illegible]

51 [illegible] consequence of a reversal of an execution sale, mesne profits are awarded to a tenant and against a landlord decree holder such mesne profits should not include the rent payable by the tenant to the landlord Such rent is liable to be deducted from the mesne profits)
52 ('21) AIR 1921 Mad 42 (44 46) 44 Mad 987.
('74) 21 Suth W R 276 (276, 277)
53. (25) AIR 1925 Mad 145 (146) 47 Mad 800
('33) AIR 1933 Mad 825 (828) 57 Mad 49
('25) AIR 1925 Mad 297 (297)
(72) 18 Suth W R 251 (251) (Actual receipts to be proved by the person in wrongful possession)
(18(5) 3 Suth W R Misc 25 (25) (Do)
(28) AIR 1928 Mad 387 (389)
(35) AIR 1935 P C 49 (50) 62 Ind App 53 62 Cal 499 (P C)
54 (24) AIR 1924 Nag 117 (118) 20 Nag L R 52
(74) 1 Suth W R 269 (270)
(82) 8 Cal 913 (951)
[See also (70) 2 N W P H C R 217 (270) (Hamabandi papers filed by patwaris *prima facie* evidence of the profits of the estate)]

Note 6

1 (38) AIR 1938 P C 139 (142) · 32 Sind L R 492 (P C)

[illegible] had been kept out of their money by conduct of defendants it is only fair that defendants should pay a reasonable rate of interest upon the sum awarded)

(31) AIR 1931 Mad 513 (520) (Interest may be disallowed on special grounds)
('16) AIR 1916 Mad 895 (896) (Power to order interest on mesne profits beyond three years is discretionary)
(21) AIR 1921 Pat 430 (432) (Rate of interest on mesne profits)
4. (1900) 27 Cal 951 (967) 27 Ind App 110 (P C)
5 (1900) 27 Cal 951 (967) 27 Ind App 110 (P C).
(12) 17 Ind Cas 915 (916) (All)
(03) 25 All 275 (276)
('14) 18 Cal W N 76n
(09) 2 Ind Cas 464 (465) (All)
[*See* (21) AIR 1921 Cal 699 (700)]
[*See also* (07) 6 Cal L Jour 462 (470, 471)]
6. (31) AIR 1931 Mad 650 (652) 54 Mad 955 (F B) (Overruling AIR 1927 Mad 954)
(1900) 22 All 262 (265)

O. 20 R. 12
Notes 6-7

executing Court is simply to carry out the decree and not to *add to* it or *vary* it in any way But when the *preliminary* decree is silent as to interest the Court can award *interest in the final decree*

If mesne profits are payable month to month or at intervals of other periods, then interest also should be calculated according to such periods[7] The rate of interest usually awarded by the Court is six per cent[8] In the undermentioned decision[9] the Calcutta High Court made a distinction between the period before the delivery of possession of the property to the plaintiff and the period after such delivery and held that while in respect of the former period a higher rate of interest should be paid in respect of the latter period it was enough if the usual court rate allowed on money decrees was paid But this view has been criticised by the Privy Council[10] which has held that there is no reason for making any such distinction and that in the absence a statutory provision or a special contract there is no ground for awarding interest on mesne profits at a higher rate up to the date of delivery of possession and at a lower rate subsequently As to the period for which the interest should be calculated see the undermentioned cases[11] Where under a redemption decree accounts are directed to be taken as to the mesne profits payable by the defendant and it is also directed that the plaintiff should pay interest on the mortgage money from the date on which it fell due to the date on which it was deposited in Court it is proper that the plaintiff should be charged with counter interest on the amount thus due as interest from him[12]

7. Value of mesne profits, if affects jurisdiction — See Note 5 to Section 6 and the undermentioned case[1]

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(67) 7 Suth W R 173 (173)
(79) 4 Cal 882 (884)
(38) AIR 1938 Cal 563 (569) (When profits are earned or might have been earned by the wrong doer yearly interest on those profits must be calculated yearly and year by year)
8 (22) AIR 1922 All 117 (118) 44 All 579
(21) AIR 1921 Cal 699 (707) (*Bona fides* of tres passer to be considered when awarding interest)

(79) 3 Cal L Rep 517 (519) (Interest can be cal culated upon the rental at the end of each year)
(03) 30 Cal 506 (507) (Twelve per cent awarded)
(12) 14 Ind Cas 396 (398) (Mad) (3¾ per cent *held* proper)
(78) 3 Cal 654 (661) (Interest Act no bar)
(21) AIR 1921 Lah 234 (235) (12 per cent award ed)
(37) AIR 1937 P C 143 (146) 16 Pat 357 64 Ind App 240 31 Sind L R 300 (P C) (Rate of in terest depends on variety of circumstances but in absence of special circumstances 6 per cent is fair rate)
(38) AIR 1938 Cal 563 (568) (Do)
(35) AIR 1935 PC 49 (57) 62 Ind App 53 62 Cal 499 (P C) (In absence of special circumstances 6 per cent is fair rate of interest)
(37) *AIR 1937 All 328 (333)*
(36) AIR 1936 All 549 (553)
9 (08) 7 Cal L Jour 197 (201)
10 (37) AIR 1937 P C 143 (146) 64 Ind App 240 16 Pat 382 31 Sind L R 300 (P C) [*See also* (38) AIR 1938 Cal 563 (568) (The above Privy Council view followed)]
11 (24) AIR 1924 All 801 (802) 46 All 842 (Preliminary decree awarding mesne profits — But amount ascertained subsequently—Interest to be calculated from the date of the preliminary decree)
(80) 6 Cal L Rep 357 (360) (Case under the 1877 Code — Interest may be allowed from com mencement of suit)
(69) 11 Suth W R 25 (25) (Under the Code of

—Interest at six per cent to be calculated upon each year s mesne profits up to date of decree — Interest on consolidated sum from date of ascertainment)
(24) AIR 1924 Pat 781 (783) 4 Pat 57 (Interest up to date of realisation of mesne profits can be allowed)
12 (38) AIR 1938 P C 139 (142) 32 Sind L R 492 (P C)

Note 7

1 (37) *AIR 1937 Cal 761 (762) I L R (1937) 2 Cal 176* (Person deliberately undervaluing mesne profits accruing before institution of suit

8. Court-fees. — Under Section 11 of the Court-fees Act (VII of 1870), where the amount of *past* mesne profits (*i. e*, profits before the date of the suit) decreed or ascertained is in excess of the amount claimed in the plaint, execution of the decree will not be allowed unless the deficient court-fee is paid [1] But the Court has no jurisdiction to levy court-fee on the *application* to ascertain the profits after the preliminary decree [2] The fee can be levied only after ascertainment and before execution. Nor can the Court refuse to execute the decree for *possession* because the court-fee due in respect of mesne profits is not paid [3]

No court-fee is payable on *future* mesne profits (*i e*, profits after the institution of the suit) under Section 11 of the Court-fees Act [4] In Madras, however, that Section has been amended by Madras Act V of 1922 by which such profits are chargeable with court-fee and the decree will not be executed until such fee is paid [5]

Where a court-fee is payable on mesne profits, it is to be calculated *ad valorem* on the amount claimed or decreed [6]

9. Right to apply for ascertainment of future mesne profits, when arises. — *The right to apply for the ascertainment of future mesne profits* arises on the happening of any one of the three events mentioned in clause (c) and not on the date of the preliminary decree itself.[1] Where a decree for possession is made conditional on the payment of a certain sum of money, the decree-holder will not be entitled to mesne profits until such payment is made.[2]

Decree silent as to future mesne profits — Where the right to future mesne profits is *negatived* in the preliminary decree, the Court has no jurisdiction to award the same in a *final* decree [3] Similarly, where the decree is *silent* as to the mesne profits it cannot be awarded in execution [4] But where the decree simply says, "the

—He cannot claim greater amount exceeding pecuniary jurisdiction of the Court)

Note 8

1. ('15) AIR 1915 Cal 696 (698)
('33) AIR 1933 Pat 81 (83) 12 Pat 188
('97) 24 Cal 173 (176)
[illegible]

4. ('91) 15 Bom 416 (418)
('14) AIR 1914 Cal 858 (859)
('10) 5 Ind Cas 880 (880) (Mad) (Case before Madras Act V of 1922)
('98) 21 Mad 371 (372) (Do)
[**See however** ('07) 30 Mad 32 (34) (Where court fee was directed to be paid on subsequent rent awarded — Case before Madras Act V of 1922)
('31) 129 Ind Cas 662 (663, 664) (Pat).
('20) AIR 1920 Low Bur 94 (95, 96) 10 Low Bur Rul 276]

5. [See ('37) AIR 1937 Mad 46 (48) I L R [illegible] 1030]

6. ('31) AIR 1931 All 538 (539)
('23) AIR 1923 Mad 19 (19) 45 Mad 280
('20) AIR 1920 Pat 592 (592)

Pat 188
('33) AIR 1933 Pat 234 (235) . 12 Pat 694]

Note 9

1. ('24) AIR 1924 Pat 781 (782) 4 Pat 57
[illegible]

2. [illegible]

3. [illegible]
[*See* ('31) 1931 Mad W N 846 (847) (Preliminary [illegible]

4. [illegible]
('75) 24 Suth W R 193 (195) . 2 Ind App 219 (PC).
('70) 13 Suth W R 11 (13)
('74) 22 Suth W R 160 (161)
('73) 19 Suth W R 154 (155).
('71) 15 Suth W R 292 (293)
('85) 7 All 197 (199)
('01) 6 Cal W N 672 (674)

O. 20 R. 12
Notes 6–7

executing Court is simply to carry out the decree and not to *add to* it or *vary* it in any way But when the *preliminary* decree is silent as to interest, the Court can award interest in the *final* decree

If mesne profits are payable month to month or at intervals of other periods, then interest also should be calculated according to such periods [7] The rate of interest usually awarded by the Court is six per cent [8] In the undermentioned decision,[9] the Calcutta High Court made a distinction between the period before the delivery of possession of the property to the plaintiff and the period after such delivery and held that while in respect of the former period a higher rate of interest should be paid, in respect of the latter period it was enough if the usual court rate allowed on money decrees was paid But this view has been criticised by the Privy Council[10] which has held that there is no reason for making any such distinction and that in the absence a statutory provision or a special contract there is no ground for awarding interest on mesne profits at a higher rate up to the date of delivery of possession and at a lower rate subsequently As to the period for which the interest should be calculated, see the undermentioned cases [11] Where under a redemption decree accounts are directed to be taken as to the mesne profits payable by the defendant and it is also directed that the plaintiff should pay interest on the mortgage money from the date on which it fell due to the date on which it was deposited in Court, it is proper that the plaintiff should be charged with counter interest on the amount thus due as interest from him [17]

7. Value of mesne profits, if affects jurisdiction. — See Note 5 to Section 6 and the undermentioned case [1]

See also the following cases under the old Code holding that executing Court cannot allow in

are earned or might have been earned by the wrong doer yearly interest on those profits must be calculated yearly and year by year)

8 (22) AIR 1922 All 117 (118) 44 All 579

(21) AIR 1921 Cal 699 (707) (*Bona fides* of tres

in the discretion of Court Twelve per cent allowed)

(79) 3 Cal L Rep 517 (519) (Interest can be calculated upon the rental at the end of each year)

(03) 30 Cal 506 (507) (Twelve per cent awarded)

(19) 14 Ind Cas 396 (395) (Mad) (3¾ per cent *held* proper)

(78) 3 Cal 654 (661) (Interest Act no bar)

(21) AIR 1921 Lah 234 (235) (12 per cent awarded)

(37) AIR 1937 P C 143 (146) 16 Pat 352 64 Ind App 240 31 Sind L R 300 (P C) (Rate of interest depends on variety of circumstances but in absence of special circumstance , 6 per cent is fair rate)

(38) AIR 1933 Cal 563 (568) (Do)

(35) AIR 1935 PC 49 (52) 62 Ind App 53 62 Cal 499 (P C) (In absence of special circumstances 6 per cent is fair rate of interest)

decree)

(80) 6 Cal L Rep 357 (360) (Case under the 1877 Code — Interest may be allowed from commencement of suit)

(69) 11 *Suth W R 25 (25)* (*Under the Code of*

—Interest at six per cent to be calculated upon each year s mesne profits up to date of decree — Interest on consolidated sum from date of ascertainment)

(24) AIR 1924 Pat 761 (763) 4 Pat 57 (Interest up to date of realisation of mesne profits can be allowed)

12 (38) AIR 1938 P C 139 (142) 32 Sind L R 492 (P C)

Note 7

1 (37) AIR 1937 Cal 761 (762) I L R (1937) 2 Cal 176 (Person deliberately undervaluing mesne profits accruing before institution of sui

suit for such profits will not be barred, even though the plaintiff omitted to apply for a final decree[2] See also the undermentioned case[3] and Note 125 to Section 11 and Note 24 to Order 2 Rule 2. **O. 20 R. 12 Notes 13-15**

14. Order after preliminary decree determining period and mode of accounting, if a decree. — An order passed in supplemental proceedings after the preliminary decree with regard to the mode of accounting and the period for which the defendant is liable for mesne profits amounts, according to the High Court of Calcutta,[1] to another *preliminary decree*, but according to the High Court of Allahabad,[2] only to an *interlocutory order* in a pending suit For a fuller discussion, see Note 10 to Section 2, clause (2)

15. Appeal. — Under the old Code the ascertainment of mesne profits was done in execution and the order relating thereto was appealable as having the force of a decree under Section 244 (Section 47) Under the present Code, the ascertainment is made in the *suit itself* and the result of it should be embodied in a *final decree* which is appealable as such [1]

When the decree of the trial Court dismissing a suit for possession and mesne profits is reversed in appeal, the Appellate Court should not remand the case for enquiring into the mesne profits but should pass a preliminary decree for possession directing an enquiry into mesne profits under this rule[2] *Vide also* the amendment made to this rule by the High Court of Madras.

R. 13. [S. 213.] *(1)* Where a suit is for an account of any property and for its due administration[2] under the decree of the Court, the Court shall, before passing the final decree, pass a preliminary **O. 20 R. 13**

Decree in administration suit.

('16) AIR 1916 Cal 673 (674) (This rule contemplates relation between only plaintiff and defen-

a second suit for future mesne profits was not barred, see the following cases.
('67) 7 Suth W R 364 (365)
('81) 8 Cal 178 (190), 8 Ind App 197 (PC)
('84) 7 All 170 (173, 174)

R jection of petition praying ascertainment of the profits for default — Subsequent fresh petition not barred as *res judicata*)
('70) 2 N W P H C R 176 (177) (Decree silent as to mesne profits—Decree holder applying for

mesne profits in execution — Application dismissed)]

future mesne profits—Fresh suit for such mesne profits not barred)

Note 14

1. ('24) AIR 1924 Cal 160 (162)

Note 15

1. ('28) AIR 1928 Bom 236 (238), 52 Bom 360

O. 20 R. 13
Notes 1–2

decree, ordering such accounts and inquiries to be taken and made, and giving such other directions as it thinks fit

(2) In the administration by the Court of the property of any deceased person, if such property proves to be insufficient for the payment in full of his debts[8] and liabilities, the same rules shall be observed as to the respective rights of secured[9] and unsecured creditors and as to debts and liabilities provable,[10] and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being, within the local limits of the Court in which the administration suit is pending with respect to the estates of persons adjudged or declared insolvent; and all persons who in any such case would be entitled to be paid out of such property, may come in under the preliminary decree, and make such claims against the same as they may respectively be entitled to by virtue of this Code

[1877, S 213]

Synopsis

1 Analogous law
2 Administration suits
  3 Hindu Law
  4 Mahomedan Law
5 Who may file an administration suit
5a Against whom administration suit can be filed
6 Plaint in administration suits
7 Decree in administration suits
8 Estate insufficient to pay all the debts — Sub rule (2)
9 Rights of secured creditors See Note 8
10 Provable debts and liabilities under the Insolvency Act
11 Barred debt
12 Court fees
13 Appeal

Other Topics (miscellaneous)

Costs out of the estate See Note 7
Inapplicability to suits against Administrator General See Note 8
Jurisdiction See Note 2
Principles of distribution See Note 10
Priority for individual creditors in execution See Note 7
Secured creditor whether affected See Notes 7 and 8
Suits by creditors See Note 5
Suits by executors See Note 5

1. Analogous law. — This rule corresponds to Section 34 and Part I Schedule I of the Administration of Estates Act 1925 (15 Geo V, Ch 23) The main difference between Part I Schedule I and this rule consists in the addition of the words and as to the priorities of debts and liabilities after the words ' contingent liabilities respectively See Note 8 *infra*

2 Administration suits — ' Administration means the management of the estate of a deceased person who has left no executor[1] It consists in —

(i) Payment of the funeral expenses of the deceased

Order 20 Rule 13 — Note 2

1 (3) AIR 1935 Pesh 63 (64) (Where a debtor asks another person to take up the administration of his estate for liquidation of his liabilities and a composition deed is drawn up a decree passed in accordance with this deed is not an administration decree)

(ii) Collection, realisation and preservation of assets
(iii) Payment of debts and legacies
(iv) Acts in respect of adverse claims to assets
(v) Dealings with creditors and legatees
(vi) Distribution finally among the heirs and next of kin [2]

The object of an administration suit is to have the estate administered under a decree of Court In such a suit the whole administration and settlement of the estate are assumed by the Court, the assets are marshalled and a decree is made for the benefit of creditors and other persons entitled to the property [3]

Thus, the suit is, in essence, one for an account and application of the estate of the deceased, for the satisfaction of the dues of all the creditors [4] It cannot be dismissed at the preliminary stage except where the plaint discloses no cause of action or the suit is premature [5]

An administration suit is not a suit *relating to immovable property* and, therefore, the Court is not incompetent to administer properties or to deal with questions of title in respect of properties situate *outside* its jurisdiction [6] Again, the jurisdiction of the Court, as to such a suit, does not depend upon the fact whether the deceased is one to whose estate the Succession Act applies [7]

Though sub section (1) does not *expressly prohibit* the filing of an administration suit in respect of the property of a *living* person, it has been held by the High Court of Bombay that such a suit is *not* maintainable [8]

Before the Court takes upon itself the administration of the property, the preliminary decree for administration should be passed [9] The Court may also make an order for grant of maintenance *pendente lite* but this power has to be exercised with caution [10] Where a preliminary decree has been passed under this rule, the Court can stay proceedings taken by another decree holder and direct him to come in and prove his claim in the administration suit [11] It has been held that a creditor who has neglected to come in under the administration decree cannot subsequently sue the creditors who have proved their debts and received dividends, for a re distribution of the assets and for a *pro rata* refund by such creditors [12]

3. Hindu Law.— An administration suit is filed only in respect of the estate of the deceased and therefore if the property of a Hindu passes by *survivorship*, there is no *estate* of the deceased left for administration and a suit for administration is not maintainable [1]

4. Mahomedan Law. — Under the Mahomedan law, the funeral expenses of the deceased should be defrayed first from out of the assets, then his debts and then

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perties from defendants alleged to be in wrongful possession of them cannot be held to be an

1. (03) 32 Bom 351 (355)

O. 20 R. 13
Notes 1-2

decree, ordering such accounts and inquiries to be taken and made, and giving such other directions as it thinks fit.

(2) In the administration by the Court of the property of any deceased person, if such property proves to be insufficient for the payment in full of his debts[8] and liabilities, the same rules shall be observed as to the respective rights of secured[9] and unsecured creditors and as to debts and liabilities provable,[10] and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being, within the local limits of the Court in which the administration suit is pending with respect to the estates of persons adjudged or declared insolvent; and all persons who in any such case would be entitled to be paid out of such property, may come in under the preliminary decree, and make such claims against the same as they may respectively be entitled to by virtue of this Code.

[1877, S. 213.]

Synopsis

Other Topics (miscellaneous)

1. Analogous law. — This rule corresponds to Section 34 and Part I, Schedule I of the Administration of Estates Act, 1925, (15 Geo. V, Ch 23) The main difference between Part I, Schedule I and this rule consists in the addition of the words "and as to the priorities of debts and liabilities" after the words "contingent liabilities respectively" See Note 8 *infra*.

2. Administration suits. — "Administration" means the management of the estate of a deceased person who has left no executor.[1] It consists in —

(i) Payment of the funeral expenses of the deceased

Order 20 Rule 13 — Note 2

1. (35) AIR 1935 Pesh 63 (64) (Where a debtor asks another person to take up the administration of his estate for liquidation of his liabilities and a composition deed is drawn up a decree passed in accordance with this deed is not an administration decree)

7. Decree in administration suits. — In drawing up decrees in administration suits the forms prescribed in the Code should be followed as far as possible [1] For forms of preliminary decree, see Schedule I, Appendix D, Forms Nos 17 and 19, *infra*, and for forms of final decrees, see Forms Nos 18 and 20, *infra* In a suit by a creditor for administration, it cannot be held that the other creditors are represented by the plaintiff in the sense that they are, in effect, *parties* to the suit [2] But a decree for the administration of the estate of a deceased person is a decree in favour of all creditors and persons entitled to the effects of the deceased, and therefore a creditor who has attached the property of the deceased is not entitled to any priority in respect of his claims and will only rank among other creditors [3] But the pendency of an administration suit will not debar a *secured* creditor from enforcing his security.[4] After the passing of the preliminary decree it is not proper for the Court to sanction a compromise to which all parties to the suit are not parties,[5] or to discharge the receiver appointed by the Court and direct him to make over the estate to the plaintiff [6] So also, a *supplementary* decree cannot be passed after the preliminary decree has been passed, the only other decree that can be passed in the case after the preliminary decree being the *final* decree [7]

Although a Court in pursuance of a decree in an administration suit is competent to direct one of the parties to the suit to restore or hand over to the administrator or receiver assets belonging to the estate which are in the possession of such party, it is not open to the Court in an administration suit to direct a debtor to pay a debt (which is disputed by the alleged debtor) to the administrator or the receiver [8]

The Code makes no provision as to when a final decree in an administration suit should be passed or as to the contents of such decree, this must depend upon the circumstances in each case [9]

8. Estate insufficient to pay all the debts — Sub-rule (2). — Where the estate of the deceased, in respect of which administration by Court is sought, is *insufficient* to pay all the debts of the deceased in full, sub rule (2) will apply Under that sub rule, the law of insolvency in respect of the following heads should be observed in the administration of such estates —

(i) as to the respective rights of secured and unsecured creditors (see Sections 28 and 47 of the Provincial Insolvency Act, 1920, and Section 48 and clauses 9 to 17 of Schedule II of the Presidency Towns Insolvency Act, 1909),

(ii) as to the debts and liabilities of the estate provable (see Sections 45 and 46 of the Provincial Insolvency Act, 1920, and Sections 46 and 48 of the Presidency Towns Insolvency Act, 1909), and

(iii) as to the valuation of annuities and future and contingent liabilities (see

Note 7

1 (05) 32 Cal 561 (566)
[*See* (36) AIR 1936 Lah 879 (882) (The forms are merely to be used as a guide in framing decrees they can be varied and adopted according to the circumstances in each case)]
[*See also* (25) AIR 1925 P C 261 (262) (P C) (Change in form of preliminary decree was [illegible]

4. (81) 7 Cal 733 (735)
5. (05) 32 Cal 561 (565 566)
6 (01) 5 Cal W N 417 (419)
7. (38) AIR 1938 Rang 372 (374)
8 (36) AIR 1936 Lah 865 (865)
9 [illegible]
sheet, such order must be construed as a final decree to that extent and is appealable.)

O 20 R. 13
Notes 4-6

the legacies The residue is to be thereafter distributed amongst the heirs of the deceased[1] A suit by the heirs or the creditors or the legatees of a deceased Mahomedan for the enforcement of their claims against the estate of the deceased becomes essentially a suit for *administration*[2] though in such cases partition of the estate may be an incident thereof[3] and even the heirs of the deceased who are not parties to such a suit are bound by the proceedings and cannot claim anything but what remains after the debts of the deceased have been paid[4]

5. Who may file an administration suit — A suit for administration of the estate may be instituted by any person *interested in the estate* Thus the following persons may maintain a suit for administration —

(i) Any person entitled to a share in the deceased s estate such as next of kin[1]

(ii) A legatee or an annuitant[2]

(iii) A creditor of the deceased But the creditor should sue on behalf of himself and on behalf of all the creditors[3]

(iv) An executor or administrator where there are disputes between the heirs or the legatees and where there is a doubt as to the manner in which he should administer the estate[4]

(v) The legal personal representative of the deceased[5]

An order for administration will not be made in a suit therefor, unless the plaintiff proves his claim or establishes his right to bring the suit[6] But it is not obligatory on the Court to pass a decree for administration if the defendant before decree satisfies the plaintiff s claim It may dismiss the suit[7]

5a Against whom administration suit can be filed — A suit for administration is maintainable against persons who were in possession of the property during the lifetime of the deceased as agents or managers and who continued to be in possession after his death[1] In an administration suit where a legatee sues the executor for payment of a legacy and for administration of the estate of the deceased the executor, if there is one is the only necessary party and not the other legatees[2] The next of kin and the intermeddler with the estate of the deceased are proper parties to an administration suit[3]

6 Plaint in administration suits — As to the form of plaint in such suits see Schedule I Appendix A Forms Nos 41 to 44

Note 4

1 ('82) 8 Cal 20 (24)

2 ('15) AIR 1915 Cal 655 (657) (Mahomedan widow can have her claim to dower settled only by administration suit)

('97) 1 Cal W N 336 (337) (Heirs opposing probate may maintain suit for administration against administrator *pendente lite*)

('82) 8 Cal 370 (374) (Creditor s suit—Treated as administration suit)

('79) 4 Cal 142 (159) (FB) (Do)

('75) 24 Suth W R 3 (4) (Do)

3 ('28) AIR 1928 Mad 760 (762 763)

4 ('94) 21 Cal 311 (317 318)

Note 5

1 ('28) AIR 1928 Mad 760 (762)

2 (1877) 7 Ch D 58 (59) Wollaston v Wollaston

3 ('75) 15 Beng L R 296 (301)

('84) 10 Cal 713 (734)

vested interest in property)

4 ('09) 3 Ind Cas 164 (165) 33 Bom 409

5 ('32) AIR 1932 P C 146 (151) (PC)

6 (1887) 36 Ch D 269 (276 277) Battyany v Walford

7 ('14) AIR 1914 Mad 646 (647)

Note 5a

1 ('32) AIR 1932 Lah 328 (330)

2 ('32) AIR 1932 Cal 337 (338) 59 Cal 77

3 ('33) AIR 1933 Mad 74 (79) 56 Mad 273

R. 14. [S 214] *(1)* Where the Court decrees a claim to pre-emption[2] in respect of a particular sale of property and the purchase-money has not been paid into Court, the decree shall — O 20 R 14

Decree in pre emption suit

(a) specify a day on or before which the purchase money shall be so paid,[6] and

(b) direct that on payment into Court[9] of such purchase money, together with the costs (if any) decreed against the plaintiff, on or before the day referred to in clause *(a)*, the defendant shall deliver possession of the property to the plaintiff, whose title thereto shall be deemed to have accrued[8] from the date of such payment, but that, if the purchase-money and the costs if any are not so paid, the suit shall be dismissed with costs

(2) Where the Court has adjudicated upon rival claims to pre emption,[15] the decree shall direct, —

(a) if and in so far as the claims decreed are equal in degree, that the claim of each pre-emptor complying with the provisions of sub-rule *(1)* shall take effect in respect of a proportionate share of the property including any proportionate share in respect of which the claim of any pre-emptor failing to comply with the said provisions would, but for such default, have taken effect; and

(b) if and in so far as the claims decreed are different in degree, that the claim of the inferior pre-emptor shall not take effect unless and until the superior pre-emptor has failed to comply with the said provisions

[1877, S 214]

Synopsis

1 Legislative changes
2 *Pre-emption*
3 Pre emption under Mahomedan law
4 Pre emption by custom
5 Pre-emption by contract
6 Shall specify a day before which purchase-money shall be paid
7 Extension of time
8 Plaintiff's title when accrues
9 Payment into Court
10 *Tender of money, if sufficient.*
11 On or before the day referred to ' See Note "
12 Right to rents and profits
13 Vendor's title in pre emption suits.
14 Set-off of costs against purchase money
15 Rival pre-emptors — Sub rule (2)
16 Appeal

O. 20 R. 14
Notes 1–2

Other Topics (miscellaneous)

1. Legislative changes. —

1 The words "whose title thereto shall be deemed to have accrued from the date of such payment ' are new See Note 8, *infra*

2 Sub-rule (2) is new

2. Pre-emption.—The right of pre emption is the right of a person to purchase property before opportunity to purchase it is offered to others [1] Such a right may, however, be defeated by waiver or acquiescence on the part of the claimant [2]

The doctrine of pre emption does not apply to *execution sales,* apparently because the would-be pre emptor can, in such a case, as well have bid at the auction [3]

The right of pre emption arises only on a *sale* of immovable property.[4]

Where a plaintiff having a right to pre empt joins with himself, in a suit for pre emption, a *stranger,* he forfeits his right to pre-empt,[5] but not so where the other persons joined are members of the plaintiff's family [6] See also the undermentioned cases [7]

Order 20 Rule 14 — Note 2

1. The Concise Oxford Dictionary

2. ('08) 35 Cal 402 (411) 35 Ind App 60 (PC) (Delay in asserting right to pre emption construed as waiver)

('89) 11 All 164 (174) (Acquiescence in mortgage by conditional sale is not relinquishment of right of pre emption upon conditional sale becoming absolute)

Mere fact that negotiations were made with vendee without resorting to suit does not amount to waiver '

('94) 16 All 300 (302)

('97) 19 All 334 (336)

3. ('05) 27 All 670 (677) (Private sale by receiver is not a compulsory sale and right of pre emption exists)

('32) AIR 1932 Nag 44 (45) 28 Nag L R 11 (Sale in execution in presence of a compromise decree—No right of pre emption)

('71) 15 Suth W R 455 (456)

4. ('92) 14 All 333 (335) (Gift—No right of pre emption)

('88) 15 Cal 184 (186) (Perpetual lease—No right

5.

6. ('82) 4 All 950 (960)

('33) AIR 1933 Lah 481 (483) 14 Lah 421.

('01) 23 All 129 (130) (Guardian of minor is competent to exercise or refuse to exercise on behalf of the minor a right of pre emption)

('04) 26 All 549 (553) (In suit for pre emption vendor is not a necessary party)

('11) 9 Ind Cas 414 (414) (Oudh) (Jurisdiction of Court is to be decided by the valuation set forth in the plaint)

('87) 9 All 471 (473) (Price alleged in deed of sale not true contract price — Vendor and vendee concealing real price — Court should ascertain the market price at the time of the sale)

('97) 19 All 148 (152) (Sale to two, one of whom alone is liable to be pre empted—Interest separable —Pre emption only of his interest allowable)

('93) 20 All 100 (102) (Land having been sold to stranger, subsequently re sold by the stranger before suit to a co sharer having equal rights with those seeking pre emption—No right of pre emption)

('99) 21 All 374 (379) (Right to pre empt must subsist both at the time of the sale and at the time of the institution of suit)

('99) 21 All 441 (444, 445) (Right to pre empt lost during pendency of suit — Suit to be dismissed)

('96) 18 All 382 (384) (Claimant for pre emption under wajib ul arz does not forfeit his right by [illegible]

3. Pre-emption under Mahomedan law — The Mahomedan law is the only system of law which provides substantive rules relating to pre emption [1] In the Madras Presidency, the right of pre emption under the Mahomedan law is not recognised on the ground of its being opposed to public policy which favours the free and unrestricted transfer of property [2]

The undermentioned are some of the cases bearing upon the Mahomedan law of pre emption [3] See also the Punjab Pre emption Act (I of 1913) Section 11 the Agra Pre emption Act, 1922, and the Oudh Laws Act 1876

4. Pre-emption by custom. — A right of pre emption is recognised by custom among Hindus in Behar,[1] Gujrat[2] and the United Provinces [3] See also the under mentioned cases [4]

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pre emption conveyed by one transfer—See also (1884) 6 All 423 (426 427))
(89) 11 All 109 (117) (Claimant disqualified to sue as to part cannot claim the remainder)

Note 3

1 (83) 5 All 110 (113 117)
(83) 5 All 180 (182)
2 (70) 6 Mad H C R 26 (31)
3 (98) 20 All 88 (89) (Sunnis—Plaintiff dying before suit—Right does not survive to his heirs —See however 12 Ind Cas 720 (720) (Bom)— Heirs and representatives of executors or

Transaction complete and right of pre-emption arose)
(06) 28 All 127 (129) (Owner of the dominant tenement has in respect of a sale of the servient

(90) 12 All 229 (231 234) (Shia law — Property owned by more than two sharers — No right of pre emption)
(1900) 22 All 102 (104 105) (Mahomedan of the Shia sect cannot maintain claim for pre emption based on the ground of vicinage under the Mahomedan law when both the vendor and vendee are Sunnis)

Note 4

1 [illegible]

3 (See for instance (90) 12 All 234 (254 258))
4 *One coparcener has no right of pre emption against another*
(66) 6 Suth W R 250 (252)
(79) 4 Cal 831 (834 835) (FB)
(87) 14 Cal 761 (766)

Persons not entitled to pre empt

(98) 20 All 419 (420) (Wajib ul arz — Cosharers and owners of separate plots of muafi land — Muafidars *held* not entitled to pre empt)
(01) 23 All 427 (428) (Hissedar of superior class not entitled to pre emption upon sale to hissedar of inferior class)
(94) 16 All 412 (414)
(95) 17 All 447 (450) (Vendor who is not a cosharer)

(84) 6 All 17 (19) (Maintenance holder)

Classes of persons entitled to pre empt

(87) 9 All 480 (483) (Recorded cosharer to be preferred to person claiming to be cosharer by virtue of benami purchase)

Miscellaneous

(1900) 22 All 1 (11 29, 32) (FB) (Perfect partition extinguishes co sharer s right of pre-emption)
(14) AIR 1914 All 75 (75 76) 36 All 456 (Claim can be based in the alternative on contract custom or Mahomedan law)
(70) 2 N W P H C R 222 (223) (Claims to pre-emption based on contract as well as custom may be united in one suit)
(06) 28 All 590 (592) (Generally custom to be presumed to be co-extensive with Mahomedan law)
(01) 23 All 32 (33) (*Fluids* meaning of)
(90) 12 All 234 (251) (Custom ordinarily co-extensive with Mahomedan law)

O.20 R.14
Notes 1–2

Other Topics (miscellaneous)

1. Legislative changes.—

1 The words "whose title thereto shall be deemed to have accrued from date of such payment' are new See Note 8, *infra*

2 Sub rule (2) is new

2. Pre-emption.—The right of pre emption is the right of a person to purc property before opportunity to purchase it is offered to others[1] Such a right r however, be defeated by waiver or acquiescence on the part of the claimant[2]

The doctrine of pre emption does not apply to *execution sales*, appare because the would be pre emptor can, in such a case, as well have bid at the auctic

The right of pre emption arises only on a *sale* of immovable property[4]

Where a plaintiff having a right to pre empt joins with himself, in a suit pre emption a *stranger*, he forfeits his right to pre empt,[5] but not so where the ot persons joined are members of the plaintiff's family[6] See also the undermentio cases[7]

Order 20 Rule 14 — Note 2

1. The Concise Oxford Dictionary

2 (08) 35 Cal 402 (411) 35 Ind App 60 (PC) (Delay in asserting right to pre emption construed as waiver)

(89) 11 All 164 (174) (Acquiescence in mortgage by conditional sale is not relinquishment of right of pre emption upon conditional sale becoming absolute)

Mere fact that negotiations were made with vendee without resorting to suit does not amount to waiver

(94) 16 All 300 (302)

(97) 19 All 334 (336)

3 (05) 27 All 670 (677) (Private sale by receiver is not a compulsory sale and right of pre emption exists)

('32) AIR 1932 Nag 44 (45) 28 Nag L R 11 (Sale in execution in presence of a compromise decree—No right of pre emption)

(71) 15 Suth W R 455 (456)

4 ('92) 14 All 333 (335) (Gift—No right of pre emption)

(88) 15 Cal 184 (186) (Perpetual lease—No right of pre emption)

(05) 32 Cal 988 (991) (Sham sale—No right of pre emption)

(33) AIR 1933 Lah 481 (483) 14 Lah 421

(01) 23 All 129 (130) (Guardian of mino competent to exercise or refuse to exercise behalf of the minor a right of pre emption)

(04) 26 All 549 (553) (In suit for pre emp vendor is not a necessary party)

(11) 9 Ind Cas 414 (414) (Oudh) (Jurisdictio Court is to be decided by the valuation set fc in the plaint)

(87) 9 All 471 (473) (Price alleged in deed of not true contract price — Vendor and ven concealing real price — Court should ascert the market price at the time of the sale)

(97) 19 All 148 (152) (Sale to two one of wh

(99) 21 All 374 (379) (Right to pre empt m subsist both at the time of the sale and at time of the institution of suit)

(99) 21 All 441 (444 445) (Right to pre em lost during pendency of suit — Suit to be d missed)

(96) 18 All 382 (384) (Claimant for pre empti under wajib ul arz does not forfeit his right

must include whole of the property subject

6 (82) 4 All 259 (260)

(97) 19 All 311 (311)

7. (85) 7 All 107 (111) (Decree for pre emption —Property transferred by decree holder—He can thereafter execute the decree)

may, if it thinks fit, enlarge the time[4] Where the appeal is dismissed or the decree of the lower Court is varied and the appellate decree is silent about the extension of time, there is a conflict of opinion as to whether the time fixed by the original decree is to be calculated from the date of the appellate decree See Note 9 to Section 148 *ante* and the undermentioned case[5] Where, however, the Appellate Court *increases* the sum to be paid by the plaintiff in a pre emption suit and he deposits the excess amount ordered *within a reasonable time after the appellate decree*, the payment is a valid one[6]

Effect of failure to deposit within the time allowed — On the plaintiff s default in paying the purchase money within the time allowed, the suit should be dismissed,[7] though the decree does not contain a specific provision to that effect[8] But where the plaintiff has appealed against the *very condition* in the decree that he should pay the purchase money within a certain period, the Appellate Court should not dismiss the suit simply on the ground of non payment within the time so fixed[9]

Where a suit for pre emption by a son *in his own individual capacity* is dismissed owing to his failure to pay the purchase money within the time allowed, a fresh suit by his father, for pre emption, in assertion of his own individual right is not barred[10]

8. Plaintiff's title, when accrues — The pre emptor's title to the property accrues from the date of the payment of the purchase money into Court and not from the date of the sale or of the decree[1] A registered instrument is not necessary for passing the title[2] The words "whose title thereto shall be deemed to have accrued from the date of such payment have been newly inserted in this rule to make this clear and to supersede the opinion expressed by the Madras High Court in the undermentioned case[3] that a registered instrument is necessary for passing title to the pre empted property[4] It has been held that where, at the time of the deposit in

(39) AIR 1939 Nag 107 (109) (Plaintiff failing to make payment within period fixed by Court — His right of pre emption is lost—Mere fact that plaintiff files appeal and executes security bond does not extend time)
4 (80) 2 All 744 (745)
(69) 3 Agra 254 (255)
(23) AIR 1928 All 516 (517) 45 All 456
(96) 18 All 223 (226)
(39) AIR 1939 Nag 140 (141) (Plaintiff can appeal though he has not paid the money within the time fixed—Appellate Court can also extend time)
[illegible]

be so the moment the due date passes without payment After that it becomes a decree in the defendant s favour)
8 (03) 1903 Pun Re No 53, p 205
(98) 1898 Pun Re No 47, p 160
(89) 14 All 529 (531)
(88) 1888 All W N 4 (5)
9 (12) 17 Ind Cas 868 (868) (All)
10 (85) 1885 Pun Re No 1 p 1

Note 8

1. (30) AIR 1930 Lah 273 (277) 11 Lah 128 (FB) (Overruling 1908 Pun Re No 25)
(33) AIR 1933 Lah 791 (792)
(29) AIR 1929 All 953 (954) 51 All 998 (Title does not date from decree)
(95) 1895 All W N 13 (14)
(25) AIR 1925 Lah 202 (203) 5 Lah 486 (Title does not date from sale)
(23) AIR 1923 Lah 529 (530) (The Punjab Pre emption Act does not in any way modify the [illegible]
(FB))]
2 (29) AIR 1929 All 237 (238)
3 (01) 24 Mad 449 (463)
4. See Notes on Clauses by Select Committee

O.20 R.14
Notes 5-7

5. Pre-emption by contract. — Pre-emption can be claimed on the basis of a contract between the person claiming to pre-empt and the vendor, if the vendee has notice of such contract.[1] (See Transfer of Property Act, Section 40.)

Thus, a right of pre-emption in respect of a property may be conferred on a mortgagee thereof.[2] The price in such cases may or may not be fixed beforehand.[3] It has been held that the right cannot be enforced against an execution purchaser of the equity of redemption.[4]

6. Shall specify a day before which purchase-money shall be paid. — It is necessary under this rule that the decree should *specify a day* before which the purchase money shall be paid.[1] It is not a compliance with the rule to say that the money should be paid within a certain period; the *date* by which the amount should be paid should be specified.[2]

Where the vendee has paid off encumbrances on the property the amount should be included in the purchase money, unless he has paid off the encumbrance in bad faith or improvidently.[3]

7. Extension of time. — The general principles embodied in O. 20, R. 3 apply to pre-emption decrees under this rule and hence Section 148 does not enable the Court to enlarge the period fixed by the decree for paying the purchase money.[1] But where the last day allowed to the plaintiff to deposit the purchase money is a holiday the money may be deposited on the next court day on general principles of law.[2]

may if it thinks fit enlarge thCourt after its usual working hours is not valid"
the lower Court is varied a**he day referred to"** — See Note 7 above
time there is a conflict of **and profits** — The rights of a pre emptor are different
is to be calculated from t purchaser Under a pre emption decree the right to posses
ante and the undermenti the consequential right to mesne profits accrue to the
the sum to be paid by t date when he pays the amount of the purchase money finally
amount ordered *within* Till then the original purchaser retains possession and is
valid one [6] d profits [1] As to whether the vendee is entitled to the crops on
Effect of fail date of payment see Note 8 above
default in paying the
dismissed [7] though th **title in pre-emption suits** — A pre emptor is not entitled in
where the plaintiff put the vendor to proof of his title to the property which he
should pay the pur he principle of pre emption is substitution A pre emptor is
not dismiss the suit take the title which the vendee was ready to take [1]

Where a s **of costs against purchase-money** — The rule does not provide
dismissed owing to s instead of being awarded against the pre emptor were awarded
fresh suit by his fa e decree Under the doctrine of equitable set off he is entitled to
not barred [1] hen depositing the purchase money [1] It has been held that when
he purchase money to be deposited within a specified time but does

8 **Plaintiff** s awarded to the defendant to be deposited the plaintiff is not
accrues from the da h costs although he deducts from the purchase money the costs
the date of the sal
passing the titl **al pre-emptors — Sub-rule (2)** — Sub rule (2) is new and prescribes
from the t decree to be passed where there are rival pre emptors Under the old Code
clear ar ecided such cases on general principles suited to the emergencies of each case [1]
underm ent rule enables rival claimants to pre emption to join as plaintiffs in a suit for
pre emp on and to obtain in that suit a decision not only as to their right to pre
(39) AIR I also as to their rival claims [2] But where the plaintiffs do not ask the Court
make payn

(88) 1888 Pun Re No 70 page 183
(1900) 3 Oudh Cas 323 (324)
(12) 15 Ind Cas 337 (337 338) 34 All 596
(11) 10 Ind Cas 454 (455) (All)
(06) 3 All L Jour 804 (806 807) 28 All 676
(84) 6 All 351 (357)
(39) AIR 1939 All 228(229) ILR (1939) All 261
(37) AIR 1937 All 756 (757)
2 (39) AIR 1939 All 228 (230) I L R (1939) All 261 (Reversing on Letters Patent Appeal A I R 1937 All 756)

276 (Payment into the treasury without informing the Court not a due compliance)]

Note 12

16) AIR 1916 P C 179 (181) 44 Cal 675 44 Ind App 80 (P C)
(33) AIR 1933 All 91 (92) (Pre emptor s su t

Note 13

1 (15) AIR 1915 All 154 (155) 37 All 529

Note 14

1 (22) AIR 192 Lah 142 (143) 2 Lah 294
(33) AIR 1933 All 113 (114)

Note 15

1 *See also the following cases*
(84) 6 All 370 (373 375)
(84) 6 All 455 (456)
(88) 10 All 182 (187)
(89) 11 All 164 (16)
(75) 1 All 291 (293)
(99) 21 All 292 (296)
(85) 7 All 720 (728)
(85) 1885 All W N 3 9 (309)
(92) 1892 Pun Re No 29 page 116
(81) 1881 Pun Re No 20 page 35
(81) 1881 Pun Re No 10 page 236
(05) 2 All 465 (467)
2 (29) AIR 1929 P C 58 (60) 56 Ind App 80 51 All 267 (P C)

O. 20 R. 14 Notes 15-16

to adjudicate upon their respective rights *inter se*, a joint decree may be passed and if the amount is deposited in compliance with the decree, the defendant has no concern in the way in which the property is to be shared by the plaintiffs, but the mere fact that a joint decree is passed in favour of all has not the necessary result of passing title to all the joint decree-holders even if only one of them pays the amount. In order to determine in what proportion the joint plaintiffs are to share the property, the circumstances under which the payment was made must in each case be enquired into[3]

16. Appeal. — A plaintiff, who has obtained a decree for pre emption conditional on his paying a certain sum within a certain period, may appeal against the decree whether or not he has deposited the money in Court within the time limited[1] A vendee does not forfeit his right of appeal against a pre emption decree merely because he has withdrawn the money deposited by the plaintiff[2] A plaintiff depositing purchase money in Court under a pre emption decree is entitled to a refund of the amount on the reversal of the decree in appeal[3] A decree with a condition that unless the purchase money is paid within the time fixed the suit shall stand dismissed, is a complete decree and a subsequent order dismissing the suit is not a decree against which an appeal can be preferred[4] Further, an order passed on an application for payment of the pre emption money in compliance with a decree under Rule 14 is not appealable under Section 47 of the Code as it is not an order relating to execution, discharge or satisfaction of a decree[5]

O. 20 R. 15

R. 15. [S 215.] Where a suit is for the dissolution of a partnership, or the taking of partnership accounts, the Court, before passing a final decree, may pass a preliminary decree declaring the proportionate shares of the parties, fixing the day on which the partnership shall stand dissolved or be deemed to have been dissolved, and directing such accounts to be taken, and other acts to be done, as it thinks fit.

Decree in suit for dissolution of partnership.

[1877, S. 215]

Synopsis

1. Scope of the Rule
2. Preliminary decree directing the taking of accounts.
3. Mode of taking accounts
4. "Fixing the day on which the partnership shall stand dissolved."
5. Defendant's right to what is found due to him
6. Court-fee in partnership suits
7. Appeal
8. Letters Patent Appeal

1. Scope of the Rule. — This rule contemplates the passing of a preliminary decree in suits for dissolution of partnership so as to enable the Court to pass a final

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3 ('29) AIR 1929 All 953 (954) 51 All 998

Note 16

1 (1900) 1900 Pun Re No 9?, page 379
('96) 18 All 223 (226)
('91) 16 All 126 (129)
('91) 13 All 376 (378) (F B)
('95) 1895 Pun Re No 67, page 333
('90) 1890 Pun Re No 161, page 522
[See also ('12) 17 Ind Cas 868 (868) (All)]

2 ('07) 1907 Pun Re No 16 page 74

3 ('96) 18 All 262 (264).

[illegible] t) as

[illegible]

adjudication of the specific rights of the parties The words "may pass a preliminary decree" show that the passing of such a decree is in the judicial discretion of the Court While, on the one hand, it will be an improper exercise of the discretion to pass a preliminary decree where the shares of the parties in, and the fact and date of dissolution of, the partnership are admitted,[1] on the other hand, where such facts are not admitted, the Court *ought* to pass a preliminary decree defining and declaring the rights of the parties before giving a final adjudication in the suit [2] In *Ramchunder Shaha* v *Manick Chunder Banikya*,[3] Pontifex, J, observed as follows

'At the first hearing of the suit really what the Court had to determine was, whether there had been a partnership and what were its conditions was it dissolved or ought it to be dissolved and who were the parties interested in the partnership and in what shares and upon determining these questions it ought, in the first instance to have directed that accounts should be taken as set forth in Form No 132 (now Form No 21, Appendix D) subject, of course to any such alterations as the nature of the case might require It is only after taking these accounts and obtaining the report of the officer of the Court or, if there is no such officer when the Judge himself has arrived at a decision on the accounts that a final decree should be made according to Form No 133 of the Fourth Schedule of the Code (now Form No 22 of Appendix D) "

If, however, the Court has passed an order defining and declaring the said rights, the mere fact that no formal decree has been drawn up in those terms will be a mere irregularity not vitiating the trial [4]

Under Section 265 of the Contract Act as it originally stood, a partner had to *apply* to the *District Court* to wind up the business of the firm to provide for the payments of its debts and to distribute the surplus according to the shares of the partners respectively, and there was a conflict of opinion as to whether a *suit* for such relief in the ordinary Court lay [5] The Section was amended by the Contract Amendment Act (IV of 1886), and under that Section a suit for dissolution of partnership could be brought in the ordinary Courts like any other suit [6] See now the Partnership Act (IX of 1932)

2. Preliminary decree directing the taking of accounts.—Besides making the declarations as to the rights of the parties referred to in Note 1 above, the Court should, in the preliminary decree, direct an account to be taken of the dealings and transactions of the partnership, of the credits, property and effects due and belonging to it, and should, if need be, appoint a receiver for realising the partnership property [1]

As to the nature of the rights conferred by such a decree, see the undermentioned case [2] Although it is desirable that the preliminary decree should state who is to be the accounting party, yet the Court can, even subsequently, decide the question [3]

The ordinary form for the preliminary decree is given as Form No 21 in Appendix D *This form should ordinarily be followed unless there is any special reason* for modifying it The form is applicable also where the Court is asked to declare that

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Order 20 Rule 15 — Note 1

[illegible]

5 (83) 5 All 500 (503) (A suit lay in the ordinary Court)
(83) 1883 All W N 205 (205) (Do)
(84) 8 Bom 272 (277) (Do)
(84) 8 Bom 494 (496) (Do)
(81) 7 Cal 157 (162) (Suit did not lie in ordinary Court)
(81) 7 Cal 428 (433) (Do)

6. [*See* (18) AIR 1918 All 288 (289) 40 All 446 (A suit by a surviving partner against the representative of a deceased partner for partnership accounts)

Note 2

1. (97) 20 Mad 313 (315, 316)
2 (29) AIR 1929 Mad 641 (647) 52 Mad 503 (F B)
3 (36) AIR 1936 Lah 78 (80) (It is open to the Court to give instructions at any time to facilitate and regularise the taking of accounts)

O.20 R.15
Notes 2-5

a dissolution has taken place and an account is still required[4]

3. Mode of taking accounts.—The Court may itself take the accounts of the partnership or appoint a commissioner for the purpose In the latter case the Court may give directions, if any are required, as to the mode of taking accounts It may call upon either party to furnish a statement of particulars relating to the business and its transactions[1] All the account books and other documents relating to the partnership and in the possession of either party should be produced[2] Sufficient time should be given to the parties for the purpose and evidence should be taken if necessary[3] A commissioner taking accounts has no power to decide questions relating to the terms of the partnership, its duration or the shares of the partners[4] In a suit for dissolution of partnership and the settlement of accounts, ordinarily the partnership business must be wound up so that all questions between the parties in respect of the partnership may be finally decided, and a procedure which leaves outstanding such questions or is calculated to give rise to fresh questions is not proper[5]

As to the power of the Court to go into the accounts of firm anterior to a date on which there has been a settlement of accounts between the parties, see the undermentioned case[6]

4 "Fixing the day on which the partnership shall stand dissolved."—The preliminary decree should fix a day on which the partnership should stand dissolved or be deemed to have been dissolved The fixing of the day is a judicial act and should be done arbitrarily Ordinarily, if a notice of dissolution has been given by one of the partners, the dissolution will be declared as and from that date[1] Otherwise and in the absence of any other circumstance, the dissolution should be ordered to date from the plaint[2] It can be ordered to date from the judgment only in exceptional cases[3]

5. Defendant's right to what is found due to him.—If, on the taking of accounts, it is found that any balance is due to the defendant, the Court can pass a decree in his favour for the amount[1]

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4 (38) AIR 1938 Lah 758 (759) I L R (1939) Lah 178

Note 3

1 (81) 7 Cal 428 (433)
2 (14) AIR 1914 P C 33 (33) (P C) (Accounts [illegible]

3 [illegible] to pa s an *ex parte* final decree on the mere statements of the plaintiff)
4 [illegible]

5 [illegible]

6 (38) AIR 1938 Lah 758 (759) I L R (1939) Lah 178 (If it is necessary to examine the [illegible] acceptance of the existing accounts as correct)

Note 4

1 (18) AIR 1918 Mad 264 (264)
2 (18) AIR 1918 Mad 264 (264)
3. (1881) 17 Ch D 529 (531) Lyon v Tweddell (Refered to in AIR 1918 Mad 264)

Note 5

1 [illegible] proceed the proper course is to transpose the plaintiff to the position of defendant and make the defendant plaintiff)
(But see (06) 3 All L Jour 233 (234) (Not accepted as good law)

6. Court-fee in partnership suits. — The plaint or memorandum of appeal in a partnership suit is chargeable with an *ad valorem* court fee, the valuation being fixed under Section 7, clause (iv) (f) of the Court fees Act [1]

The defendant in such a suit is not bound either to value *his* claim or to pay any court fee If, however, on the taking of accounts any amount is found due to him, he is bound to pay court fee thereon before a decree for the amount is passed in his favour.[2]

7. Appeal. — An appeal lies from a preliminary decree passed under this rule [1] But mere directions given to the commissioner in the matter of taking accounts are not decrees and are not appealable [2]

8. Letters Patent Appeal. — An order appointing the Official Receiver as the receiver in a partnership suit was held by the Rangoon High Court to be a "judgment" within the meaning of Clause 13 of the Letters Patent and as such appealable [1] The same High Court has, however, held that orders by way of directions to the commissioner in the matter of taking accounts are not "judgments" within the meaning of the said Clause of the Letters Patent and hence not appealable [2]

R. 16. [S. 215A.] In a suit for an account of pecuniary transactions between a principal and an agent, and in any other suit not hereinbefore provided for, where it is necessary, in order to ascertain the amount of money due to or from any party, that an account should be taken, the Court shall, before passing its final decree, pass a preliminary decree directing such accounts to be taken as it thinks fit.

Decree in suit for account between principal and agent

Synopsis

Other Topics (miscellaneous)

Note 6

1 ('10) 6 Ind Cas 832 (832) 32 All 517
('33) AIR 1933 Mad 830 (831) 56 Mad 705 (Ap-
('36) AIR 1936 Lah 458 (460)

2 ('11) 10 Ind Cas 250 (253) (Lab)
('14) AIR 1914 Sind 137 (137) 8 Sind L R 122

Note 7

1 ('90) 23 Cal 406 (408 412)
('01) 1901 Pun Re No 18 p 47

2 ('28) AIR 1928 Sind 100 (100 101) 23 Sind L R 87

Note 8

1 ('27) AIR 1927 Rang 139 (139) 5 Rang 99

2. ('25) AIR 1925 Rang 43 (45) 2 Rang 469

O. 20 R. 16
Notes 1–2

1 Scope of the Rule — The rule applies to the following kinds of suits viz —

(1) suits for accounts between principal and agent [1]

(2) suits in which plaintiff has a right to a rendition of accounts from the defendant [2] and

(3) suits in which it is necessary that an account should be taken in order to ascertain the amount due to or from any party [3]

The purpose of a preliminary decree in such suits is merely to ascertain whether the defendant is liable to account to the plaintiff [4] and the preliminary judgment, therefore need not be exhaustive or specify all details [5]

2 "Shall pass a preliminary decree" — Where the plaintiff has established that the defendant was his agent[1] or that the defendant is otherwise liable to account to him [2] it is the duty of the Court to pass a preliminary decree directing an account to be taken of the transactions between the parties But no such decree need be passed if the liability to account is not established [3] or if the necessity for accounts is not made out [4]

A preliminary decree in a suit contemplated by this rule finally declares the liability of the defendant for such sum as may be found due[5] but does not terminate the suit [6]

In a suit for accounts it is a better practice for the Court to express its directions specifically in the decree rather than to insert a general reference to its judgment in the decree [7]

The proceedings under a preliminary decree for accounts to obtain a final decree for money are proceedings in the suit and not proceedings in execution [8]

For the procedure to be observed in taking accounts see the undermentioned cases [9]

Order 20 Rule 16 — Note 1

1 (21) AIR 19 1 Sind 4? (43) 15 S nd L R 16

to recover balance of *anat ial* money retained in the hands of defend t for payment to creditors)

(37) AIR 1937 All 276 (278)

4 (26) AIR 1926 Nag 393 (396)

5 (31) AIR 1931 Cal 358 (359)

Note 2

1 (87) 14 Cal 147 (153 158) 13 Ind App 123 (P C)

er is not liable to account but is liable for damages therefore no preliminary decree for account can be passed against him)

4 (25) AIR 19 , Cal 1069 (1074) 52 Cal 766

(16) AIR 1916 Cal 244 (245) (It is only where it is necessary in order to ascertain the amount of money due to or from any parties that an account should be take that the Court shall before passing the final decree pass a preliminary decree directing such account to be taken as it thinks fit)

(30) AIR 1930 Mad 721 (722) 53 Mad 475 (In every suit for an account of pecuniary transactions it is not imperative for the Court to pass —It can simple involve

(28) AIR 1928 Nag 299 (300) (The mere fact that a preliminary decree was not passed under O 20 R 16 C P Code in a suit for accounts will not render the decree passed in the suit illegal if

5 (12) 13 Ind Cas 374 (375) (Cal) (Final decree passed *ex parte* — Defendant must be given an opportunity to be heard as to how much is due from him)

6 (31) AIR 1931 Lah 268 (269)

7 (36) AIR 1936 P C 325 (329)

8 (37) AIR 1937 P C 163 (164) 18 Lah 50? 64 Ind App 191 31 Sind L R 367 (P C)

9 (92) 19 Cal 174 (178 to 181) 19 Ind App 33 (P C)

(81) 6 Cal 754 (757 758)

(81) 7 Cal 654 (656 657)

(87) 14 Cal 147 (153) 13 Ind App 123 (P C)

O 20 R 16 Notes 3-6

3 Suit by principal — Right of agent to the amount found due to him — If in a suit by the principal accounts between him and the agent are taken and nothing is found due to the principal but something is found due to the agent a decree can be passed in the defendant s favour for the amount on his paying the necessary court fee [1]

4 Valuation for court-fee and jurisdiction — Suits for accounts are governed by the provisions of Section 7 clause (iv) (f) of the Court fees Act [1] The plaintiff s valuation will be the value both for the purposes of the court fee and for the purpose of jurisdiction [2] If a defendant appeals against the whole preliminary decree in such a suit he will be bound by the valuation given in the plaint [3]

5 Appeal — An appeal lies from a preliminary decree in a suit for accounts [1] Notwithstanding that a final decree has been passed in the case the final decree will be subject to the result of the appeal from the preliminary decree [2] See Notes to Section 97 *ante*

6 Stay of proceedings — An Appellate Court in which an appeal from the preliminary decree is pending can stay further proceedings under the preliminary decree (such as enquiry into accounts) pending the hearing of the appeal [1]

O 20 R 17

Special directions as to accounts

R. 17. [New] The Court may either by the decree directing an account to be taken or by any subsequent order give special directions with regard to the mode in which the account is to be taken or vouched and in particular may direct that in taking the account the books of account in which the accounts in question have been kept shall be taken as *prima facie* evidence of the truth of the matters therein contained with liberty to the parties interested to take such objection thereto as they may be advised

[R S C, O 33 R 3]

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(68) 10 Suth W R 279 (280) (Suit for delivery of account papers —Court should direct delivery of them)
(71) 15 Suth W R 200 (200 201)
(72) 17 Suth W R 409 (410)
(74) 22 Suth W R 191 (192)
(26) AIR 1926 Nag 393 (396) (Objection to particular item should be taken when question as to accounts is tried)
(13) 19 Ind Cas 901 (902) (Cal) (Unless fraud and undue influence are proved accounts cannot be re opened)
(1872) 9 Ch D 529 (532 533) Williamson v Barbour
(87) 11 Bo 8 (85) (Williamson Parbour (1872) 9 Ch D 529 Referred)

Note 3

1 (10) 6 Ind Cas 162 (163) 32 All 5 5
(33) AIR 1933 Sind 217 (18 219)
(07) 34 Cal 893 (894 895)
(37) AIR 1937 All 276 (9 9)
[*See* (06) 3 All L Jour 33 (234) (Defendant should claim a set off Otherwise Court cannot pass a decree in his favour)
(37) AIR 1937 Lah 619 (6 0) (Do)]

Note 4

1 (08) 1908 Pun Re No 150 p 681 (Appeal)

Note 5

1 (21) AIR 1921 Sind 42 (44) 15 Sind L R 16
2 (12) 16 Ind Cas 157 (1 9) 34 All 493
(13) 19 Ind Cas 630 (631) (Cal)

Note 6

1 (04) 31 Cal 2 (7 4) (FB)

O. 20 R. 17
Notes 1–3

Synopsis

1. Scope of the Rule.	3. Omission to give directions in preliminary decree.
2. Settled accounts	

1. Scope of the Rule —The rule is new and corresponds to O 33 R 3 of the Rules of the Supreme Court in England It, however, enacts no new provision of law but only recognises an already existing practice in the matter of taking accounts It is in the discretion of the Court to give special directions or not under this rule [1] Under the English practice the Court may treat the account books as *prima facie* evidence in partnership cases [2] Similarly, account books kept by a trustee may be ordered to be taken as *prima facie* evidence against the *cestui que trust* if the latter has had access to these books [3] In other cases special directions should be obtained from the Court,[4] *and such directions will be given if the ordinary proof of accounts is not* available owing to lapse of time or other causes,[5] or if the accounts are beyond the control of the accounting party [6]

2. Settled accounts. — In proceedings by way of taking accounts a settled account may be set up or pleaded in the absence of any special directions in the matter, in the preliminary decree [1]

3. Omission to give directions in preliminary decree. — Though the necessary directions in the matter of taking accounts are generally given in the preliminary decree, yet the omission of such directions in the decree will only amount to a mere irregularity.[1] In fact this rule contemplates such directions being given subsequently also

Their Lordships of the Privy Council have held that in a decree directing accounts to be taken, it is a better practice for the Court to express its directions specifically in the decree rather than to insert a general reference to its judgment in the decree [2]

O. 20 R. 18

Decree in suit for partition of property or separate possession of a share therein

R. 18. [New.] Where the Court passes a decree *for the partition of property or for* the separate possession of a share therein, then, —

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the *Government, the decree* shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54 ;

Order 20 Rule 17 — Note 1

1. ('21) AIR 1921 Sind 42 (43), 15 Sind L R 16

liams

6. (1841) 5 Beav 515 (517, 518), Turner v Corney

Note 2

1. (1885) 28 Ch D 111 (116), Holgate v Shuth

Note 3

1. ('21) AIR 1921 Sind 42 (43) 15 Sind L R 16
2. ('36) AIR 1936 P C 325 (329) (PC)

(2) if and in so far as such decree relates to any other immoveable property or to moveable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.

Synopsis

Other Topics (miscellaneous)

1. Scope of the Rule — Sub rule (1) refers to partition decrees relating to an 'estate assessed to Government revenue' referred to in Section 54 of the Code, while sub rule (2) deals with partition decrees relating to any *other* immovable property or to *moveable* property In the former case the rule does not contemplate the passing of a *preliminary* and of a final decree[1] The Court has merely to pass a decree *declaring* the rights of the several parties interested in the property the actual partition so as to affect the Government revenue being left to be made by the Collector[2] In the latter case *i e*, a case coming under sub rule (2) the Court *may* pass a preliminary decree if the separation cannot be made conveniently without further inquiry see Note 5, *infra* Where the decree does not contain any direction as required by sub rule (1) the decree is defective and unless the defect is rectified the parties cannot ask for the transmission of the proceedings to the Collector[3]

Where in a suit for partition a decree has been passed under sub rule (1) an application to the Court by the parties for the transmission of the papers to the Collector is not one for *execution*[4]

2. Jurisdiction of Court and Collector. — See Section 54, Note 7, *ante* As has been seen in that Note where the Collector disregards the directions in the decree, the Court has the power to interfere and set right his action[1]

3 Moveable property. — Where in a suit for partition of moveable property the plaintiff files a list of properties, and the defendant either denies that they are liable to partition or that they exist, it is incumbent on the Court, before passing

Order 20 Rule 18 — Note 1

1 ('14) AIR 1914 Oudh 332 (333)

2 ('25) AIR 1925 Lah 445 (446) 6 Lah 442
('14) AIR 1914 Oudh 332 (333)

3 ('35) AIR 1935 Sind 192 (192) (It is incumbent upon the plaintiffs to have decree corrected within the time allowed by law)

4 ('39) AIR 1939 Bom 451 (455) 41 Bom L R 921 (923 924) (There is nothing in cases of this sort for the Court to execute—Asking the Court to send the paper to the Collector is really asking the Judge to do a ministerial act)

Note 2

1 ('37) AIR 193 Bom 173 (176) (Civil Court has jurisdiction to set aside in toto or modify partition effected by the Collector)

O. 20 R. 18
Notes 3-5

a preliminary decree, to determine the following points[1] —

(1) whether such properties exist, and if so in whose possession,

(2) whether they are partible and

(3) what is their value

4. Joint Hindu family property. — See the undermentioned cases[1]

5. Preliminary decree. — In cases coming under sub rule (2), the Court *may* pass a preliminary decree It is not obligatory to do so in every case For instance, it is not necessary to pass a preliminary decree if the shares can be ascertained without difficulty in execution[1] But where a partition cannot be conveniently made without further enquiry, a preliminary decree may be passed declaring the rights of the several parties interested in the property leaving the actual partition to be made later on[2] It has been held that it would be premature to decide in the preliminary decree whether certain property in the defendant s possession about which partition is claimed is available for partition or not and that the question should be left to be decided at the enquiry subsequent to the preliminary decree[3] After a preliminary decree has been passed in a partition suit, the proper course for the plaintiff desiring an absolute separation of his share is to apply for a final decree and not to bring a fresh *suit* for that purpose[4] There is no limitation for such an application inasmuch as the rule does not contemplate any such application being made by the party, and it is the duty of the *Court* to pass the final decree after the necessary enquiries[5] In fact the Court cannot, after a preliminary decree has been passed in a partition suit, dismiss it for default in depositing the fee for a commissioner to make a final partition all that the Court can do in such a case is to adjourn the proceedings *sine die*[6]

Any party to the suit whose interest it is that further proceedings be taken, may move the Court to pass a final decree, but ordinarily it is the plaintiff who moves[7]

Under the old Code it was not necessary to pass first a preliminary decree and then a final decree in a partition suit[8] It was, however, usual to pass an interlocutory *order* declaring the rights of the several parties interested in the property and then a decree See the undermentioned cases[9] As to whether there can be more than one

Note 3

1 (19) AIR 1919 Oudh 208 (210)
[*See also* (75) 7 N W P H C R 75 (77)]

Note 4

1 (15) AIR 1915 Mad 1065 (1065) (Preliminary decree for partition effects severance in status)
(99) 23 Bom 184 (187) (Suit for partition by purchaser—Court need not determine shares of other coparceners)
(99) 23 Bom 188 (190) (Suit for partition by member of joint Hindu family—Others can have their respective shares determined and allotted

the period of the suit if the defendants have been receiving interest during such period)

Note 5

possession cannot be construed as a preliminary decree for partition)
3 (25) AIR 1925 Pat 433 (433)
5 Luck 280
Luck 280
(32) AIR 1932 Mad 519 (522)
7. (24) AIR 1924 P C 193 (198) 4 Pat 61 51 Ind App 321 (PC)

preliminary decree in a case, see the discussion under Section 2 (2), Note 10, *ante* As to the maintainability of an appeal against a preliminary decree after the final decree has been passed, see Section 97 Note 5, *ante*

6. "Giving such further directions." — These words include also directions for inquiry as to future mesne profits or interest, and it is in the *preliminary decree* that such directions should be given Where such decree is silent as to future mesne profits or interest, can the final decree award the same or direct an inquiry in respect of the same? As regards *mesne profits* it has been held that the final decree cannot award it or direct an enquiry in respect of it The reason is that Rule 12 and this rule should be read together and inasmuch as, under Rule 12, the final decree can only provide for mesne profits where an inquiry into the same has been directed by the preliminary decree, the same principle will also apply to cases coming under this rule [1] But it has been held by the Madras High Court in a recent decision[2] that a Court can pass a final decree for mesne profits in a partition suit although there has been no preliminary decree in respect of such profits It has also been held by the Chief Court of Oudh[3] that where a preliminary decree passed on compromise between the parties in a suit for partition omits to make any mention of mesne profits still it is open to the Court to direct an enquiry into mesne profits where it finds that the intention of both the parties is that mesne profits should be paid to each other In any case where the final decree directs such an enquiry there is no want of jurisdiction and the executing Court cannot go behind it [4] As to the maintainability of a separate suit for mesne profits where the decree in the partition suit is silent on the point, see Section 11 Note 125 and the undermentioned cases [5]

As regards *interest* where the preliminary decree in a partition suit directs accounts to be taken but is silent as to interest, it has been held by the Bombay High Court[6] that it is competent to the Court to award by its final decree interest in a proper case The learned Judges base their decisions on certain English cases according to which a Court has power on further directions to order payment of interest on a sum found due from a defendant although the decree declaring the liability contains no direction for payment of interest or the statement of claim does not ask for it ' It was also pointed out that the case of taking an account under the present rule is similar to the case of taking an account in an administration suit under O 20 R 13 and that, if the forms of preliminary and final decrees in administration suits (Appendix D, Forms 17 and 18) are looked at, it will be clear that the Legislature does recognize that even where the preliminary decree does not contain any direction as to interest, yet, in the final decree interest may be awarded

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('81) 7 Cal 318 (320) (Do)
('95) 18 Mad 73 (87) (Do)

Note [illegible]
1 [illegible]
[illegible] (Parties referring question as to mesne

3 [illegible]
4 [illegible]
5 ('3?) AIR 1932 Bom 2?? (224) 56 Bom ?92
('35) AIR 1935 Pat 60 (6?) (Suit by purchaser from coparcener for partition and separate possession of share purchased—Question of mesne profits must be determined in the partition suit itself and not by a separate suit)
6 ('25) AIR 1925 Bom 406 (408 409) 49 Bom 282.

O. 20 R. 18 Notes 7-9

7. Final decree — Where a preliminary decree for partition has been passed under this rule, the decree cannot be made effective without a final decree [1] Where subsequent to the preliminary decree, one of the co sharers dies and the other parties become entitled to increased shares, the final decree may award them the increased shares [2] In working out preliminary decrees for partition, the Court may, instead of making an actual division of all the property, give one coparcener a charge over the share of another for any difference in favour of the former [3] A decree for partition is a joint decree in favour of all the shareholders and therefore execution proceedings taken by one of them are sufficient to keep the decree alive in favour of all [4] It has been held by the Patna High Court[5] that where, along with the preliminary decree in a partition suit the Court passes an executable order for costs in favour of the plaintiff it is open to the latter to apply to have such order incorporated in the final decree although limitation for the execution of such order independently may have expired It has been held that after a preliminary decree has been passed it is always open to the parties before the final decree, upon proper procedure to bring in further property for partition [6] See also the undermentioned case [7]

8 Stamp for final decree — A final decree for partition is an instrument of partition within Section 2 (15) of the Stamp Act, and is chargeable with stamp duty under Schedule I Article 45 of that Act [1]

See also the undermentioned cases [2]

9 Appeal — Under the present Code a preliminary decree in a partition suit is appealable under Section 96 and if not appealed against, cannot be questioned in the appeal from the final decree [*vide* Sections 2 (2), 96 and 97] Under the old Code there was only one decree in a partition suit though the decree might be preceded by an interlocutory *order* declaring the rights of the several parties interested in the property As to the appealability of such order and other connected questions under the old Code see the undermentioned cases[1] which are not of any practical

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Note 7

1 [illegible]
2
3

4

[*See also* (32) AIR 1932 Cal 869 (870)]
5 (38) AIR 1938 Pat 188 (189)
6 (35) AIR 1935 P C 12 (12 13) (P C)
7 (17) AIR 1917 Nag 118 (119)

Note 8

1 (05) 32 Cal 483 (488 491)
(32) AIR 1932 Lah 249 (250) (Final decree in partition suit not stamped with general stamp— Decree not having been drawn up on stamp paper was held not to be a decree upon which

(It is the duty of the Court to decide the proportion of stamp payable by each person who desires his share separated)
[*See* (32) AIR 1932 Rang 120 (122) (Preliminary decree declaring the extent of shares without actually dividing—It does require to be stamped under S 2 (15) Stamp Act)
2 (32) AIR 1932 Mad 722 (723) 55 Mad 9 5 (In a suit for partition a defendant co-sharer can ask for a decree for his share without paying court fee The Crown is only entitled to the

—Defendant need not pay court fee to have his share separately allotted to him)

Note 9

1 (97) 24 Cal 725 (735 736 738 739) (In appeal against final decree appellant can take objection to such order)
(95) 18 Mad 78 (87) (Interlocutory order declaring

importance now An order on an application for the appointment of a commissioner to work out the shares in a decree for partition is not appealable [2] **O 20 R. 18 Note 9**

R. 19. [S 216] *(1)* Where the defendant has been allowed a set off against the claim of the plaintiff, the decree shall state what amount is due to the plaintiff and what amount is due to the defendant, and shall be for the recovery of any sum which appears to be due to either party **O. 20 R. 19**

Decree when set off is allowed

(2) Any decree passed in a suit in which a set off is claimed shall be subject to the same provisions in respect of appeal to which it would have been subject if no set-off had been claimed

Appeal from decree relating to set off

(3) The provisions of this rule shall apply whether the set-off is admissible under rule 6 of Order VIII or otherwise

[1877, S. 216; 1859, S 195]

Local Amendment

ALLAHABAD

In sub rule (1), *substitute* a comma for the full stop at the end and *add* the following

' but no decree shall be passed against the plaintiff unless the claim to set off was within limitation on the date on which the written statement was presented

Synopsis

1 ' Where defendant has been allowed a set off '

2 Appeal from decree relating to set off

3 Decree for defendant claiming set off

4 Applicability of Rule to equitable set off—Sub rule (3)

1 **" Where defendant has been allowed a set-off "**—The rule applies only where the defendant has been allowed a ' set off against the plaintiff s claim and not in any other case Thus the rule does not apply to a case where in determining the defendant s liability for mesne profits deductions are made for costs or expenses of cultivation [1]

2 **Appeal from decree relating to set-off** — Under the second paragraph of Section 216 of the old Code corresponding to sub rule (2) of the present rule the *forum* of appeal in relation to the defendant s claim of set off depended upon the sum *claimed by him* and not upon the valuation of the suit made by the plaintiff [1] This has been amended under the present rule so as to give effect to the view that appeals from

of a second preliminary decree)

Order 20 Rule 19 — Note 1

1 (76) 25 Suth W R 9 5 (? 5)

Note 2

1 (05) 32 Cal 634 (65J)
(88) 10 All 557 (594 599)

O. 20 R. 19
Notes 2–4

decrees relating to set off should lie to the Courts to which appeals in respect of the original claim of the plaintiff would lie[2]

A preliminary order disposing of a claim of set off made by *the defendant* is not a decree and is not appealable by itself but can be attacked in an appeal from the decree[3]

3. Decree for defendant claiming set-off. — Where the amount due to the defendant by the plaintiff is found to exceed that due to the plaintiff by the defendant, the Court may not only dismiss the suit, but may pass a decree in favour of the defendant against the plaintiff[1]

The question has arisen as to whether a decree may be passed in favour of the defendant *in a suit for accounts*, where, on taking accounts, it is found that the balance is in defendant's favour In such a case, it was observed by Phillips, J, in the undermentioned Madras case[2] that there is really no 'set off" pleaded to which the present rule may apply The High Courts of Allahabad[3] and Calcutta[4] have, on the other hand, held that a decree may be passed in favour of the defendant in such a case under O 20 Rr 15 and 16 In one of the Calcutta cases[5] it was even said that it was a case of equitable set off and that Rule 19 itself might apply

4. Applicability of Rule to equitable set-off—Sub-rule (3).—Order 8 Rule 6 provides only for a *legal* set off being allowed But the present rule applies also to *equitable* set off and provides for a decree being passed giving effect to such set off[1] As to the distinction between the two types of claims, see Notes under Order 8 Rule 6. See also the undermentioned cases[2]

O. 20 R. 20

Certified copies of judgment and decree to be furnished

R. 20. [S. 217.] Certified copies of the judgment and decree shall be furnished to the parties on application to the Court, and at their expense.

[1877, S. 217; 1859, S. 198.]

1. Certified copies of judgment and decree to be furnished. — An application for copies under this rule is to be made to the *Court* which has decided the case and such an application must be deemed to be a proceeding before the Court, although

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2 Notes on Clauses
3. (17) AIR 1917 Lah 261 (265) 1917 Pun Re No 62

Note 3

1. (05) 32 Cal 654 (659)
(34) AIR 1934 All 543 (545) 56 All 912 (Court must pass a decree in favour of defendant on his [illegible]
2 [illegible] set off)
3. ('10) 6 Ind Cas 162 (163) 32 All 525
('24) AIR 1924 All 854 (854, 855) 46 All 858 (Suit for partnership accounts—Distinguishing 3 All L Jour 233)
4. (31) AIR 1931 Cal 358 (358, 359)
(07) 34 Cal 892 (895, 896)
5. (31) AIR 1931 Cal 358 (359)

Note 4

1. (05) 27 All 145 (147)
(93) 15 All 9 (11)
(96) 1896 Bom P J 728 (728)
('17) AIR 1917 Mad 258 (259) 39 Mad 939
2 [illegible]
('36) AIR 1936 Cal 277 (279) (Set off may be purely defensive or may be by way of counter [illegible] claim)

the Court may have delegated its functions in the matter to some other officer Hence, an offence committed in connection with such an application comes within the purview of Sections 195 and 476 of the Criminal Procedure Code [1] See also the undermentioned cases [2] **O. 20 R. 20 Note 1**

Local Amendments

ALLAHABAD

Add the following

"21 (1) Every decree and order as defined in Section 2, other than a decree or order of a Court of Small Causes or of a Court in the exercise of the jurisdiction of a Court of Small Causes, shall be drawn up in the Court vernacular As soon as such decree or order has been drawn up, and before it is signed, the Munsarim shall cause a notice to be posted on the notice board stating that the decree or order has been drawn up, and that any party or the pleader of any party may, within six working days from the date of such notice, peruse the draft decree or order and may sign it, or may file with the Munsarim an objection to it on the ground that there is in the judgment a verbal error or some accidental defect not affecting a material part of the case, or that such decree or order is at variance with the judgment or contains some clerical or arithmetical error Such objection shall state clearly, what is the error, defect, or variance alleged, and shall be signed and dated by the person making it **O. 20 R. 21 (Allahabad)**

(2) If any such objection be filed on or before the date specified in the notice, the Munsarim shall enter the case in the earliest weekly list practicable, and shall, on the date fixed, put up the objection together with the record before the Judge who pronounced the judgment, or, if such Judge has ceased to be the Judge of the Court, before the Judge then presiding

(3) If no objection has been filed on or before the date specified in the notice, or if an objection has been filed and disallowed, the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of Rules 7 and 8

(4) If an objection has been duly filed and has been allowed, the correction or alteration directed by the Judge shall be made Every such correction or alteration in the judgment shall be made by the Judge in his own handwriting A decree amended in accordance with the correction or alteration directed by the Judge shall be drawn up, and the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of Rules 7 and 8

(5) When the Judge signs the decree, he shall make an autograph note stating the date on which the decree was signed "

RANGOON

Add the following

Certificate to be issued to Land Records Department when interests in land are affected

"21 As soon as the decree of a Court of first instance in a suit relating to land in a district in which there is a Land Records Establishment has become final, or if the decree has been appealed against, when the decree in appeal has become final, and the interest of any party to the suit in any land included in the survey **O. 20 R. 21 (Rangoon)**

Order 20 Rule 20 — Note 1

1. (28) AIR 1928 Lah 759 (761, 762)
2. (1864) 1 Bom H C R 1[illegible] (1[illegible]) (Parties entitled to copies and not merely translations) ('70) 7 Bom H C R A C 130 (131) (Rule applies to Small Cause Courts) ('75) 2 Cal L R [illegible] 553 (554) (Right of strangers to obtain copies) ('73) 20 Suth W R 10[illegible] (10[illegible])

O 20 R 21 (Rangoon) has been affected thereby, the Court of first instance shall certify the nature and extent of such change of interest in each plot of land in suit to the Superintendent of Land Records of the district in which the land is situate A copy of the certificate in every such case should also be sent to the Sub Registrar within whose sub district the land or any part thereof is situate

O 20 R 22 (Rangoon) Form of certificate 22 The certificate shall be in the prescribed form and shall be signed by the presiding officer of the Court

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ORDER XXI.

Execution of Decrees and Orders

Payment under Decree

O 21 R. 1 Modes of paying money under decree **R. 1.** [S 257] *(1)* All money payable under a decree shall be paid as follows, namely —

(a) into the Court whose duty it is to execute the decree, or

(b) out of Court to the decree holder, or

(c) otherwise as the Court which made the decree directs

(2) Where any payment is made under clause *(a)* of sub rule *(1)*, notice of such payment shall be given to the decree-holder

[1877, S 257; 1859, S 206]

Local Amendments

CALCUTTA

(1) For clause (a) of sub rule (1) *substitute* the following clause

(a) By deposit in or by postal money order sent to the Court whose duty it is to execute the decree or

(2) In sub rule (2)

(i) Read the number 2 as 2 (a)

(ii) After the words the decree holder *add* the words or the person in whose favour the order is made

(iii) *Add* the following as clause (b)

(b) the cost of giving such notice shall be borne by the person making payment who shall have the option of having the notice served either by a process server of the Court or by a registered post No such notice shall issue until the said cost shall have been paid

LAHORE

Add the following

Explanation — The judgment debtor may if he so desires pay the decretal amount or any part thereof into the Court under clause (a) by postal money order on a form specially approved by the High Court for the purpose

NAGPUR

(1) In sub-rule (1), *after* the words "a decree" *insert* the words "or an order,"

(2) *For* clause (a) of sub-rule (1), *substitute* the following clause

"*(a)* by deposit in, or by postal money order to, the Court whose duty it is to execute the decree or order, or",

(3) In clause (c) of sub-rule (1), *after* the word "decree" *insert* the words "or order,"

(4). To sub rule (2), *add* the following proviso

"Provided that when the payment is made by money order, the notice may be given by registered post by the judgment-debtor direct to the decree-holder"

PATNA

For Rule 1 *substitute* the following

"1 (1) All money payable under a decree or order shall be paid as follows, namely

(a) by deposit in or by special postal money order to the Court whose duty it is to execute the decree or order, or

(b) out of Court to the decree holder, or

(c) otherwise as the Court which makes the decree or order shall direct

(2) Where a judgment debtor makes any payment under clause (a) of sub-rule (1), he may give notice thereof to the decree-holder —

(a) either through the Court, on payment of the fees laid down in the rules framed by the High Court under clause (1) of Section 20 of the Court fees Act, 1870 (Act 7 of 1870), or

(b) notwithstanding anything contained in Order 48 Rule 2, by registered post direct

Where interest is payable under the decree or order, such notice shall, if duly proved, operate as a bar to the accrual of such interest, upon the amount so paid, after the date of receipt of such notice by the decree holder"

Synopsis

1. Legislative changes. — Clause (2) of the rule is new

2. Retrospective operation of the Rules of this Order. — See Note 3 to the Preamble

3. Scope and applicability of the Rule. — The judgment debtor is bound to pay the decretal debt in one of the modes specified in the rule[1] He cannot be relieved

Order 21 Rule 1 — Note 3

1. (33) AIR 1933 Mad 523 (524) (Judgment debtor cannot be required to pay the money to a third party who has got an unregistered assignment of the decree merely because he happens to know of it)

O 21 R 1
Notes 3-5

from such liability on the ground that the decree holder is dead[2]

The rule does not apply to decrees that are *inexecutable* as where a compromise decree provides that on default in payment the decree holder shall have the right to file a *suit*[3] Nor does the rule apply to money payable under an *order* though such orders are *executable* under the provisions of Section 36 like decrees Thus where a party is ordered to pay the costs of the day to the opposite side he cannot deposit the costs in Court under this rule[4] Under Section 11 of the Charitable and Religious Trusts Act (XIV of 1920) the provisions of the Code relating to execution of decrees are applicable to execution of orders under that Act

4 **Payment into Court** — Where a payment under a decree has to be made *only into Court* as in the case of pre emption decrees under O 20 R 14 and the Court is closed on the last day for making such payment the maxim *lex non cogit ad impossibilia*[1] will apply and the payment can be made on the day the Court re opens[2] It has been held by all the High Courts except the High Court of Allahabad that the same rule will apply even where the decree amount may be paid to the *decree holder* or *into Court* inasmuch as the judgment debtor is entitled to choose the method of payment[3] The High Court of Allahabad[4] is of the opinion that in such cases the judgment debtor cannot get the time for payment extended by choosing to pay the amount only in Court

An arbitrator is not an officer of the Court and a payment to him is not a payment into Court[5] Where a receiver appointed in an administration suit was not authorized to receive certain payments to be made by X but the latter made the payments to the receiver who misappropriated them it was held by the Privy Council that X was not discharged from liability by reason of such payments[6]

The words all money payable under a decree do not mean the entire amount payable under the decree Therefore even if a portion of the decretal amount is paid into Court it will be a valid payment and the decree holder can take out execution only for the balance[7]

5 **Who should make payment** — A payment into Court under this rule can be made only by the judgment debtor his agent or his representative A payment made by a *stranger* will not have the effect of satisfying the decree unless the decree holder consents thereto[1] But a payment made by the mortgagee of a party liable to pay is effective though he is not a party to the suit[2] In execution of a decree for money

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2 (10) 5 Ind Cas 63 (64) (Cal) (Liable for interest on the whole of the amount due)
(10) 7 Ind Cas 992 (992) 35 Bom 35
(06) 10 Cal W N 535 (539)

3 (29) AIR 1929 All 207 (207) 51 All 527
[**See however** (35) AIR 1935 Pat 355 (393) 14 Pat 488 (Payment need not be due under executable decree—Payment made under preliminary decree is within this rule)]

mise decree and any other decree)
(35) AIR 1935 Lah 369 (370)
[*See also* (38) AIR 1938 Mad 593 (594)]

4 (89) 12 Mad 190 (192)

Note 4

1 The law does not compel a man to do that which he cannot possibly perform

2 (81) 3 All 850 (851)
(84) 1884 All W N 217 (217)
(25) AIR 1925 All 687 (687)
(60) 5 Cal 906 (909) (Payment under S 52 of Bengal Act VIII of 1869 had to be made in Court)
[*See also* (29)AIR1929 All 207(207) 51 All 527]

3 (99) 1 Bom L R 644 (644)

4 (29) AIR 1929 All 207 (207) 51 All 527
(38) AIR 1938 All 199 (200) I L R (1938) All 337

5 (24) AIR 1924 Rang 263 (264) 3 Rang 147

6 (32) AIR 1932 P C 191 (193) 59 Ind App 311 7 Luck 382 (PC)

7 (33) AIR 1933 Pat 69 (90) 11 Pat 796

Note 5

1 (17) AIR 1917 Mad 739 (741)

2 (24) AIR 1924 P C 133 (135) 51 Ind App 236 48 Bom 404 (P C)

obtained by *A* against *B*, a receiver was appointed to collect certain amounts due to *B* by *C*. *C* paid the amount into the hands of the receiver who absconded and did not pay the money into Court. It was held that the payment by *C* to the receiver did not discharge the judgment debtor from liability under the decree.[3]

6. **Effect of payment.** — A payment into Court towards a decree debt operates as a discharge of the decree debt to that extent[1] and where interest has been awarded on the decree amount, it will cease to run on the sum deposited.[2] But if, after having made the payment, the judgment debtor prevents the sum reaching the hands of the decree holder, he will be liable for interest until the money becomes available to the decree holder.[3]

If money is paid into Court under process of execution and the decree holder or his agent is present, the Court should cause it to be paid to him immediately.[4]

7. **Decree directing payment to decree-holder.** — Even where the decree directs the payment to be made to the decree holder, payment into Court is a valid compliance with the decree[1] unless perhaps the Court directs that payment should *not* be made otherwise than by payment to the decree holder.[2]

8. **Payment out of Court to decree-holder.** — A payment made to the decree holder out of Court also discharges the decree.[1] But the decree holder is not bound to accept a sum in part satisfaction of his decree and the refusal to receive it will not deprive him of his right to interest.[2] Where a payment out of Court is made through post before a certain fixed date but does not reach the decree holder within that date, the payment is not effective.[3]

The language of the rule is only permissive and does not prohibit a payment to an *agent* or representative of the decree holder, and hence a payment out of Court may be made to the decree holder's agent or representative or in the case of members of a Hindu joint family, to the manager of the family.[4]

The term 'decree holder' in clause (b) of this rule used in the singular includes the plural also.[5] Where therefore, the decree is in favour of two or more persons jointly, a payment out of Court, in order to be binding on all, must be made to all the joint decree holders.[6] See also Notes to Order 21 Rule 15.

9. **Notice of payment.** — The question of notice of payment into Court to the decree holder is material only where the decree awards *interest*. Where no interest has been awarded by the decree and the decretal amount is paid into Court it operates as a discharge of the decree, even if no notice is given to the decree holder.[1] But if the decree *awards interest*, then the decree holder is entitled to interest till the *date of*

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3 ('97) 20 Mad 224 (228) (Per Shephard, J.)

Note 6

1 ('97) 20 Mad 224 (229)
('73) 20 Suth W R 131 (131)
2 ('18) AIR 1918 All 234 (234, 235) 40 All 125
('33) AIR 1933 Lah 126 (1[illegible]6)
3 ('29) AIR 1929 Nag 297 (298)
('78) [illegible] Cal L R p 183 (184)
4 ('70) 5 Mad H C R App 2 (2)

Note 7

[illegible] 19 Nag [illegible]

Note 8

1 ('87) 9 All 9 (10)
('71) 1871 Pun Re No. 29
2 ('67) 7 Suth W R 20 (20)
3 ('18) AIR 1918 All 403 (404, 405)
4 ('11) 12 Ind Cas 503 (50[illegible]) (Mad)
('30) AIR 1930 All 659 (660) (Attaching decree holder is a representative of the decree holder and a payment can be made to him out of Court.)
5 ('34) AIR 1934 Mad 330 (33[illegible]) 57 Mad 696
6 ('34) AIR 1934 Mad 330 (33[illegible]) 57 Mad 696
('17) AIR 1917 Mad [illegible] ([illegible])
('30) AIR 1930 Cal [illegible] ([illegible])

Note 9

1 ('24) AIR 1924 Pat 115 (119) 2 Pat 751

O.21 R.1 Note 9 *notice*[2] Notice of such payment must be in writing and be served on the decree holder in the way prescribed for the service of summons[3] Even if the judgment-debtor fails to give notice of the fact of payment, it is the duty of the Court to inform the decree-holder about it when he next applies for execution of the decree[4]

Clause (2) of this rule does not apply to redemption decrees They are governed by O 34 R 8, which does not require any such notice to be given[5]

O.21 R.2 **R. 2.** [S. 258.] *(1)* Where any money payable under a decree[3] of any kind[4] is paid out of Court,[5] or the decree is otherwise adjusted[6] in whole or in part[7] to the satisfaction of the decree-holder, the decree-holder shall certify[12] such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same[19] accordingly.

Payment out of Court to decree-holder.

(2) The judgment-debtor also may inform the Court[15] of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.

(3) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized[21] by any Court executing the decree.[22]

[1877, S. 258; 1859, S. 206.]

Local Amendments

MADRAS

Substitute the following *for* the existing sub rule (2)

"Any party to the suit or his legal representatives or any person who has become surety for the decree debt also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified, and if, after service of such notice, the decree holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly"

PATNA

In sub-rule (2) *for* the words "and if after service of such notice," *substitute* ", ,"

of such

))

' and where certification has been made by an endorsement of such payment or adjustment by the decree holder or by any person authorized by him in that behalf upon the process issued by the Court the Court shall issue such notice of its own motion If after service of the notice — O 21 R. 2 Note 1

Synopsis

1 Legislative changes
2 Scope and applicability of the Rule
3 Money payable under a decree
4 ' Decree of any kind
5 ' Is paid out of Court '
6 ' Or the decree is otherwise adjusted '
7 Adjustment in part
8 Oral adjustments
9 When and with whom payment or adjustment should be made
10 Payment to one of several joint decree holders See Notes to Order 21 Rule 15
11 Adjustment by guardian of minor party
12 The decree holder shall certify
13 Effect of certifying without payment or adjustment being made
14 Certification by one of several joint decree holders See Notes to Order 21 Rule 15
15 The judgment debtor may also inform Court and apply
16 Judgment debtor meaning of
17 Certification form of
18 Limitation for certification
19 ' Shall record the same
20 Notice
21 Uncertified payment or adjustment not to be recognized by Court executing the decree
22 ' Court executing the decree '
23 Court acting under Order 21 Rule 16
23a Court dealing with application under O 21 Rr 90 95 97 and 98
24 Suit by judgment debtor based upon an uncertified payment or adjustment
25 Suit by decree holder based on uncertified payment or adjustment
26 Effect of fraud
27 Effect on limitation
28 Operation as estoppel
29 Remedies of the judgment debtor
30 Suit for damages
31 Restitution of uncertified payment on reversal of decree in appeal
32 Criminal proceedings
33 Appeal and revision

Other Topics (miscellaneous)

Assignee of the decree—Whether comes within the rule See Note 9
Certificate — In which Court to be filed See Note 15
Compromise — Whether and when sufficient adjustment See Note 6
Judgment debtor pleading agreement with assignee of decree See Note 2
Rule whether confined to parties only See Note 2
Show cause See Note 20
Such payment or adjustment See Note 20

1 Legislative changes —

1 In sub rule (1) after the words payable under a decree the words of any kind have been added See Note 4 *infra*

2 The words as a payment or adjustment of the decree which occurred in the old Code in sub rule (3) after the word recognized have been omitted See Note 27 *infra*

3 The words or if any payment is made in pursuance of an agreement of the nature mentioned in Section 257A after the words to the satisfaction of the decree holder have been omitted Section 257A of the old Code has also been omitted It ran as follows

> Every agreement to give time for the satisfaction of a judgment debt shall be void unless it is made for consideration and with the sanction of the Court which passed the decree and such Court deems the consideration to be under the circumstances reasonable
>
> Every agreement for the satisfaction of a judgment debt which provides for the payment directly or indirectly of any sum in excess of the sum due or to accrue due under the decree shall be void unless it is made with the like sanction

O 21 R 2
Notes 1-2

Any sum paid in contravention of the provisions of the Section shall be applied to the satisfaction of the judgment debt and the surplus if any, shall be recoverable by the judgment debtor

The omission of Section 257A from the present Code renders the under mentioned decisions[1] now merely of academic interest The effect of the omission is that the legality of such arrangements between parties after decree must be tested like other agreements[2]

2 Scope and applicability of the Rule — The object of this rule is to ensure that the Court executing the decree shall not be troubled with any disputes between the parties with regard to any payment or adjustment unless the same has been duly certified or recorded[1] Sub rule (1) contemplates a certification by the *decree holder* and a record by the Court of the payment or adjustment sub rule (2) contemplates an application by the *judgment debtor* In this case *notice* is to be given to the decree holder and the Court should give a *judicial decision* whether the payment or adjustment should be recorded as certified[2] Lastly sub rule (3) imposes a bar upon the Court executing the decree and prevents it from recognising any payment or adjustment which has not been certified or recorded as certified as required by the rule[3]

Order 21 Rule 2 — Note 1

1 *In the following cases the agreement was held to be void as being contrary to S 257A*
(09) 2 Ind Cas 991 (991) (Mad)
(81) 3 All 585 (588)
(84) 6 All 623 (625)
(95) 1895 All W N 149 (150)
(85) 9 Bom 176 (179)
(88) 12 Bom 499 (501)
(88) 13 Bom 54 (55)
(98) 22 Bom 693 (700 701)
(03) 7 Bom 96 (100)
(04) 28 Bom 62 (65)
(04) 28 Bom 310 (313 314)
(04) 28 Bom 383 (386)
(14) AIR 1914 Bom 131 (132) 38 Bom 219
(01) 3 Cal 917 (9 0)
(80) 1880 Pun Re No 48 page 104
(91) 1 Mad L Jour 332 (333 334)
(03) 26 Mad 19 (26 27)
(19) AIR 1919 Mad 1128 (1129)

In the following cases it was held that an agreement made with the sanction of Court under

Section 257A applies only as between parties to the decree
(83) 6 Mad 101 (102)
(89) 13 Bom 671 (6 2)
(99) 23 Bom 502 (505)

(88) 12 Bom 499 (501)
(89) 1889 Bom P J 377
[*See also* (90) 12 All 571 (575) (Sanction could be given only by Court which passed the decree)]

See also the following cases
(03) 25 All 317 (320 321)
(92) 16 Bom 618 (625)
(89) 14 Bom 890 (39) (Section related only to debts enforceable in execution)
(89) 16 Cal 504 (507)
(01) 6 Cal W N 27 (30)
(85) 11 Cal 671 (672)
(08) 1908 Pun Re No 99 page 151 (FB)
(94) 17 Mad 382 (383)
(93) 6 C P L R 133 (135)
(01) 4 Oudh Cas 284 (288)
(35) AIR 1935 Bom 257 (258)

2 (14) AIR 1914 Cal 697 (698)
(11) 13 Ind Cas 204 (205) (Mad)
(25) AIR 1925 Oudh 364 (365) 28 Oudh Cas 255

Note 2

1 (22) AIR 1922 Bom 330 (330 331) 46 Bom 226
2 (29) AIR 1929 P C 19 (22 23) 56 Ind App 30 3 Luck 684 (P C)

(25) AIR 1925 Bom 300 (300) 49 Bom 548 (F B)
(2) AIR 19 Bom 350 (350 331) 46 Bom 220
(89) 13 Bom 171 (1 6)

The prohibition under sub rule (3) will apply only when the parties to a transaction entered into for the purpose of satisfying or adjusting a decree stand to one another, at the date of such transaction, in the *relation of judgment debtor and judgment creditor*[4] Thus where *A*, a transferee decree holder, applied for execution of the decree and *B*, the judgment debtor, objected on the ground that he had transferred certain immovable property to *A* in consideration of his paying the judgment debt to the original decree holder and that *A* having discharged the debt had got the decree transferred to himself, instead of entering up satisfaction of the decree and had fraudulently applied for execution, it was held that there must be an enquiry into the truth of *B* s allegations[5] But there is nothing in the wording of this rule to limit the payment to the *decree holder only* Thus where a compromise decree directed the payment of money to a third party and the payment was not certified to the Court, it was held that it could not be relied upon in execution[6]

This rule does not apply to a compromise which is entered into between the parties to a mortgage suit after a final decree, and which is pleaded in bar of an application for a *personal* decree against the mortgagor under O 34 R 6 The reason is that there is no adjustment of the mortgage decree in such a case, nor is the Court to which the application for personal decree is made, a Court *executing* the mortgage decree[7]

Section 71 of the Dekkhan Agriculturists' Relief Act (Bombay) expressly excludes the application of sub rule (3) of this rule to payments out of Court made in

('90) AIR 1920 Cal 289 (290)
('19) AIR 1919 Cal 121 (122)
('12) 14 Ind Cas 839 (842) (Cal)
('10) 6 Ind Cas 43 (44) (Cal)
('93) 20 Cal 32 (35) 36)
('99) 25 Cal 86 (89)
(1865) 4 Suth W R Misc 11 (11)
('73) 20 Suth W R 150 (150)
('67) 8 Suth W R 318 (320)
('67) 7 Suth W R 134 (134)
('68) 9 Suth W R 362 (362)
('71) 15 Suth W R (O C) 5 (6)
('25) AIR 1925 Lah 566 (567)
('78) 1878 Pun Re No 26 page 113
('32) AIR 1932 Mad 250 (252) (Uncertified payment by judgment debtor to decree-holder after latter's adjudication as insolvent cannot be recognized as against receiver)
('17) AIR 1917 Mad 605 (606, 607)
('11) *12 Ind Cas 562 (563) 36 Mad 357*
('07) 17 Mad L Jour 527 (528)
('06) 29 Mad 312 (313)
('81) 3 Mad 113 (114)

('21) AIR 1921 Pat 135 (137 138) 6 Pat L Jour 3)
('18) AIR 1918 Pat 278 (278)
('31) AIR 1931 Rang 148 (149) 9 Rang 101 (The Court has no power to stay the confirmation of the sale of the judgment-debtor s properties on the basis of such an adjustment)
('25) AIR 1925 Rang 340 (3 0)

('14) 22 Ind Cas 963 (963) 1 Upp Bur Rul 191
('11) 11 Ind Cas 780 (781) (Low Bur)
('36) AIR 1936 Pat 253 (254)
('36) AIR 1936 Lah 842 (843)
('27) AIR 1927 Mad 911 (915) 50 Mad 897
('35) 39 Cal W N 961 (966)
[*See also* ('90) 1890 All W N 68 (69)
('67) 7 Suth W R 510 (510)]
[**But see** ('74) 7 Mad H C R 387 (391) (Case under Code of 1859)
('66) 4 Bom H C R A C 120 (124)]

4 ('96) 19 Mad 230 (232 233)
('31) AIR 1931 Mad 399 (400) 54 Mad 184
('23) AIR 1923 Mad 230 (231)
('11) 12 Ind Cas 657 (661 662) 35 Mad 659 (Per Sundara Iyer J)
('27) AIR 1927 Cal 694 (696) (Agreement by judgment debtor with the proposed assignee can be pleaded in an application for execution by the assignee)
('88) 1888 Pun Re No 137 page 370
[*See also* ('83) 5 All 269 (271)
('27) AIR 1927 Mad 676 (677)
('38) AIR 1938 Nag 265 (265) (Money paid previous to decree—O 21 R 2 does not apply)]
[**See however** ('37) AIR 1937 Cal 31 (36) (A [illegible] up by *B* as bar to execution in absence of certification under this rule)]

5 ('96) 19 Mad 230 (232)

6 ('23) AIR 1923 All 271 (271) 45 All 304

7 ('36) AIR 1936 Mad 34 (37) 59 Mad 183 (FB) (O 23 R 3 applies to such a case)

O. 21 R. 2
Note 2

proceedings under the Act [8] As to whether this rule applies to proceedings under the Bengal Tenancy Act, see the undermentioned cases [9] Sub rule (3) of this rule has been repealed, so far as the Punjab is concerned, by Section 36 of the Punjab Relief of Indebtedness Act, VII of 1934 [10] Section 80 of the Agra Tenancy Act (III of 1926) deals with certification under this rule

This rule clearly contemplates a stage in the execution proceedings when the matter lies only between the judgment debtor and the decree holder and when no other interests have come into being When once a sale in execution has been effected, a third party s interest intervenes which cannot be disregarded Therefore, after a sale is duly held the Court cannot refuse to confirm the sale on the ground that the decree holder and the judgment debtor say that the decree has been satisfied out of Court, and the only method by which the sale can be set aside is by the procedure prescribed in O 21 R 89 [11] But, it has been held that where the adjustment has been made *before* the sale and an application for recording the adjustment is made after the sale the adjustment may be recorded and the sale may be set aside [12]

The principle that an adjustment cannot be recorded under this rule to the detriment of a third party was applied in the undermentioned case[13] in which it was held that an adjustment cannot be recorded under this rule when such recording will defeat the rights of the Government to court fees under O 33 R 10 See also the undermentioned decision [14] After a decree has been satisfied and the decree holder has certified such satisfaction, there is no subsisting decree and a sale held in ignorance of the satisfaction is void and liable to be set aside [15] But if the satisfaction is not certified, the sale is not vitiated and cannot be impeached [16]

This rule applies only to the adjustment of a *decree or order*. Hence it does not apply to the adjustment of a *claim* for restitution under Section 144 before such claim is allowed by the Court [17]

The executing Court is not precluded from recognizing a compromise entered into between the parties after the decree though such a compromise does not amount to an *adjustment* of the decree [18]

For cases under Section 206 of the Code of 1859 corresponding to this rule, see the undermentioned cases [19]

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8 ('21) AIR 1921 Bom 142 (142, 143) 45 Bom 1128
('39) AIR 1939 Bom 255 (256) (Section applies only to payments and not to adjustments)
9. (1865) 3 Suth W R Act X 7 (7 8) (Not applicable)
('68) 9 Suth W R 372 (373) (Do)
('74) 22 Suth W R 204 (204) (Applicable)
10 ('38) AIR 1938 Lah 603 (603) (The Act is retrospective)
('38) AIR 1938 Lah 126 (127) ILR (1938) Lah

('3?) AIR 1932 Lah 238 (?39)
('28) AIR 1928 Pat 40 (43, 44) (But if decree-

(The Court as a general rule, will not for the

of the parties)

barred by this rule—Remedy is by way of suit

3. "Money payable under a decree." — A mortgage decree is a decree for the payment of money within the meaning of this rule even though it contains a further direction for the sale of the mortgaged properties on default of payment The adjustment of such a decree out of Court must be certified under this rule[1] But where a mortgagee decree holder is in possession of the mortgaged properties under the original contract of mortgage or by virtue of the terms of the decree, income received by the mortgagee from the mortgaged property is not "money payable under a decree' and does not therefore require to be certified[2] Where, in a suit for possession by *A* against *B*, his tenant who set up a right to hold the land under a *mirasi* tenure, the Court declared in favour of *B* and directed payment of rent as before, it was held that rents paid by *B* to *A* out of Court were not "moneys payable under the decree[3]

The words "money payable under a decree' do not mean any money which the party *may* pay if he chooses, but money which is recoverable by a party in execution against the party liable to pay it Thus, where a decree merely provided that if one party paid within a certain time a certain sum of money to the other party, the latter was to reconvey certain property to the former and that if default was made in payment, the latter was to enjoy the property with absolute rights, it was held that it was not a decree under which payment of money could be compelled in execution, and that this rule did not apply, so as to bar the Court from recognizing an uncertified adjustment out of Court[4]

As to adjustments or payments made between the dates of preliminary and final decrees in mortgage suits, see Order 34 Rule 5, Note 14

An award under the Arbitration Act when filed in Court is a *decree* for the purposes of Section 47 of the Code and this rule consequently applies to adjustments of such awards[5]

4. "Decree of any kind." — Under the old Code, the High Court of Calcutta[1] and the Chief Court of Punjab[2] held that Section 258 of that Code applied to any kind of decree and not merely to money decrees The High Court of Madras[3] on the contrary, held that Section 258 was applicable only to *decrees under which money is payable* and not to other kinds of decrees Under the present Code, the High Courts of Bombay,[4] Calcutta,[5] Lahore[6] and Patna[7] have held that the addition of the words "of any kind after the word "decree' in sub rule (1) makes it clear that the provisions of this rule are not confined to money decrees but apply to *every kind of decree*

(1865) 2 Suth W R Misc 2 (2)]

Note 3

1. (05) 28 Mad 473 (476 477, 478) (Over ruling 24 Mad 412)

gage decrees are decrees for payment of money

income received under a different contract of mortgage requires to be certified)

3. (94) 18 Bom 690 (69?)

4 (26) AIR 1926 Mad 749 (751) 49 Mad 716

5 (27) AIR 1927 Sind 66 (75)
(21) AIR 1921 Sind 182 (184) 16 Sind L R 215
(35) AIR 1935 Nag 250 (257) 31 Nag L R Sup 43 (FB)

Note 4

1 (81) 6 Cal 786 (788) (Decree for possession)
(99) 3 Cal W N 187n
(72) 18 Suth W R 520 (521)

2 (06) 1906 Pun Re No 44 page 158 (Decree for foreclosure)

3 (99) 22 Mad 182 (184) (Decree for possession)

4 (22) AIR 1922 Bom 380 (380 381) 46 Bom 226 (Decree for partition)

5 (28) AIR 1928 Cal 715 (716 717) (Decree for partition—AIR 1922 Bom 380 Followed)

6 (36) AIR 1936 Lah 842 (843) (Decree for possession of house is within rule)

7 (35) AIR 1935 Pat 355 (359) 14 Pat 4[illegible]

O. 21 R. 2
Note 2

proceedings under the Act[8] As to whether this rule applies to proceedings under the Bengal Tenancy Act, see the undermentioned cases[9] Sub rule (3) of this rule has been repealed so far as the Punjab is concerned by Section 36 of the Punjab Relief of Indebtedness Act, VII of 1934[10] Section 80 of the Agra Tenancy Act (III of 1926) deals with certification under this rule

This rule clearly contemplates a stage in the execution proceedings when the matter lies only between the judgment debtor and the decree holder and when no other interests have come into being When once a sale in execution has been effected a third party s interest intervenes which cannot be disregarded Therefore after a sale is duly held the Court cannot refuse to confirm the sale on the ground that the decree holder and the judgment debtor say that the decree has been satisfied out of Court and the only method by which the sale can be set aside is by the procedure prescribed in O 21 R 89[11] But it has been held that where the adjustment has been made *before* the sale and an application for recording the adjustment is made after the sale the adjustment may be recorded and the sale may be set aside[12]

The principle that an adjustment cannot be recorded under this rule to the detriment of a third party was applied in the undermentioned case[13] in which it was held that an adjustment cannot be recorded under this rule when such recording will defeat the rights of the Government to court fees under O 33 R 10 See also the undermentioned decision[14] After a decree has been satisfied and the decree holder has certified such satisfaction there is no subsisting decree and a sale held in ignorance of the satisfaction is void and liable to be set aside[15] But if the satisfaction is not certified the sale is not vitiated and cannot be impeached[16]

This rule applies only to the adjustment of a *decree or order* Hence it does not apply to the adjustment of a *claim* for restitution under Section 144 before such claim is allowed by the Court[17]

The executing Court is not precluded from recognizing a compromise entered into between the parties after the decree though such a compromise does not amount to an *adjustment* of the decree[18]

For cases under Section 206 of the Code of 1859 corresponding to this rule see the undermentioned cases[19]

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8 ('21) AIR 1921 Bom 142 (142 143) 45 Bom 1128
('39) AIR 1939 Bom 255 (256) (Section applies only to payments and not to adjustments)
9 (1865) 3 Suth W R Act X 7 (7 8) (Not applicable)
('68) 9 Suth W R 372 (373) (Do)
('74) 22 Suth W R 204 (204) (Applicable)
10 ('38) AIR 1938 Lah 602 (603) (The Act is

(The Court as a general rule will not for the

for protection of the solicitor who in such an event can claim payment of the costs by either of the parties)

barred by this rule—Remedy is by way of suit

O. 21 R. 2 Note 6

suit, or the time when the decree becomes executable, is not an adjustment of the decree[2] Thus, an agreement between the parties to a decree by which arrangements are made to enable the decree-holder to collect moneys due to the judgment debtor and credit them towards his decree, and which provides for a temporary suspension of execution proceedings, is not such an adjustment of the decree as is contemplated by this rule[3] Similarly, where the parties agree that certain new or different rights not given by the decree should be included therein and be enforceable in execution, the arrangement is not an adjustment of the decree, but a variation of the decree Nor can such an arrangement be given effect to by enforcement in execution as it is a fundamental principle that the executing Court cannot go behind the decree This view has been laid down by the Privy Council in *Pradyumna Kumar Mullik* v *Kumar Dinendra Mullik*[4] The view taken in the undermentioned cases[5] that the arrangement

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and a certain other sum by instalments in discharge of larger decretal amount—Property conveyed to decree holder — Agreement is adjustment)
('35) AIR 1935 Bom 303 (305) (Oral agreement to accept part of decree amount in instalments in full satisfaction is an adjustment)

ment of the decree)
(26) AIR 1926 Mad 184 (185) (Adjustment of

deed whereby the judgment debtor is released from liability)
('11) 12 Ind Cas 169 (169) (Mad) (Agreement to discharge debt by services rendered)
(25) AIR 1925 Rang 349 (349, 350) (Agreement not to execute decree in consideration of dis-

(89) 1889 Bom P J 33 (Adjustment by execution of mortgage)
(26) AIR 1926 All 501 (503), 48 All 475 (Award of

consideration is … adjustment)
2. (10) AIR 1910 Mad 601 (601)
(28) AIR 1928 Cal 5-7 (…)

(31) AIR 1931 Lah 608 (609)
(27) AIR 1927 Mad 911 (913) 50 Mad 897
('35) AIR 1935 All 364 (365) (Agreement by decree holder limiting methods of execution — Agreement though not an adjustment is binding on parties)
(35) AIR 1935 Mad 429 (430) (Mortgage decree against *A* and *B* directing *A* s property to be sold first and then *B*'s property—Compromise between decree holder and *A* that *B* s property to be sold first — *B* not party to it — Compromise is not adjustment)
[*See also* (22) *AIR 1922 Cal 311 (313)*]
[**See however** ('26) AIR 1926 Oudh 385 (387)

from)
(36) AIR 1936 Cal 518 (519) (Act of parties agreeing to vary decree is not adjustment—But

again in instalments and Court accepting it—Court can allow adjustment)]
3. (85) 7 All 424 (431)
4. (37) AIR 1937 P C 256 (259) 64 Ind App 302 I L R (1938) 1 Cal 66 31 Sind L R 637 (P C) (Third person paying off decretal amount, becoming assignee of mortgagee and advancing fresh loan to mortgagor—Fresh deed by mortgagor covenant-

it comprised in first mortgage and also to treat

Sind L R 491
(37) AIR 1937 Cal 223 (224)]
5. (37) AIR 1937 Cal 236 (237) (In this case

O. 21 R. 2
Note 6

entered into between the parties can be enforced in execution is, it is submitted, not correct It is not necessary that the judgment-debtor must have carried out all the terms of the arrangements made by him with the decree-holder, a *completed contract* by which he promises to do something at a future date can be accepted by the decree holder as a legal and immediate adjustment in satisfaction of his decree[6] But an inchoate agreement, which if completed would bar the execution of the decree, cannot be pleaded as an adjustment within the meaning of this rule[7] The reason is that an inchoate agreement is an agreement not yet concluded by the parties and therefore the judgment debtor cannot claim that the decree against him has been adjusted to the satisfaction of the decree-holder while the matter is still in the stage of negotiation Similarly, where the decree holder has agreed to accept the *doing* of certain acts by the judgment debtor as satisfaction of the decree, the adjustment is not complete till such acts are done[8]

There is no question of the "adjustment" of a decree when it is transferred to one of the judgment debtors[9]

Where there is a dispute as to whether a decree has or has not been adjusted by a compromise, the executing Court will have to determine whether there was a compromise, whether the compromise amounted to an adjustment and what the effect of the adjustment is on the decree[10]

The adjustment contemplated by this rule is one to the satisfaction of the decree holder Hence, the *acceptance* of the decree holder is necessary for an

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however the decision can be supported on the ground that the compromise and the order of the Court thereon amounted to an order for instalments under O 20 R 11)
('37) 41 Cal W N 1133 (1134)
('29) AIR 1929 Cal 687 (689) 57 Cal 789
('36) AIR 1936 Sind 191 (195) 30 Sind L R 249

6. ('27) AIR 1927 Lah 544 (545) (Adjustment need not be embodied in writing)
('30) AIR 1930 Lah 334 (335)
('33) AIR 1933 Mad 28 (30) 63 Mad L Jour 598 (603, 609, 610) 56 Mad 198
('35) AIR 1935 Lah 589 (590) (Adjustment to be complete must extinguish the decree even if it is to be performed at some future date—AIR 1933 Lah 732, Reversed)
('38) AIR 1938 Rang 202 (203) 1938 Rang L R 385 (FB)
('36) AIR 1936 Bom 277(280) 60 Bom 729 (Actual payment not necessary for valid adjustment)
('38) 42 Cal W N 313 (314)
('37) AIR 1937 Nag 217 (220) 19 Nag L Jour 175 (178)
('37) AIR 1937 Cal 222 (224)
('36) AIR 1936 Pat 619 (620) 15 Pat 390
('38) AIR 1938 Rang 353 (354) (Executory contract may form subject of adjustment)
[But see ('25) AIR 1925 Mad 206 (207)
('30) AIR 1930 Mad 410 (411) (Dissented from in AIR 1933 Mad 28)
('31) AIR 1931 Lah 608 (609)
('36) AIR 1936 Sind 191 (195) 30 Sind L R 249
('37) AIR 1937 Sind 229(230) 31 Sind L R 491]

7. ('18) AIR 1918 Mad 396 (397)
('34) AIR 1934 Rang 190 (190)
('33) AIR 1933 Pesh 53 (55)
('33) AIR 1933 Mad 28 (32) 56 Mad 1[illegible]
('22) AIR 1922 All 13 (15) 44 All 258
('27) AIR 1927 Lah 544 (545)
('30) AIR 1930 Lah 231 (232)
('27) AIR 1927 Lah 537 (538)
('35) AIR 1935 Lah 317(349) I L R (1938) Lah 4[illegible]0
[*See* ('12) 16 Ind Cas 972 (973, 974) (Cal)]

8. ('38) AIR 1938 Rang 202 (203) 1938 Rang L R 385 (FB)
('35) AIR 1935 Lah 973 (973) (Decree holder's [illegible]
('35) AIR 1935 Mad 581 (582)
('38) 42 Cal W N 313 (314)
('36) AIR 1936 Rang 289 (290) (Decree holder agreeing that if judgment debtor transfers some land and pays certain amount he would regard decree as fully adjusted — Land not transferred [illegible] There [illegible]

9. ('38) AIR 1938 Oudh 106 (106)

10. ('30) AIR 1930 Lah 334 (335)

adjustment under this rule[11] An arrangement which, although not consented to by the decree holder, is binding upon him by operation of law cannot be an adju tment under this rule[12]

The question whether an executing Court can entertain an objection to the execution of the decree based on an arrangement between the parties prior to the decree has already been discussed in Section 47, Note 31, *ante* An adjustment of a decree pending an appeal from it is not a 'pre decree' arrangement but an 'adjustment' within the meaning of this rule[13]

See also Section 47 Note 41

7. Adjustment in part. — A decree may be adjusted in part and the judgment debtor is entitled to apply for a certificate of part satisfaction[1] Where there is a money decree against two or more defendants, an agreement discharging one or some only of the judgment debtors is an adjustment of the decree in part and should be certified[2]

Where a decree has been adjusted in part, it can be executed as to the remaining portion[3]

8. Oral adjustments. — It has been held by the High Courts of Allahabad, Bombay, Calcutta, Lahore and Patna and by the Judicial Commissioner's Courts of Nagpur and Sind that evidence to prove an oral adjustment subsequent to the decree is not inadmissible by reason of Section 92 of the Evidence Act[1] They proceed on the view that the words "as between the parties to any such instrument' in that Section suggest that the Section applies to *dispositive documents* between contracting parties and that a decree is not an ' instrument between parties in the sense in which that expression is used in that Section But the High Court of Madras[2] has held that Section 92 of the Evidence Act is not confined in its operation to dispositive instruments but applies to decrees also and that therefore no evidence in proof of an oral agreement in adjustment of the decree is admissible

9. When and with whom payment or adjustment should be made. — The adjustment under this rule must be to the satisfaction of the *decree holder* and, therefore an adjustment to which the decree holder is not a party cannot be recorded by the executing Court[1] The term "decree holder in this rule includes his assignee and

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1 [illegible]

(37) AIR 1937 Cal 211 (21?) I L R (1937) 1 Cal 781

[illegible]

Scheme though made binding on him by law cannot amount to adjustment within the meaning of O 21 R 2)

13 (3 AIR 1936 Mad 494 (495)

Note 7

1 (80) 5 Cal 448 (449 450)

(35) AIR 1935 Lah [illegible] (9?3)

2 (0?) 31 Mad 40? (40?)

(17) AIR 191? Pat 433 434)

(33) AIR 19?3 Pat [illegible]

3 (33) AIR 19?3 Bom 100 (101)

Note 8

1 (29) AIR 1929 All 79 (81)

(33) AIR 1933 Lah 806 (807) 14 Lah 6?8

(26) AIR 1926 Cal 643 (644)

(2?) AIR 1927 Lah 544 (545) (Adjustments need [illegible]

[illegible] Mad 697

(30) AIR 1930 Mad 6?3 (6 3)

[**See however** (35) AIR 1935 Mad 424 (425) (Plea of judgment-debtor that decree has been adjusted by decree holder accepting certain amount [illegible] that what is due under decree in full settlement — such adjustment can be proved by oral evidence

Note 9

1 (3) AIR 1939 Pat 411 (41?) 18 Pat 31?

O 21 R 2 Notes 9-12

the latter can certify a payment even before his transfer is recognized under O 21 R 16[2] The judgment debtor also can apply to record a payment made by him to the transferee[3] The reason is that it is the *transfer* and not the Court s recognition that passes the title to the decree But the contrary view has been taken in the under mentioned decisions[4] in which it has been held that until the transfer of the decree is recognized under O 21 R 16 the transferee is not a decree holder Where an order recognizing the transfer of a decree is cancelled and before the order of cancellation is set aside in appeal the judgment debtor pays the decretal amount to the original decree holder the payment is binding on the transferee decree holder[5]

A judgment creditor has a right to absolve his judgment debtor from liability at any time before other persons have acquired a right to realize the debt Therefore after a decree has been certified in Court as having been satisfied it is not open to any creditor of the decree holder to attach the decree on the ground that the satisfaction was certified collusively in order to defraud his creditors[6] There is also nothing in this rule to prevent the holder of a decree which is attached to enter satisfaction of his decree after the attachment if the payment or adjustment had been made before the attachment[7] As to the validity of payments or adjustment made after attachment of the decree see Notes to Order 21 Rule 53

10 Payment to one of several joint decree-holders — See Notes to O 21 Rule 15 *infra*

11 Adjustment by guardian of minor party — The provisions of O 32 R 7 apply to a compromise entered into even after a decree has been passed and an adjustment of a decree to which a minor is a party requires the sanction of the Court[1] A payment or adjustment certified to the Court without the leave of the Court is not binding on a minor decree holder and cannot be recognized by the Court executing the decree[2]

12 "The decree-holder shall certify" — It is the *duty* of the decree holder to report to the Court any payment or adjustment made out of Court[1] It has been held that when once a Court is seised of an application to enter up satisfaction of a decree it is bound to make an enquiry and see whether the decree has been satisfied The Court will not be justified in permitting the decree holder to withdraw his petition[2]

2 ('12) 17 Ind Cas 617 (618) (Mad)
3 ('12) 14 Ind Cas 709 (703) (Mad)
4 ('35) AIR 1935 Nag 230 (231) 31 Nag L R Sup 111 (Adjustment made with transferee of decree before transfer is recognized under R 16 does not require certification under this rule and can be pleaded by judgment debtor in bar of execution by transferee although not certified under this rule)
('37) AIR 1937 Mad 605 (606) (Adjustment made with original decree holder before recognition of transfer under R 16 and certified by such decree-holder can be set up against transferee when he applies for execution)
5 ('71) 1871 Pun Re No 99
6 ('09) 2 Ind Cas 523 (523 524) (Mad)
7 ('92) 2 Mad L Jour 288 (290)
('19) AIR 1919 Mad 198 (199)

Note 11

1 ('01) 26 Bom 109 (114)
('33) AIR 1933 Rang 186 (188)
('06) 29 Mad 309 (310)
('17) AIR 1917 Mad 409 (411)
('24) AIR 1924 Nag 185 (186)
[*See also* ('36) AIR 1936 Mad 494 (495)]
2 ('01) 26 Bom 109 (114)
('33) AIR 1933 Rang 186 (188)
('21) AIR 1921 Bom 142 (148) 45 Bom 1128
('25) AIR 1925 Mad 230 (232)
('28) AIR 1928 Pat 40 (44)
[*See also* ('37) AIR 1937 Lah 387 (389)]

Note 12

1 ('27) AIR 1927 Mad 947 (948)

As to the remedy of the judgment debtor in case the decree-holder does not certify the payment or adjustment, see Notes 30 and 32, *infra*

13. Effect of certifying without payment or adjustment being made.—Where a decree holder admits and certifies to the Court satisfaction of the decree, he cannot afterwards apply to execute the decree on the ground that he was induced to certify by means of fraud or coercion or that the certification was made under a mistake [1]

14. Certification by one of several joint decree-holders.—See Notes to Order 21 Rule 15

15. "The judgment-debtor may also inform Court . . . . . and apply."—Where a judgment debtor pays the amount due under the decree out of Court, he is not bound to wait till the decree holder fails to certify the payment[1] or till the decree is actually drawn up,[2] but may himself inform the Court of such payment and apply for its being recorded as certified Where such application is resisted by the decree holder on the ground that no such payment or adjustment was made, the Court cannot straightway dismiss the application [3] It is bound to investigate and decide any question upon which the parties may not be agreed, upon such materials as they may legally place before it [4] The reason is that the words "to show cause" do not mean merely to *allege* cause, nor even to make out that there is room for argument, but both to allege cause and to prove it to the satisfaction of the Court [5]

The dismissal for default of an application under sub rule (2) does not bar a fresh application by the judgment debtor for the same purpose, and he is entitled to have an adjudication on the merits subject, of course, to any objection that may be open to the decree holder [6]

A certificate of payment or adjustment should be filed in the Court *which has to execute the decree* [7] It has been held by the High Court of Calcutta in the undermentioned cases[8] that, where an agreement or adjustment has been brought to the notice of the Appellate Court by the judgment debtor when an appeal from the decree is pending before it and the same is not objected to by the decree holder, there

default—Subsequent application by judgment debtor after limitation should be treated as in continuation of the former application by decree-holder)]

Note 13

1. (70) 1870 Pun Re No 1 (Fraud—Remedy is by suit)
(34) AIR 1934 Nag 143 (144) 31 Nag L R 21 (*Decree certified as fully satisfied through negligence of agent or pleader — Order cannot be reviewed*)
(71) 1871 Pun Re No 39 (Duress)
(20) AIR 1920 Lah 73 (74) (Mistake)
(17) AIR 1917 Low Bur 164 (165) (Mistake — R[illegible] review)
[*See also* (76) 1876 Pun Re No 65 p 171)]

Note 15

1 ([illegible]) [illegible] Mad L Jour 94 (95) (He may himself [illegible] he has paid money)
2. ([illegible]) AIR [illegible] Cal 1064 (1065)
3 ([illegible]) 11 Cal [illegible] ([illegible])
(17) AIR 1917 Mad 409 (410 411)
4 ([illegible]) 1884 All W N 40 (40)
([illegible]) AIR [illegible] All [illegible] ([illegible])
(1[illegible]) AIR 1913 All 20[illegible] ([illegible]) 41 All 413
(88) 1888 All W N 82 (83)
(27) AIR 1927 Lah 544 (545)
(22) AIR 1922 Pat 276 (277 278) 1 Pat 644

5. (85) 11 Cal 166 (168) (Evidence may be given either orally or by affidavit)

not enquire into a proceeding under this rule)
(22) AIR 1922 Pat 276 (277) 1 Pat 644
(19) AIR 1919 Sind 92 (9[illegible]) 13 Sind L R 130 (C[illegible] reference in a plaint in another proceeding is not sufficient)
[See ([illegible]) AIR 192[illegible] Mad 16[illegible] ([illegible]) (D[illegible] attached — I[illegible] timation by the [illegible] to the attaching Court that decree [illegible] satisfied is not sufficient)]
8 ([illegible]) AIR 19[illegible] Cal [illegible] ([illegible])
(12) 13 Ind Cas 63 (6[illegible]) (Cal)

O. 21 R. 2
Notes 15-17

is a sufficient compliance with the provisions of sub rule (2) The High Court of Madras[9] has dissented from this view and has held that the filing of a certificate of satisfaction in the wrong Court and obtaining an order recording it cannot be treated as legally valid Where a decree has been transferred to another Court for execution, the transferee Court is the only Court which has the power to enquire into an application under this rule by the judgment debtor[10] A Collector to whom a decree is transferred for execution under Section 68 is not a 'Court whose duty it is to execute the decree within the meaning of this rule[11]

16. "Judgment-debtor," meaning of. — The word "judgment debtor in this rule includes persons claiming through him Thus, a transferee of the equity of redemption in the suit property from a judgment debtor in a mortgage decree is a 'judgment debtor for the purposes of this rule[1] A surety for a judgment debtor can plead an uncertified payment or adjustment made by him *(the surety)* with the decree holder[2] The reason is that when a Court proceeds against a surety under Section 145 it does not purport to execute the decree but only enforces the bond in the manner provided for the execution of decrees and is not therefore a Court executing the decree within the meaning of sub rule (3)

But the surety cannot plead an uncertified satisfaction or adjustment by *the judgment debtor* inasmuch as the latter himself could not have pleaded it and the surety cannot be in any better position[3]

17. Certification, form of. —

Certification by decree holder — There is no particular form in which the decree holder is required to certify a payment or adjustment[1] The certification may be done orally,[2] or by statement made in a subsequent execution application[3] or in a statement in answer to the objections of the judgment debtor,[4] or in a petition filed by him[5] or by way of admissions[6] An intimation by him to the Court that the decree is satisfied is also a sufficient certification[7] Where a decree for sale was passed in favour

9 (13) 21 Ind Cas 639 (641) (Mad)
10 (39) AIR 1939 Bom 202 (203)
(94) 16 All 228 (231)
(35) AIR 1935 Bom 803 (804)
[*See also* (80) 5 Cal 448 (450)]
11 (36) AIR 1936 Bom 277 (279) 60 Bom 729 (Application for entering satisfaction to be made to the Civil Court)
(37) AIR 1937 Nag 217 (219) 19 Nag L Jour 175 (177)

Note 16

1 (07) 30 Mad 537 (540)
(19) AIR 1919 Mad 358 (359) (Purchaser in execution of another money decree can apply to certify satisfaction of mortgage decree against the same property)
2 (36) AIR 19[illegible] Sind 105 (106 107) 20 Sind L R 309
[illegible]

Note 17

1 (16) AIR 1916 Mad 795 (799)
(24) AIR 1924 Lab 676 (677)
(3[illegible]) AIR 193[illegible] Mad 511 (513 514) (It does not matter under what circumstances the payment is brought to the notice of the Court by the decree holder)
2 (17) AIR 1917 Cal 466 (467)
(71) 1871 Pun Re No 32
(17) AIR 1917 Low Bur 164 (165)
3 (24) AIR 1924 Lah 676 (677)

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[illegible]
[*See* (34) AIR 1934 All 534 (535) 56 All 991 (Instalment decree — Mere placing of a cross mark after the instalment does not amount to certification)]
4 (88) 1888 All W N 115 (116)
5 (69) 12 Suth W R 358 (358)
6 (20) AIR 1920 Lah 73 (74)
[illegible]
by judgment debtor — [illegible]
7 (11) 12 Ind Cas 572 (574) 35 Bom 516

of a mortgagee in possession but the decree failed to provide for the taking of accounts of the profits that might thereafter be received by the mortgagee and the decree holder intimated to the Court in his application for sale that the net profits should go in reduction of the decree amount it was held by the High Court of Madras[8] that the application could be treated as an intention to certify adjustment of the decree and that an enquiry may be directed as to the amounts collected by him The High Court of Bombay[9] has however held that a certification of payment or adjustment without *specifying the amount* of the payment or without mentioning the *terms of the adjustment* is not a sufficient compliance with the rule The certification must be of payment of money due under the *decree* Hence an admission that certain sums of money were received coupled with a statement that they were received on account of interest not allowed by the decree itself but paid in consequence of a separate agreement entered into after the passing of the decree does not amount to a certification within the meaning of this rule [10]

Application by judgment debtor — An application by the judgment debtor to certify a payment or adjustment cannot be said to comply with the rule where there is no prayer for the issue of a *notice* to the decree holder to show cause why the payment or adjustment should not be recorded as certified [11]

According to the High Courts of Allahabad [12] Bombay[13] and Rangoon [14] where a judgment debtor contests an application for execution on the ground of payment or adjustment the statement of objection can be treated as an application under sub rule (2) provided it is made within 90 days of such payment or adjustment The High Courts of Calcutta[1] and Madras[16] have on the other hand taken a contrary view and have held that to so treat the objection would be to ignore the express language of the rule The Patna High Court held in the undermentioned decision[17] that an objection to execution can be treated as an application under sub rule (2) But in later decisions the same High Court has held that that sub rule only applies to cases where the judgment debtor applies for the recording of satisfaction *before* the starting of execution proceedings against him and not where he sets up the contention of payment or adjustment *pending* the execution proceedings [18]

8 (16) AIR 1916 Mad 795 (799 800)
9 (1900) 2 Bom L R 901 (905)
10 (39) AIR 1939 All 581 (583 584)
[See however (29) AIR 1929 Mad 783 (783)
11 (18) AIR 1918 Cal 62 (63)
(29) AIR 1929 All 6 4 (675) (Deposit of money by judgment debtor mentioning prior payment is not an application for certification of that prior payment)
[See (0) AIR 1930 Cal 289 (290) (Judgment [illegible]

See however [illegible]

(0) 21 Al [illegible] 0 (Thou [illegible] ot a k for [illegible] served—*Held* [illegible] may be [illegible]]
12 (29) AIR 1 [illegible] All (0)
(24) AIR 1 24 All 29 ([illegible])
(39) AIR 1939 All 581 (583)
[But see (91) 1891 All W N 11 (11) (Cannot be treated so)]
13 (35) AIR 1935 Bom 303 (304)
14 (28) AIR 1928 Rang 62 (63) 5 Rang 833
(11) 11 Ind Cas 780 (781) (Low Bur) (Written [illegible]

1 [illegible]
16 (12) 1 Ind Cas 5 (53) (Mad)
[But see (11) 1 Ind Cas 562 (563) 3 Mad 35 (*Obiter* and distinguished in 1 Ind Cas 5)]
17 (30) AIR 1930 Pat 5 6 (5 [illegible]) 9 Pat 5 1
18 (3) AIR 1938 Pat 904 (0) (The rule that [illegible] decree holder fails to [illegible] the court [illegible] certified [illegible] application [illegible] execution proceedings [illegible] payment or adjustment [illegible] decree)

O.21 R.2
Note 18

18. Limitation for certification —The period of limitation for an application by the judgment debtor under sub rule (2) is 90 days from the time when the payment or adjustment was made (see Article 174, Limitation Act) Where a judgment debtor alleges that the decree holder had fraudulently kept him from exercising his right to apply under sub rule (2) by promising that he would himself certify the payment or adjustment, the judgment debtor cannot claim an extension of time under Section 18 of the Limitation Act (IX of 1908)[1] The reason is that Section 18 does not deal with the *exercise* of the right to apply, but only to cases where a person has been fraudulently kept from the *knowledge* of his right An order granting a time barred application to record satisfaction of a decree is, however, not a nullity, but is valid and binding unless set aside in appeal or other appropriate proceedings[2]

There is no express Article of the Limitation Act applicable to certification by the decree holder Such certification is not an *application* within the meaning of Article 181 of the Limitation Act and therefore can be made at any time[3] See also Note 27, *infra* In *Shri Prakash Singh v Allahabad Bank*,[4] it was held by their Lordships of the Privy Council that even if the document by which the decree holder certifies is styled as an application, and is in the form of a petition, it cannot alter the real nature of the procedure and convert what is really no more than a certificate, into an application within the meaning of Article 181

It has been held by the High Courts of Calcutta, Madras and Rangoon and the Chief Court of Oudh following the decision of the Privy Council in *Shri Prakash Singh s* case, that a certification by the decree holder is not an *application* to the Court to take some step in aid of execution, within the meaning of Article 182, clause 5 of the Limitation Act[5] The High Court of Allahabad,[6] on the other hand, held that it is a

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(30) AIR 1936 Pat 253 (254) (Sub rule (3) of R 2, O 21 clearly contemplates a certification before the objection is taken to the execution on the basis of an adjustment or payment in satisfaction of the decree)

Note 18

1 (1) AIR 1915 Cal 73 (73)
(11) 13 Ind Cas 63 (66) (Cal)
(23) AIR 1923 Rang 103 (106) 11 Low Bur Rul 363
(19) AIR 1919 Cal 181 (182) (Certification made after decree is barred by limitation does not save time)
(15) AIR 1915 Cal 235 (236)
(24) AIR 1924 Lah 676 (677)
(16) AIR 1916 Mad 958 (959)

(29) AIR 1929 Mad 811 (811)
('18) AIR 1918 Mad 670 (621) 41 Mad 251
(12) 17 Ind Cas 617 (618) (Mad)
(27) AIR 1927 Oudh 7 (11) 1 Luck 498 (Affirmed

(39) AIR 1939 All 581 (584)
(35) AIR 1935 Mad 922 (923)
[But see (22) AIR 1922 Cal 30 (31 32) (No longer law in view of AIR 1929 P C 19)]
4 (29) AIR 1929 P C 19 (23) 56 Ind App 30 3 Luck 684 (P C)

Act)
(36) AIR 1936 Mad 118 (119) 59 Mad 424
[But see (25) AIR 1925 Rang 26 (27) 2 Rang 333
(19) AIR 1919 Low Bur 117 (118) 10 Low Bur Rul 31]
6 (11) 9 Ind Cas 1023 (1024) (All)

step in aid of execution provided the payment or adjustment was actually made But in a recent decision[7] the High Court of Allahabad also has followed the view of the above mentioned High Courts and held that the prior decisions of that Court are no longer good law in view of the decision of the Privy Council in *Shri Prakash Singh s* case

Although there is thus no period of limitation for a certification by the decree holder under this rule when once it is brought to the notice of the executing Court that a certain alleged payment or adjustment has not been certified or recorded under this rule the Court must refuse to recognize such payment or adjustment and the defect cannot be cured by the decree holder subsequently certifying the payment or adjustment[8]

19. "Shall record the same."— Where a decree holder certifies a payment or adjustment, the Court is *bound* to record it in accordance with his statement It has no power to proceed to satisfy itself before recording the satisfaction that such statement is true[1] But the judgment debtor will be entitled to show when an application for execution is made that no such payment or adjustment was made or that if it was made, it did not operate to extend the period of limitation for execution[2]

Where the payment or adjustment is pleaded by the *judgment debtor* under sub rule (2), the Court is *not bound* to record the same as certified without requiring proof of it merely because the decree holder does not appear to show cause why it should not be recorded as certified[3] After a payment or adjustment is recorded, it is not necessary that a fresh or amended decree should be drawn up[4]

Sub rule (3) which provides that an uncertified payment or adjustment shall not be recognized by any Court executing the decree does not require that the payment or adjustment must be both certified *and* recorded Thus where a certificate by the decree holder was not recorded by the Court as provided in this rule the judgment debtor does not lose his protection merely because the Court fails to perform the duty cast upon it to make the record[5]

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(10) 5 Ind Cas 295 (296) 3? All 257
(01) ?6 All 19 (20)
(90) 1? All 399 (40? 403) (F B)
(8?) 9 All 9 (10)
([illegible]

Note 19

1 (31) AIR 1931 Rang 33? (333)
(33) AIR 1933 Mad 5?3 (524) (Court cannot go i[illegible] to question whether satisfaction was intended creditor)
(38) AIR 1938 Lah 69 (70) (The question [illegible]
([illegible] (Court suspicious that amount certif[illegible] by decree holder was less than what was actually paid — Court can hold enquiry after notice to judgment-debtor)]
2 (18) AIR 1918 Oudh 400 (40?) 1 Oudh Cas 161
3 (28) AIR 19?8 Rang 1?? (1?6) 6 Rang 218 (Court should be satisfied that it is true)
4 (?5) AIR 19?5 Oudh 136 (137) (The Court has no juri[illegible]tion to make such an amendment of the decree)
(25) AIR 19?5 Nag 49 (49) ?0 Nag L R 122
5 (1) AIR 1915 Cal ?44 (4?)
(2) AIR 192 Mad 15? (155 1?6) (The decree-holder [illegible] withdraw an application made by him to have an adjustment recorded nor can the Court [illegible])
(?5 AIR 19?5 Mad ?30 (31)
(19 AIR 19?9 Mad 1 3 (1
(19) AIR 19?9 [illegible] (Court can take evidence to decide whether decree holder has certified)

An order recording the adjustment of a decree, brought about by the fraud practised by one party upon another can be vacated under the inherent powers of the Court [6] But the Court ought not to exercise such powers to vacate the order unless it is prejudicial to one of the parties [7]

See also Note 2 *supra*

20. Notice. — Sub rule (1) does not contemplate the issue of a notice to the judgment debtor [1] But when the judgment debtor applies under sub rule (2), the Court is bound to issue a notice to the decree holder to show cause why the payment or adjustment should not be recorded as certified [2] An order allowing a certification without notice to the decree holder is bad in law [3] and an application will lie to set aside such an *ex parte* order [4]

21. Uncertified payment or adjustment not to be recognized by Court executing the decree. — The prohibition in sub rule (3) against the recognition of an uncertified payment or adjustment is limited to a "Court executing the decree" and will not extend to a Court, which is not executing the decree, when dealing with such a matter [1] The object of the prohibition is to compel the judgment debtor to be careful to apply to the Court to have recorded as certified any payment he may have made on account of the decree, if he desires that it should be recognized by the executing Court as against the decree holder executing the decree [2]

Where the liability of the judgment debtor under a decree is only a *conditional* one as for instance where a decree provides that the decree holder is to execute the decree only in the event of the judgment debtor failing to comply with a particular condition, it will be open to the latter to prove, where execution is taken out, that the condition has been complied with, sub rule (3) has no application to such a case [3]

22. "Court executing the decree." — The third clause of Section 258 of the Code of 1877 as well as Section 206 of the Code of 1859 provided that a payment or adjustment made out of Court shall not be recognized by "any Court executing the decree" unless it had been certified or recorded as certified [1] Section 258 was amended in 1879 by Section 36 of Act XII of 1879 by omitting the words "executing the decree" after 'any Court' and the Section as amended was re enacted in the Code of 1882 This gave rise to a conflict of opinion as to the effect of the amendment The High

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(38) AIR 1938 All 116 (118)
(37) AIR 1937 Rang 507 (507)
6 (15) AIR 1915 Mad 281 (282)
7 (20) AIR 1920 Pat 750 (751) 5 Pat L Jour 379

Note 20

1 (18) AIR 1918 Oudh 460 (461) 21 Oudh Cas 161
('19) AIR 1919 Pat 136 (137) 4 Pat L Jour 159
2 (20) AIR 1920 Nag 20 (20)
3 (30) AIR 1930 Lah 113 (114)
4 (30) AIR 1930 Lah 113 (114)
(97 01) 2 Upp Bur Rul 254

Note 21

1 [illegible]

For other cases see Notes 22 24 25 and 30
2 (95) 17 All 42 (45)
3 (26) AIR 1926 Lah 641 (642)
[illegible]

to execute—Contention that the instalments had been duly paid and that decree holder was not entitled to execute—Executing Court can not recognize such payments unless certified or recorded)]

Note 22

1. (79) 4 Bom 295 (297)
(82) 5 Mad 397 (400) (F B)
(83) 6 Mad 41 (42 43)
(68) 10 Suth W R 354 (355) (Under S 206 of the Code of 1859)
[*See also* (74) 22 Suth W R 270 (271) (Do)]

Courts of Allahabad,[2] Calcutta[3] and Madras[4] and the Chief Court of the Punjab[5] held that the amendment had not the effect of altering the law as it stood before the amendment and that an uncertified payment or adjustment could be recognized by a Court other than a Court executing the decree A contrary view was taken by the High Court of Bombay [6] Owing to this conflict of opinion the Section was again amended by Section 27 of the Amending Act VII of 1888 which again restricted the prohibition to the Court executing the decree thus restoring the law to the state in which it was prior to the amendment of 1879 [7] The rule is now in the same form

23 Court acting under O 21 R 16 — Can a judgment debtor, who is debarred under this rule from pleading an adjustment of the decree with the decree holder for failure to have it certified, nevertheless plead the same when opposing an application by the assignee of the decree under O 21 R 16? The High Court of Bombay[1] held that he can The High Court of Madras also held the same view in the undermentioned decisions [2] These cases proceed on the view that when an application is made under O 21 R 16 by a transferee decree holder, it is heard by the Court as a Court which passed the decree and not as a Court which is *executing the decree* The said Madras decisions have however, now been overruled by a Full Bench decision[3] according to which the judgment debtor cannot plead such an uncertified adjustment and evade the operation of this rule This view is based on the ground that an application under O 21 R 16 is an application for execution and therefore the Court which passed the decree when dealing with such an application does not cease to be an executing Court as well The High Courts of Allahabad [4] Calcutta[5] and Rangoon[6] and the Judicial Commissioner s Courts of Nagpur[7] and Sind[8] have taken the same view See also the undermentioned decision [9]

23a Court dealing with application under O 21 Rules 90, 95, 97 and 98. — It has been held by the High Courts of Lahore and Patna that an application to set aside a sale under O 21 R 90 is not a proceeding in execution of a decree, and an

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2 (81) 3 All 533 (535)
(81) 3 All 538 (540)
3 (84) 10 Cal 354 (356 357)
(87) 14 Cal 376 (379)
(83) 9 Cal 789 (790)
4 (85) 8 Mad 2[illegible] (283) (F B)
(89) 12 Mad 61 (62 63)
[**But see** (89) 11 Mad 469 (472) (Not followed in 12 Mad 61)]
5 (84) 1884 Pun Re No 63 page 230 (FB) (Overruling 1881 Pun Re No 47 and 1883 Pun Re No 11)
6 (87) 11 Bom 6 (12 34 35) (FB) (Such payment or adjustment means payment or adjustment of the decree as such 6 Bom 146 Overruled)
(86) 10 Bom 155 (165)
7 (91) 13 All 339 (319)
([illegible]) [illegible]
([illegible]) [illegible] 59 (592)
(91) [illegible] (491)
(93) [illegible]

Note 23

[illegible]

3 [illegible]

(33) AIR 1933 Mad 157 (157) 56 Mad 316 (Following AIR 1932 Mad 8 2)
[*See also* (15) AIR 1915 Mad 1138 (1140)]
4 (34) AIR 1934 All 209 (219) 56 All 694
(34) AIR 1934 All 445 (447)
5 (37) AIR 1937 Cal 31 (34)
6 (36) AIR 1936 Rang 218 (215)
7 (91) 4 C P L R 132 (133)
8 (34) AIR 1934 Sind 205 (06)
9 (37) AIR 1937 Mad 511 (513) (Decree holder receiving part payment but before it is certified or recorded transferring decree to another by document which says that the part payment has been made and purports to transfer the

adjustment or compromise of the matter in dispute cannot be certified under the provisions of O 21 R 2 but must be recorded only under the provisions of O 23 R 3[1] On the same principle it has been held by the High Court of Bombay that a proceeding under O 21 Rules 95, 97 and 98 is not one in execution and the Court dealing with such an application is not an executing Court and is therefore not debarred from recognizing an uncertified adjustment of the decree[2]

24. Suit by judgment-debtor based upon an uncertified payment or adjustment. — It is only a Court *executing the decree* that is debarred from recognising an uncertified payment or adjustment A *suit* based upon such payment or adjustment is not barred

Illustrations

1 *B* was a surety for *D* on a bond for Rs 50 passed by *D* to *G* *G* obtained a decree against *B* on this bond and *B* fully satisfied the decree by paying *G* Rs 38 The payment was made out of Court and was not certified to the Court *B* now sued *D* to recover the money so paid by him to *G* It was held that sub rule (3) did not bar the suit and that the payment might be proved[1]

2 *M* obtained a decree against *C* for possession of a *jote* and mesne profits Subsequently *C* adjusted the decree by paying the amount of mesne profits to *M* and purchasing the *jote* from him by a registered conveyance *After M s* death his heirs executed the decree and obtained possession *C s* plea of uncertified adjustment having been overruled, *C* now sued *M s* heirs for possession of the *jote* It was held that though the adjustment was not certified, the suit based upon it was maintainable[2]

See also the undermentioned decision[3]

25. Suit by decree-holder based on uncertified payment or adjustment. — Where a judgment debtor executed a bond in favour of the decree holder in adjustment of the decree against him, it was held that, in a suit by the decree holder upon the bond, the uncertified adjustment can be proved[1] The reason is that the adjustment of a decree out of Court, if not certified to the Court under this rule, is ineffectual only so far as the *execution of the decree* is concerned Similarly, where the plaintiff brought a suit under O 21 R 63 to establish his right to certain attached property on the allegation that the property attached had been transferred to him in satisfaction of a decree held by him against the judgment debtor, it was held that it was unnecessary that such transfer should be certified under the provisions of this rule[2]

26. Effect of fraud. — *A* obtains a decree against *B* *B* satisfies the decree by a payment or adjustment made out of Court, but such payment or adjustment is not certified to the Court in time *A* then applies for execution of the decree fraudulently omitting to state in his application the payment or adjustment as required by O 21,

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right to execute in respect of the balance— Assignee cannot in spite of the terms of the

Note 23a

1 ('20) AIR 1920 [illegible]

2. [illegible]

Note 24

1. ('88) 12 Bom 235 (237)
('20) AIR 1920 Nag 265 (26[illegible])
2. ('98) 25 Cal 718 (722, 724)
3. ('35) 157 Ind Cas 26 (28) (Rang) (Agreement to adjust decree though not certified is a contract —Suit for specific performance is maintainable)

Note 25

1. ('85) 7 All 124 (129 130)
('92) 16 Bom 589 (592)
('91) 15 Bom 419 (421)
('01) 25 Bom 252 (262)
('82) 1882 Pun Re No 182 p 537
(1900) 10 Mad L Jour 213 (214) (Bond assigned by judgment debtor to decree holder in adjustment—Suit on bond maintainable though adjust [illegible]

[illegible] L Jour [illegible] FB) [illegible] in 26 [illegible]

2. ('91) 13 All 339 (342)

Rule 11 (e) Is *B* entitled to claim an investigation of the question under Section 47? The answer is no. Although the question is one relating to the *satisfaction* of the decree within the meaning of Section 47, it is taken out of the purview of that Section by virtue of the *particular provision* contained in this rule specifically dealing with such questions[1]

27 Effect on limitation — It has been already mentioned in Note 22 *ante* that Section 258 of the old Code provided that an uncertified payment or adjustment shall not be recognized by any Court executing the decree *as a payment or adjustment* of the decree. Consequently it was held that such a payment could however be relied upon by a decree holder for the purpose of extending the period of limitation for execution under Section 20 of the Limitation Act[1] The words as a payment or adjustment of the decree have now been omitted in the present rule with the result that the executing Court cannot recognise an uncertified payment or adjustment for *any purpose* whatever[2]

Now suppose a decree holder makes an application for execution of his decree more than three years after the date of the decree or after the last starting point of limitation and mentions in the application a part payment made by the judgment debtor. Can the Court executing the decree recognize the payment and hold that by virtue of such payment the decree is not time barred? The High Courts of Madras[3]

Note 26

1 ('19) AIR 1919 Lah 13(14) 1919 Pun Re No 135
('26) AIR 1926 Oudh 620 (620)
('35) AIR 1935 Mad 257 (257)
('23) AIR 1923 Rang 103(103) 11 Low Bur Rul 363
('25) AIR 1925 Bom 309(309 310) 49 Bom 548(FB)
('23) AIR 1923 Cal 342 (343) 50 Cal 468
('28) AIR 1928 Cal 527 (529 530)
('17) AIR 1917 Cal 422 (425)
('12) 13 Ind Cas 424 (425) (Cal)
('12) 13 Ind Cas 63 (65) (Cal)
('12) 13 Ind Cas 326 (327 328) (Cal)
('92) 20 Cal 32 (36)
('12) 13 Ind Cas 944 (945) (Cal)
('10) 7 Ind Cas 55 (57 58) (Cal)
('09) 4 Ind Cas 402 (404) (Cal)
('26) AIR 1926 Mad 674 (675) 49 Mad 325
('18) AIR 1918 Mad 644 (644) 40 Mad 789
('06) 29 Mad 312 (313)
('98) 21 Mad 409 (410)
('11) 12 Ind Cas 562 (563) 36 Mad 357
('07) 17 Mad L Jour 527 (528)
('26) AIR 1926 Oudh 482 (483)
('28) AIR 1928 Oudh 195 (198) 3 Luck 170(FB)
('20) AIR 1920 Pat 833 (835) 5 Pat L Jour 70
('21) AIR 1921 Pat 135(137 138) 6 Pat L Jour 337
('97 01) 2 Upp Bur Rul 256
('25) AIR 1925 Sind 140 (142) 18 Sind L R 51
('21) AIR 1921 Sind 10 (11) 15 Sind L R 77
('19) AIR 1919 Sind 56 (56 57) 13 Sind L R 71
('35) AIR 1935 Mad 257 (257) (Uncertified agreement not to sell property of judgment debtor—Agreement cannot be relied on to prove fraud in conducting sale)

The following cases it is submitted are not good law
('08) 12 Cal W N 485 (487)
('19) AIR 1919 Cal 202 (203)
('98) 21 Mad 356 (358) (Dissented from in 29 Mad 312)
('26) AIR 1926 Mad 945 (945)
('25) AIR 1925 Oudh 225 (226) 27 Oudh Cas 217 (Dissented from in AIR 1926 Oudh 482)
('22) AIR 1922 Low Bur 31 (32)
('16) AIR 1916 Bom 217 (218) 40 Bom 333 (Overruled in AIR 1925 Bom 309)
('10) 7 Ind Cas 940 (943) 34 Bom 575 (Do)

Note 27

1 ('04) 26 All 36 (38) (Overruling 12 All 569)
('95) 17 All 42 (44 45)
('13) 18 Ind Cas 731 (732) 35 All 178
('09) 2 Ind Cas 524 (524) 31 All 590
('85) 7 All 327 (330)
('82) 4 All 316 (317)
('79) 2 All 291 (293)
('97) 21 Bom 122 (125)
('87) 11 Bom 506 (513 514)
('94) 21 Cal 542 (549)
('71) 15 Suth W R 66 (67)
('70) 4 Beng L R 130 (134) (F B)
('69) 11 Suth W R 232 (233)
('96) 19 Mad 162 (164)
2 ('12) 13 Ind Cas 424 (425) (Cal)
('18) AIR 1918 Cal 977 (978) 45 Cal 630
3 ('18) AIR 1918 Mad 620 (621 622) 41 Mad 251
('16) AIR 1916 Mad 958 (959)
('35) AIR 1935 Mad 922 (923)

O. 21 R 2 Notes 27-28

Calcutta[4] Bombay[5] Lahore[6] Patna[7] Rangoon[8] and Nagpur[9] and the Judicial Commissioner s Court of Sind[10] have held that it will amount to a sufficient certificate and the payment can therefore be recognized provided the payment is as a *matter of fact made* and provided also the application for execution is within three years of such payment (as otherwise Section 20 of the Limitation Act will not apply) The said decisions proceed on the view that nothing is prescribed in this rule as to the time within which or the manner in which the decree holder must certify a payment or adjustment See also Notes 17 and 18 *supra* The High Court of Allahabad on the other hand held the contrary view in a series of cases In one class of cases[11] it was held that this rule contemplates a formal proceeding consisting of two steps —

first an application by the decree holder informing the Court of the payment and

secondly a formal order of the Court recording the payment

and therefore a statement as to payment in an execution application is not such a certificate as is contemplated by this rule and would not save limitation It was held in another class of cases[12] that where the decree will be time barred if the payment sought to be certified by the decree holder is ignored such a payment cannot be certified In a recent Full Bench ruling however[13] the same High Court has impliedly overruled these cases and fallen in line with the other Courts The Judicial Commissioner s Court of Oudh[14] has followed the earlier view of the High Court of Allahabad It is submitted that in view of the general trend of opinion the said decision cannot be accepted as correct

28 Operation as estoppel — It is not open to the executing Court to enquire into the fact of payment or adjustment of a decree which has not been certified or recorded within the period allowed by law on the ground that the decree holder is estopped from denying such payment or adjustment[1] The reason is that sub rule (3) enacts a special law for a special purpose and the general law of estoppel cannot be allowed to override the special law

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4 (15) AIR 1915 Cal 235 (236)

(19) AIR 1919 Cal 181 (182) (As explained in AIR 1925 Cal 1012)
[But see (22) AIR 1922 Cal 200 (200)]

5 (21) AIR 1921 Bom 411 (412) 45 Bom 31

6 (24) AIR 1924 Lah 6 6 (6)

7 (19) AIR 1919 Pat 136 (137) 4 Pat L Jour 159

8 (30) AIR 1930 Rang 329 (331) 8 Rang 310
(25) AIR 1925 Rang 26 (27) 2 Rang 303

9 (36) AIR 1936 Nag 281 (282) I L R (1937) Nag 106

10 (31) AIR 1931 Sind 28 (30) 25 Sind L R 360
(20) AIR 1920 Sind 23 (21) 14 Sind L R 198
(19) AIR 1919 Sind 70 (75) 13 Sind L R 37
[But see (15) AIR 1915 S [illegible]

Note 28

1 (10) 7 Ind Cas 910 (911 912) 34 Bom 575 (Per Chandavarkar J)
(14) AIR 1914 Cal 253 (254)
(12) 13 Ind Cas 326 (327 3 8) (Cal)

29 Remedies of the judgment-debtor — Where a judgment debtor satisfies the decree by a payment or adjustment made out of Court which is not certified to the Court in time and the decree holder applies for execution of the decree in spite of the satisfaction what is the remedy of the judgment debtor in such a case? It is clear that the judgment debtor cannot maintain a suit for a declaration that the decree has been satisfied and is consequently incapable of execution [1] The reason is that such questions relate to the *satisfaction* of the decree a separate suit in respect of which is barred by Section 47 If the properties of the judgment debtor are sold in execution in such circumstances no separate suit will for the same reason lie to set aside the sale [2] As to whether a suit *for damages* will lie against the decree holder see Note 30 below

O 21 R 2
Notes 29–30

30 Suit for damages — Where a decree holder whose decree has been satisfied by payment out of Court fails to certify satisfaction to the Court and executes the decree and *realises the money* a second time the judgment debtor may sue him for the recovery of the money paid out of Court [1] Such a suit will not be barred by Section 47 for the question in the suit as observed by Turner C J in *Viraraghava* v *Subbakkha* I L R 5 Madras 397 relates not to the execution of a decree but to a contract which formed no subject of inquiry in the suit and could not form a subject of inquiry in execution of the decree

The cause of action for the suit is *failure of consideration* or breach of an express or implied promise or of a statutory duty to certify the payment

There is a difference of opinion as to when the cause of action for such a suit arises — whether it arises as soon as the application for execution is presented or only

(25) AIR 19 5 S nd 140 (142) 18 Sind L R 51

Note 29

1 (94) 21 Cal 437 (445 449 460) (FB)

Rul 367

The following cases are no longer good law

(74) 2 Suth W R 194 (194)

(25) AIR 1925 Lah 54 (55)

(99) 23 Bom 394 (396)

(79) 4 Bom 295 (297)

(66) 4 Bom H C R A C 76 (77)

(12) 13 Ind Cas 63 (66) (Cal)

(11) 11 Ind Cas 1 (1 2) (Cal)

(79) 3 Cal L Rep 414 (416)

(74) 22 Suth W R 298 (298)

(73) 20 Suth W R 150 (150)

(70) 13 Suth W R 69 (73) (F B)

(68) 9 Suth W R 210 (211)

(67) 8 Suth W R 449 (449)

(17) AIR 1917 Lah 90 (91)

(77) 1877 Pun Re No 66 page 172

(92) 1892 Pun Re No 79 page 281

(18) AIR 1918 Mad 720 (721)

(11) 10 Ind Cas 462 (462) (Mad) (Affirming 6 Ind Cas 267 on appeal)

(85) 8 Mad 277 (283) (F B)

(82) 5 Mad 397 (400) (FB) (Overruling 3 Mad H C R 188)

(83) 6 Mad 41 (42 43)

(04) 14 Mad L Jour 359 (369)

(76) 1 Mad 203 (204)

(97) 20 Mad 369 (370 371)

(04) 17 C P L R 60 (61)

(26) AIR 1926 Oudh 483 (483)

(23) AIR 1923 Rang 88 (92) 11 Low Bur Rul 429

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Note 30

1 (08) 30 All 461 (466)

(81) 3 All 538 (540)

(69) 1 N W P H C R 23 (239)

(23) AIR 1923 Bom 253 (253)

(93 1900) 1893 1900 Low Bur Rul 621

(35) AIR 1935 Pat 65 (66) (Suit is maintainable irrespective of whether payment is pleaded or not in execution)

O 21 R 2
Notes 30–32

after the amount is *actually recovered* in execution The High Courts of Allahabad[2] and Patna[3] the Judicial Commissioner s Court of Nagpur[4] and the undermentioned decisions[5] of the High Court of Madras have held that the cause of action arises only when damage is actually sustained that is when the money is recovered a second time In the undermentioned cases[6] however the High Court of Madras has held that the cause of action arises when the decree holder fails to fulfil his duty and applies for execution and that an execution need not actually be levied and money realised a second time before the suit can be maintained Where the decree holder has not applied for execution at all nor realised anything over and above the payments alleged to have been made by the judgment debtor towards the satisfaction of the decree the judgment debtor has no cause of action to sue the decree holder merely because the payment out of Court has not been certified[7]

Where the decree holder transfers the decree after it is satisfied by an uncertified payment or adjustment and the assignee executes the decree he is not liable to repay the decretal amount realised in execution of the decree even though he has knowledge of the payment or adjustment[8] The reason is that there is no privity *of contract* between the parties

Where an application by the judgment debtor under sub rule (2) for recording a payment out of Court is dismissed by the executing Court on a consideration of the merits the judgment debtor cannot maintain a suit for recovery of the amount alleged to have been paid twice over for, such a suit will be barred on general principles of *res judicata*[9]

31 Restitution of uncertified payment on reversal of decree in appeal — *V* obtained a decree against *G* for Rs 89 *G* appealed against the decree and pending appeal made a payment of Rs 60 to the decree holder which was not certified to the Court The decree was reversed in appeal and *G* applied for refund of the amount he had paid It was held that *G* was entitled to recover on the ground that the decree having been reversed the payment whether certified or not could only be regarded as made without consideration and entitling the defendant to have it restored[1]

32 Criminal proceedings — Sub rule (3) has no application to a case where a Criminal Court is investigating a charge under Section 210 of the Penal Code of

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[illegible]

2 (33) AIR 1933 All 511 (512)
3 (39) AIR 1939 Pat 156 (157)
4 (23) AIR 1923 Nag 219 (222)
5 (10) 6 Ind Cas 267 (268) (Mad)
(06) 16 Mad L Jour 54 (55 56)
6 [illegible]

from the date of payment—It is not clear from the report whether the judgment debtor paid the amount twice over or not)
(98) 21 Mad 409(410) (The fact whether decree holder recovered money from the judgment debtor a second time is not clear from the judgment)]

7 (39) AIR 1939 All 495 (496) 1939 All L Jour 403 (404)
(35) AIR 1935 Mad 961 (964) (Actual filing of execution and not failure to certify is cause of action)
8 (19) AIR 1919 Mad 424 (426) 42 Mad 333
9 (12) 14 Ind Cas 751 (752) 1912 Pun Re No 91
(95) 18 Mad 26 (27)
(09) 4 Ind Cas 818 (819) (Upp Bur)

Note 31

1 (87) 11 Bom 724 (726)
(39) AIR 1939 Mad 176 (176) (Payment to decree holder s pleader not certified — Decree reversed in appeal — Application for restitution is maintainable)

fraudulently executing a decree[1] The prohibition in sub rule (3) only means that the Court cannot consider the alleged adjustment in the *course of the execution of the decree in question* The sub rule does not prohibit the Court executing the decree from holding an enquiry under Section 476 of the Criminal Procedure Code into an alleged payment or adjustment with a view to file a complaint against the decree holder for an offence under Section 210 Penal Code[2] Any other interpretation would make Section 210 Penal Code a mere nullity and there could never be any prosecution for such an offence Where on the objection of the judgment debtor the Court dismisses an application for execution on the ground that the decree has been satisfied by a payment out of Court the decree holder is not guilty of an offence under Section 210 Penal Code because the decree has not been *caused to be executed*[3] O 21 R. 2 Notes 32-33

33 Appeal and revision — An order on an application by the judgment debtor under sub rule (2) recording or refusing to record as certified a payment or adjustment made out of Court is the determination of a question between the parties relating to the satisfaction of the decree within the meaning of Section 47 and hence is appealable as a decree[1] No appeal lies against an order refusing to set aside a dismissal of an application for default[2] or an order refusing to review an order rejecting an application under this rule[3]

Where a decree holder certifies a payment made out of Court but the Court in spite of it orders execution to proceed on the ground that the payment is not proved the Court fails to exercise a jurisdiction vested in it by law and the order is therefore revisable by the High Court under Section 115[4] A Judge declining to proceed with an application for execution on the ground of an uncertified payment or adjustment out of Court acts with material irregularity and his order is open to revision[5]

Courts Executing Decrees

R. 3. [New] Where immoveable property forms one estate or tenure situate within the local limits of the jurisdiction of two or more Courts, any one of such Courts may attach and sell the entire estate or tenure O 21 R. 3

Lands situate in more than one jurisdiction

Synopsis

1 Sale of property situate in more than one jurisdiction

2 Change of territorial jurisdiction See Section 37

Note 32

1 (86) 10 Bom 288 (299) (Case under Amend

1 (91) 16 All 129 (129 130)
(87) 11 Bom 57 (58 59)
(03) 7 Cal W N 172 (174) (Even though there may be no pending application for execution still Court may be said to be executing the decree)

O. 21 R. 3
Notes 1-2

1. Sale of property situate in more than one jurisdiction. — As has been seen in Note 8 to Section 17, *ante*, it is a general principle of law that no Court can execute a decree in which the subject matter of the suit or of the application for execution is property situate *entirely* outside the local limits of its jurisdiction. This rule is an exception to that general rule[1] Even before this provision was enacted in this Code, it was held by the Calcutta High Court[2] that where property attached in execution of a decree forms one estate and is situate within the territorial jurisdiction of two or more Courts, any one of such Courts has jurisdiction to sell the *entire* estate. See also Note 6 to Section 38 *ante*

2. Change of territorial jurisdiction. — See Section 37

O. 21 R. 4

Transfer to Court of Small Causes

R. 4. [S 223, para. 5.] Where a decree has been passed in a suit of which the value as set forth in the plaint did not exceed two thousand rupees and which, as regards its subject-matter, is not excepted by the law for the time being in force from the cognizance of either a Presidency or a Provincial Court of Small Causes, and the Court which passed it wishes it to be executed in Calcutta, Madras [a]*or Bombay*, such Court may send to the Court of Small Causes in Calcutta, Madras [a]*or Bombay*, as the case may be, the copies and certificates mentioned in rule 6; and such Court of Small Causes shall thereupon execute the decree as if it had been passed by itself.

[1877, S. 223, para. 5]

a Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Bombay or Rangoon

Synopsis

1. Scope of the Rule
2. "As if it had been passed by itself"
3. Decrees of foreign Court See Note 1
4. Jurisdiction of Court of Small Causes to question validity of order of transfer.

1. Scope of the Rule. — This rule is not restricted in its application to decrees of British Indian Courts, it applies equally to decrees of such foreign Courts as come within Section 44[1] See also Order 51 Rule 1, *infra*

2. "As if it had been passed by itself." — The Court of Small Causes in Calcutta, Madras or Bombay, in executing a decree of another Court transferred to it under this rule, has the same powers as it possesses in regard to execution of its own

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Order 21 Rule 3 — Note 1

1. (23) AIR 1923 Cal 619 (621)
2 (86) 12 Cal 307 (312)
(82) 8 Cal 703 (705)
(73) 19 Suth W R 434 (436)
(75) 23 Suth W R 154 (155)

decrees[1] See also Section 42

3. Decrees of foreign Court. — See Note 1 above

4. Jurisdiction of Court of Small Causes to question validity of order of transfer.—The Court of Small Causes to which a decree is sent for execution under this rule has no jurisdiction to question the correctness or validity of the order of transfer[1]

R. 5. [S 223, para 6] Where the Court to which a decree is to be sent for execution is situate within the same district as the Court which passed such decree, such Court shall send the same directly to the former Court But, where the Court to which the decree is to be sent for execution is situate in a different district, the Court which passed it shall send it to the District Court of the district in which the decree is to be executed.

Mode of transfer.

[1877, S 223.]

Local Amendments

ALLAHABAD

For the word 'district,' where it occurs *after* the words "same" and "different *read* 'Province

LAHORE

In the last sentence after the words "the District Court' and before the words "of the district' *insert* the words "or the Court of any Judge having jurisdiction in the place where the decree is to be executed to whom power to receive plaints has been delegated by the District Judge'

OUDH

For the word "district" where it occurs *after* the words "same" and "different" *read* "Province"

RANGOON

Add the following proviso

"Provided that where the Court to which the decree is sent for execution is presided over by the same Judge as the Court which passed the decree, such transfer may be effected by recording a formal order of transfer in the diary of the execution proceedings"

Synopsis

1 **Scope of the Rule.**
2. **Power of Court to which decree is sent for execution.** See Ss 51 and 42
3 **Transfer of local jurisdiction.** See Section 37

1. Scope of the Rule. — Where two Courts are in the *same district*, one Court may transmit a decree for execution to the other Court direct *without the*

Note 2

1. ('07) 34 Cal 823 (827) (Trying a question of title in respect of tiled huts in execution)

Note 4

1. (30) 165 Ind Cas 625 (626) (Cal) (It is the function of the transferring Court to decide whether the transfer can or cannot be made

O. 21 R. 5
Notes 1-3

intervention of the District Court [1]

But where the Court to which the decree is to be sent is situate in a *different* district, it should be sent to the *District Court* of the district in which the decree is to be executed Where this procedure is not followed and the decree is sent direct to the Court subordinate to the District Court in another district, that Court cannot execute the decree [2] It should not, however, dismiss the application, but should send the papers back to the Judge who sent them for adopting the correct procedure [3] In the undermentioned cases[4] it was held that the failure to send the decree through the District Court is a mere irregularity which can be waived

The High Court of Madras[5] has framed a rule — Rule 161A of the Civil Rules of Practice — under which the transferee Court is to return the papers to the transmitting Court, if no steps are taken by the decree holder within six months from the date of transfer. This rule is one of convenience made with the object of inducing decree holder to take early steps to execute the decree, and a violation thereof does not render the proceedings taken after six months *void ab initio*

See also the undermentioned case[6] as to the practice in Sind Courts

2. Power of Court to which decree is sent for execution. — See Sections 51 and 42, *ante*

3. Transfer of local jurisdiction. — See Section 37, *ante*

O. 21 R. 6

Procedure where Court desires that its own decree shall be executed by another Court

R. 6. [S. 224.] The Court sending a decree for execution shall send —

(*a*) a copy of the decree;

(*b*) a certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed, or, where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unsatisfied; and

(*c*) a copy of any order for the execution of the decree, or, if no such order has been made, a certificate to that effect.

[1877, S. 224; 1859, S. 286.]

Order 21 Rule 5 — Note 1

1. ('92) 15 Mad 345 (347).

('36) AIR 1936 Cal 571 (572) (Decree transferred without express request by decree holder — Acquiescence by decree holder — Jurisdiction of transferee Court to execute not affected)

2. ('95) 22 Cal 764 (766)

('33) AIR 1933 Lah 839 (840, 841) (There is an inherent lack of jurisdiction to execute the decree—Even assuming such jurisdiction it cannot send decree to another Subordinate Court for execution)

('14) AIR 1914 Cal 786 (78?).

('19) AIR 1919 Pat 324 (324) 4 Pat L Jour 49 (It is open to the parties at any stage to question the jurisdiction of the Subordinate Judge to execute it)

3. ('14) AIR 1914 Cal 786 (786)

4 ('36) AIR 1936 Lah 765 (765).

('37) AIR 1937 Lah 174 (176)

('36) AIR 1936 Lah 891 (894)

5

6

plying for same unless he is a person not fit to be trusted with such papers)

Local Amendments

ALLAHABAD

Rule 6 shall be re numbered as 6 (1) and *add* the following sub rule (2)

"(2) Such copies and certificates may, at the request of the decree holder, be handed over to him or to such person as he appoints, in a sealed cover to be taken to the Court to which they are to be sent

N-W F P

Read Rule 6 as Rule 6 (1) and *add* the following sub rule (2)

"(2) Such copies and certificates may, at the request of the decree holder be handed over to him or to such person as he appoints in a sealed cover to be taken to the Court to which they are to be sent

OUDH

To Rule 6, *add* the following as sub rule (2) and re number 6 as 6 (1)

(2) Such copies and certificates may, at the request of the decree holder, be handed over to him or to such person as he appoints, in a sealed cover to be taken to the Court to which they are to be sent'

PATNA

Insert the following words after the word "decree' in clause (a)

'and a copy of the suit register relating to the suit in which the decree was passed and a memorandum showing the costs allowed to the decree holder subsequent to the passing of the decree

RANGOON

To Rule 6 *add* the following proviso

Provided that where a transfer is effected under the proviso to Rule 5 it shall not be necessary to send the above documents

Synopsis

1 Scope of the Rule
2 Certificate, effect of not sending
3 Presumption as to compliance with the Rule
4 Copy of any order
5 Small Cause Courts
5a Notice to judgment debtor
6 Appeal

1. Scope of the Rule. — The documents required to be transmitted by the Court sending the decree for execution to another Court are —

(1) a copy of the decree,

(2) a certificate as required by clause (b) and

(3) a copy of any order for execution that may have been passed [1]

As to the form of certificate of non satisfaction, see Appendix E Form No 4

Where a Court, upon an application for transfer of the decree for execution to another Court, places a wrong construction on the decree and mentions in the certificate that a particular amount is due the statement is *ultra vires* and the judgment debtor need not have it amended by the transferor Court [2] In sending the certificate of non satisfaction, the Court which passed the decree is not called upon to consider whether the decree is still capable of execution, that is a question for determination by the transferee Court when a proper application for execution is presented to it [3]

When once an order is made sending a decree to another Court for execution, that by itself is sufficient to entitle the decree holder to apply to the Court to which

Order 21 Rule 6 — Note 1

1. ('69) 4 Mad H C R 331 (333)

2 ('25) AIR 1925 Pat 807 (809 810) 4 Pat 440

3 ('10) 8 Ind Cas 22 (25) (Cal)

O. 21 R 6 Notes 1-5a

the decree is sent for execution[4] Where an application for execution has already been made to the Court which passed the decree, a fresh application for execution need not be made to the Court to which the decree is transferred for execution[5] See also the undermentioned case[6]

2. Certificate, effect of not sending. — *The omission to send the certificate* as required by clause (b) of this rule is a mere irregularity and does not affect the jurisdiction of the Court to which the decree is transferred for execution to entertain the application for execution[1] Nor is it a ground for an application under O 21 R 90 to set aside a sale[2] Similarly it has been held that a mere mistake in the certificate of non satisfaction as to the number of the suit or the names of the judgment debtors will not affect the jurisdiction of the execution Court to proceed with the execution[3]

3. Presumption as to compliance with the Rule. — Where the validity of an attachment effected by the transferee Court is attacked on the ground that no copy of the decree was sent by the Court which passed the decree it lies upon the judgment debtor to prove that it was not transmitted, the maxim applicable being *omnia præsumuntur rite esse acta* — all things are presumed to have been rightly and duly performed[1] Where a decree was passed by a Judge in the capacity of a Small Cause Judge and an application for execution of the decree was filed before the same Judge acting on the original side, it was held that even though there was no formal order of transfer, the provisions of this rule were sufficiently complied with[2]

4 Copy of any order. — The words 'copy of any order for the execution of the decree in clause (c) mean a copy of any *subsisting* order and not a copy of an order for execution in the previous execution application[1]

5 Small Cause Courts — This rule applies to proceedings in the Small Cause Courts in the mofussil and if there is no sufficient property within the jurisdiction of the Small Cause Court to satisfy the decree it may be sent to another Court[1]

5a Notice to judgment-debtor — Where the application for transmission of the decree for execution to another Court is made when the decree is already under execution in the Court which passed it, notice should be given to the judgment debtor and the transfer should not be ordered unless there is sufficient cause to order simultaneous execution[1] See also Note 17 to Section 39 *ante*

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4 (10) 8 Ind Cas 852 (853) 35 Mad 588 (For rateable distribution)
[But see (28) AIR 1928 Mad 496 (497) *(Obiter)*]

5 (36) AIR 1936 Cal 267 (269)

6. (36) AIR 1936 Lah 369 (369) (Order transferring decree of High Court to another Court for execution may be signed by the Registrar and *need not be signed by the Judge*)

Note 2

1 (31) AIR 1931 Cal 649 (649)

2 (97) 20 Mad 10 (12)

3 (38) AIR 1938 Pat 513 (514)
[*See also* (36) AIR 1936 Lah 765 (765) (Certificate wrongly addressed to the Subordinate Judge instead of to the District Judge — Defect held cured in the circumstances of the case)
(36) AIR 1936 Cal 571 (572) (Irregularity in manner of transfer does not prevent the transferee *Court from having seisin of the execution*)]

Note 3

1 (72) 17 Suth W R 289 (291)

2 (27) AIR 1927 Cal 782 (783) (Appeal would lie from an order in execution)
(28) AIR 1928 Rang 15 (16) 5 Rang 613 (Transfer is not invalid)

Note 4

1 (89) 13 Bom 371 (373)

Note 5

1 (68) 9 Suth W R 175 (177)

Note 5a

1 (39) AIR 1939 Bom 258 (260) 41 Bom LR 491 (493) (A mere order transmitting a decree for execution to another Court may be said to be a purely ministerial order but an order which amounts to the grant of a certificate and allows simultaneous execution proceedings to go on in more than one Court is not a mere ministerial order Such an order is a judicial order)
(35) AIR 1935 Cal 268 (270)

6. **Appeal.** — An order directing or refusing the issue of a certificate is appealable [1] **O.21 R.6 Note 6**

R. 7. [S. 225.] The Court to which a decree is so sent shall cause such copies and certificates to be filed, without any further proof of the decree or order for execution, or of the copies thereof, unless the Court, for any special reasons to be recorded under the hand of the Judge, requires such proof **O.21 R.7**

Court receiving copies of decree, etc, to file same without proof.

[1877, S. 225; 1859, S. 286.]

Synopsis

1. Legislative changes
2. Without any further proof
3. Jurisdiction of the Court which passed the decree. See Section 42, Note 1
4. Executing Court, whether can question the jurisdiction of the Court which passed the decree.
5. Whether a transferee Court can execute a decree in excess of its pecuniary jurisdiction. See Section 38, Note 7

1. **Legislative changes.** — The words "or of the jurisdiction of the Court which passed it" which occurred in the old Section have now been omitted See Note 4

2. **Without any further proof.** — As soon as a copy of the decree which is sent for execution to another Court is filed in the Court to which it is transmitted, it has the same effect as a decree of that Court [1]

3. **Jurisdiction of the Court which passed the decree.** — See Section 42, Note 1

4. **Executing Court, whether can question the jurisdiction of the Court which passed the decree.** — Section 225 of the old Code contained the words "or of the jurisdiction of the Court which passed it" There was a conflict of decisions as to whether the transferee Court can go into the question of the jurisdiction of the Court which passed the decree, if it sees any reason to do so [1] The said words have now been omitted and it has been held that the transferee Court has no power under the present Code to question the jurisdiction of the Court which passed the decree under execution [2] But it has been held that where the decree was passed against a *dead* person, it is a nullity and objection to the decree on this ground can be taken

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Note 6

1 [illegible]

('86) 10 Bom 65 (68)
('82) 7 Bom 481 (483)

Order 21 Rule 7 — Note 2

1. ('68) 10 Suth W R 46 (50) (FB)

Note 4

1. ('89) 11 All 314 (318)
('95) 17 All 478 (482)
('04) 28 Bom 378 (382)
('91) 15 Bom 216 (219) (A case of foreign judgment)

('23) AIR 1923 Mad 212 (214)
[illegible]

O. 21 R. 6
Notes 1–5a

the *decree is sent for execution*[4] Where an application for execution has already been made to the Court which passed the decree, a fresh application for execution need not be made to the Court to which the decree is transferred for execution[5] See also the undermentioned case[6]

2. Certificate, effect of not sending — The omission to send the certificate as required by clause (b) of this rule is a mere irregularity and does not affect the jurisdiction of the Court to which the decree is transferred for execution to entertain the application for execution[1] Nor is it a ground for an application under O 21 R 90 to set aside a sale[2] Similarly, it has been held that a mere mistake in the certificate of non satisfaction as to the number of the suit or the names of the judgment debtors will not affect the jurisdiction of the execution Court to proceed with the execution[3]

3 Presumption as to compliance with the Rule. — *Where the validity of an attachment effected by the transferee Court is attacked on the ground that no copy of the decree was sent by the Court which passed the decree it lies upon the* judgment debtor to prove that it was not transmitted the maxim applicable being *omnia præsumuntur rite esse acta* — all things are presumed to have been rightly and duly performed[1] Where a decree was passed by a Judge in the capacity of a Small Cause Judge and an application for execution of the decree was filed before the same Judge acting on the original side it was held that even though there was no formal order of transfer the provisions of this rule were sufficiently complied with[2]

4 Copy of any order. — The words 'copy of any order for the execution of the decree' in clause (c) mean a copy of any *subsisting* order and not a copy of an order for execution in the previous execution application[1]

5. Small Cause Courts — This rule applies to proceedings in the Small Cause Courts in the mofussil and if there is no sufficient property within the jurisdiction of the Small Cause Court to satisfy the decree it may be sent to another Court[1]

5a. Notice to judgment-debtor. — Where the application for transmission of the decree for execution to another Court is made when the decree is already under execution in the Court which passed it, notice should be given to the judgment debtor and the transfer should not be ordered unless there is sufficient cause to order simultaneous execution[1] See also Note 17 to Section 39 *ante*

4 ('10) 8 Ind Cas 852 (853) 35 Mad 588 (For rateable distribution)
[**But see** ('28) AIR 1928 Mad 496 (497) *(Obiter)*]
5 ('36) AIR 1936 Cal 267 (269)
6 ('36) AIR 1936 Lah 369 (369) (Order transferring decree of High Court to another Court for execution may be signed by the Registrar and need not be signed by the Judge)

Note 2

1 ('31) AIR 1931 Cal 649 (649)
2 ('97) 20 Mad 10 (12)
3 ('38) AIR 1938 Pat 513 (514)
[*See also* ('36) AIR 1936 Lah 765 (765) (Certificate wrongly addressed to the Subordinate Judge instead of to the District Judge — Defect *held* cured in the circumstances of the case)
('36) AIR 1936 Cal 571 (572) (Irregularity in manner of transfer does not prevent the transferee Court from having seisin of the execution)]

Note 3

1 ('72) 17 Suth W R 289 (291)
2 ('27) AIR 1927 Cal 782 (783) (Appeal would lie from an order in execution)
('28) AIR 1928 Rang 15 (16) 5 Rang 613 (Transfer is not invalid)

Note 4

1 ('89) 13 Bom 371 (378)

Note 5

1. ('68) 9 Suth W R 175 (177)

Note 5a

1 ('39) AIR 1939 Bom 258 (260) 41 Bom L R 431 (433) (A mere order transmitting a decree for execution to another Court may be said to be a purely ministerial order but an order which amounts to the grant of a certificate and allows simultaneous execution proceedings to go on in more than one Court is not a mere ministerial order Such an order is a judicial order)
('35) AIR 1935 Cal 269 (270)

signed by the sheristadar "by order" of the District Judge, is a valid endorsement complying with the provisions of this rule and is not vitiated by the absence of the signature of the Judge[2] **O. 21 R. 8 Notes 1-2**

Where an Assistant Judge is invested with all the powers of a District Judge within any part of the district of such Judge, he is the "District Court" in such part for the purposes of this rule[3]

2. "Competent jurisdiction." — There is a conflict of opinion as to the meaning of the expression "Court of competent jurisdiction" It was held by the Madras High Court in the undermentioned case[1] that the expression refers to *territorial* competence and therefore if the attached property is transferred from the jurisdiction of the transferee Court to some other Court, the sale by the transferee Court after the transfer of the property from its jurisdiction, is not valid even though the Court had jurisdiction over such property at the time of the transfer But in a recent case[2] the same High Court has held that the expression means "competent to sell in execution."

R. 9. [S. 227.] Where the Court to which the decree is sent for execution is a High Court, the decree shall be executed by such Court in the same manner as if it had been passed by such Court in the exercise of its ordinary original civil jurisdiction. **O. 21 R. 9**

Execution by High Court of decree transferred by other Court.

[1877, S. 227.]

Synopsis

1 Scope.
2. Ordinary original civil jurisdiction, meaning of.
3 Limitation.

1. Scope. — It has been held in a very early case of the Calcutta High Court[1] that the functions of the High Court, in respect of the execution of a decree of another Court are limited to effecting execution and to the matters arising out of the proceedings in execution, and that the question whether or not the applicant had a right to obtain execution, must be judged by the Court in which the record was

Where a decree is transferred under this rule to the High Court for execution, the High Court cannot make the decree payable in instalments[2] The reason is that though the decree could be executed as if it was passed by itself, still the High Court is not the Court which passed the decree, which Court alone can act under O 20 R. 11, *ante*

2. Ordinary original civil jurisdiction, meaning of. — See Notes to Clause 12 of the Letters Patent of Calcutta, Bombay and Madras High Courts

3. Limitation. — The period of limitation applicable to the execution of a decree transmitted by one Court to another for execution depends upon the character

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2 ('96) 23 Cal 480 (482)
('10) 5 Ind Cas 155 (155) (Mad)
3. ('70) 7 Bom H C R A C 37 (40)

Note 2

1. ('18) AIR 1918 Mad 17 (17)
2. ('34) AIR 1934 Mad 573 (574, 575)

Order 21 Rule 9 — Note 1

1. ('71) 6 Beng L R App 66 (66).
2. ('34) AIR 1934 Rang 197 (195)

O.21 R.9 Note 3 of the Court *which passed the decree* and not on the character of the Court *executing it*[1] The *manner* of execution mentioned in this rule refers to the procedure under which the execution is to be had and has no reference to the law of limitation it simply applies the High Court machinery to the execution of the decree[2] Thus where a decree passed by the Calcutta Small Cause Court was transferred to the High Court at Calcutta for execution it was held that the period of limitation applicable to the decree was Article 182 of the Limitation Act and that it was not governed by the law of limitation relating to decrees of the High Court[3]

Application for Execution

O.21 R.10 **R. 10.** [S 230, Para 1] Where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court then to such Court or to the proper officer thereof

Application for execution

[1877, Ss 230, 231; 1859, S 207]

Local Amendments

LAHORE

Add the following proviso

Provided that if the judgment debtor has left the jurisdiction of the Court which passed the decree or of the Court to which the decree has been sent the holder of the decree may apply to the Court within whose jurisdiction the judgment debtor is or to the officer appointed in this behalf to order immediate execution on the production of the decree and of an affidavit of non satisfaction by the holder of the decree pending the receipt of an order of transfer under Section 39

RANGOON

Add the following

at the time of presenting the application for execution or at the time of admission thereof the holder of a decree may if he wishes deposit in Court the fees requisite for all necessary proceedings in the execution

Synopsis

1 Successive applications for execution
2 Who may apply for execution
3 What decrees may be executed
4 Court by which decree may be executed See Section 38
5 'Court which passed the decree' See Section 37
6 Court to which the decree is sent for execution
6a Time of presentation of application for execution.
7 Executing Court cannot go behind the decree See Note 8 to Section 38
8 Application for execution
9 Dismissal of application for default.

Other Topics (miscellaneous)

Application by representatives of deceased decree holder—Succession certificate if necessary See Note 2
Maintenance decree—Execution of See Note 3

Note 3

1 ('90) 17 Cal 491 (497)
('11) 11 Ind Cas 630 (637) 36 Mad 208
('08) 31 Mad 24 (27)
('11) 11 Ind Cas 210 (216) (Cal) (So assumed)
2 ('97) 21 Cal 473 (491)
3 ('90) 17 Cal 491 (496)

1. Successive applications for execution. — The Code does not bar a succession of applications for execution [1] Thus, where an application for execution is withdrawn by the decree holder without leave to apply again having been granted by the Court, a second application is not barred Section 141 cannot be invoked so as to apply O 23 R 1, since that Section does not apply to execution proceedings [2] Similarly, O 2 R 2 does not apply to proceedings in execution,[3] and when a decree gives reliefs of a different character, such as a decree for possession and a decree for costs, there is nothing which prevents separate and successive applications for execution as regards each of them [4]

A decree in a suit for money, for principal and interest, is a single money decree and it is not permissible to levy execution thereof piecemeal The rule is that a party having a right to execute a decree for money presently payable must enforce the whole decree at the same time and if enforcement is sought for a lesser sum, he must be taken to waive his right to levy execution for the balance [5] According to the Judicial Commissioner's Court of Nagpur, where an application for execution of part of a decree is made, the judgment debtor is bound to raise an objection at once and if he fails to do so, the piecemeal execution will not be invalid and a subsequent application is not barred inasmuch as O 2 R 2 does not apply to applications in execution [6]

A subsequent application for execution in respect of reliefs *different* from those claimed in a prior application cannot be said to be one in continuation of the prior application

2. Who may apply for execution. — It is only the decree holder whose name is on the record that is entitled to apply for execution of the decree [1] A defendant in a partition suit in which a decree has been passed is in the position of a decree holder and will be entitled to apply for execution [2] In the case of decrees in *representative suits* a person not on the record, but who was represented in the suit by the decree holder on record, can apply to be brought on the record and to execute the decree [3] Similarly the representatives of a deceased decree holder can apply to be brought on the record and to execute the decree [4]

Where an application was made by the guardian *ad litem* of a minor after the latter had attained majority, but the latter ratified the application subsequently, it was held that the ratification rendered the application valid from the date of the ratification [5]

Order 21 Rule 10 — Note 1

1 (11) 11 Ind Cas 385 (386) (Cal)
2 (94) 17 All 106 (111 112) 22 Ind App 44 (P C) (Overruling 10 All 71)
(91) 18 Cal 635 (639)
3 (33) AIR 1933 Bom 364 (365) 57 Bom 468
4 (91) 18 Cal 515 (517)
(97) 19 All 98 (100) (Possession and mesne profits)
(75) 7 N W P H C R 95 (97) (Do)
(88) 12 Bom 98 (100) (Do)
(09) 4 Ind Cas 408 (409) (Cal)
[But see (10) 26 Cal 888 (890) (Following 15 Bom 242)
(91) 15 Bom 242 (244) (Though not in accordance with law yet it is a step in-aid)]
5 (33) AIR 1933 Bom 364 (365 366) 57 Bom 468
6 (32) AIR 1932 Nag 89 (90) 28 Nag L R 77
7 (33) AIR 1933 Lah 3 (4) 15 Lah 205

Note 2

1. (17) AIR 1917 Oudh 182 (185) (Stranger not a party to the suit cannot apply)
(75) 24 Suth W R 10 (11) (Do)
(91) 18 Cal 639 (641)
(69) 11 Suth W R 271 (272)
See also S 2 sub s (3) note 2
2 (23) AIR 1923 Bom 23 (23) 46 Bom 937
3 (23) AIR 1923 Mad 472 (473)
[*See also* (76) 1 All 510 (511) (Decree in favour of a firm in the name of agent—Another agent applying — Proceedings though irregular, not invalid)
(37) AIR 1937 Pat 607 (608) (Father of joint Hindu family obtaining decree in respect of debt due to joint family after partition — Sons are interested in decree and can apply for execution)]
4 (70) 14 Suth W R 162 (162)
5 (31) AIR 1931 Lah 600 (601)

Where a *decree grants a relief to a person named in the decree, it has been* held that such person so named can enforce the decree notwithstanding the fact that he is not party to the *suit*[6]

As to the necessity for the production of succession certificate along with the application for execution where the decree holder is dead, see the undermentioned cases[7]

It has been held that an insolvent is not debarred from making an application for execution of a decree which he has obtained before his adjudication[8]

Fresh vakalatnama, if necessary for execution proceedings — Proceedings in execution are proceedings in continuation of the suit, and therefore a fresh authority is not required for a pleader to appear, act and plead on behalf of the decree holder in execution proceedings, if he was authorized by a *vakalatnama* in the suit itself[9] But an application for execution filed by a vakil who has no *vakalat* from the decree holder at all is *not one in accordance* with law[10]

Where an agent is authorized to apply for execution of a decree, he is also entitled to *appeal* against an order refusing to execute the decree[11]

Joint application for execution — Persons entitled to separate amounts under a decree may join in one application Where in such a case, one of them subsequently withdraws from the application, it may continue in the name of the other persons[12]

3 **What decrees may be executed.** — See Section 38, Note 5 and Section 47, Note 33 and the undermentioned cases[1]

4. **Court by which decree may be executed** — See Section 38

5. **"Court which passed the decree."** — See Section 37

6. **Court to which the decree is sent for execution.**— Where a decree is transferred to another Court for execution under Section 39 and the records are not sent back to the transferor Court, an application made to the Court which passed the decree is not an application made to the *proper* Court within the meaning of Article 182,

6 (32) AIR 1932 Bom 378 (379)
(32) AIR 1932 Mad 193 (194) (Decree holder need not be a party to the decree)

7. (97) 18 All 34 (35) (Succession certificate *necessary — But may be produced during pendency of proceedings*—It is not a condition precedent)
(02) 24 All 138 (142) (Do)
(92) 19 Cal 482 (485) (Do)
(94) 16 All 26 (28) (Application without certificate will save limitation)
(11) 9 Ind Cas 800 (801) (All) (*Do*)
(96) 20 Bom 76 (78) (Do)
(93) 20 Cal 755 (757) (Do)
(92) 16 Bom 349 (350) (Where claim is by survivorship certificate is not necessary — But where claiming as heir certificate is necessary)
(99) 22 Mad 350 (351) (Claim by survivorship —Certificate not necessary)
(93) 20 Cal 103 (105) (Decree in favour of mohunt—Application by his successor — Certificate *not necessary*)
(35) AIR 1935 Nag 1 (2) 31 Nag L R 126 (Application according to O. 21 Rr 11 to 14— Absence of succession certificate does not make application as one not in accordance with law)

8. (39) AIR 1939 Mad 196 (198)

9. (12) 13 Ind Cas 365 (369) (Cal)
(25) AIR 1925 Pat 692 (693)
(25) AIR 1925 Pat 369 (372) 4 Pat 378
(85) 7 All 564 (565) (An application by pleader after client's death is invalid)

10 (35) AIR 1935 Mad 786 (789)
(*See also* (37) AIR 1937 Mad 760 (762))

11. (36) AIR 1936 Lah 503 (506) (*Agent competent to execute decree* — Agent can remove objections to execution in both appellate and execution Courts)

12 (35) AIR 1935 All 402 (403 404) (Decree in favour of number of persons awarding separate costs)

Note 3

1 (70) 2 N W P H C R 303 (201) (Declaratory decrees cannot be executed)
(02) 26 Bom 707 (710) (*But future maintenance awarded by decree must be enforced in execution*)
(92) 19 Cal 139 (140) (Do)

clause 5 of the Limitation Act[1] See also Section 42 Note 3 A transfer made in an irregular manner is not null and void and if the irregularity is not objected to, an application made to the transferee Court is in order[2] Where a decree is transferred to another Court for execution, the mere fact that the transfer is made on the ground that the judgment debtor has immovable property within the jurisdiction of such Court does not deprive such Court of the power to entertain an application for the *arrest* of the judgment debtor[3]

Where an order has been made by the Court which passed a decree for transfer to another Court, the decree holder is entitled to apply for execution to the transferee Court, even before the copy of the decree has been received by the latter from the former Court[4] The reason is that the order of transfer is a judicial order and therefore takes effect from the date on which it was passed

6a. Time of presentation of application for execution. — It is in the discretion of the Judge or officer appointed in that behalf to accept an application for execution beyond office hours[1]

7. Executing Court cannot go behind the decree. — See Note 8 to Section 38

8. Application for execution — It has been already seen in Note 5 to Section 38, *ante*, that where a decree is reversed, modified or affirmed in appeal, the only decree capable of execution is the appellate decree Therefore, if a decree of a lower Court is confirmed on appeal while execution proceedings are pending a fresh application for execution is necessary[1]

When a decree follows an attachment before judgment O 38 R 11 does not exempt the plaintiff from making an application as required by this rule[2]

An application under Section 39 for transfer of a decree is not an application for execution[3] but is only an application to take some step in aid of execution[4] It is necessary, however, even for this purpose that the application for transfer should have been made to the Court *having jurisdiction* in the matter[5]

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(25) AIR 1925 Mad 80 (84) (Satisfied decree can not be executed)
(94) 19 Bom 546 (549) (Do)

Note 6

1 (16) AIR 1916 P C 16 (18) 39 Mad 610 43 Ind App 238 (PC) (Affirming AIR 1914 Mad 435 on appeal)
(34) AIR 1934 Lah 728 (730) 16 Lah 80 (The original Court has no power to execute until the decree is re transferred)
[illegible]

Page 479 (479)

3 (38) AIR 1938 Mad 27 (28 29)

4 (33) AIR 1933 Mad 627 (627 628) 56 Mad 692 (Following 35 Mad 588 and dissenting from AIR 1928 Mad 496)

Note 6a

1 (38) AIR 1938 Nag 46 (47) ILR (1938) Nag 451

Note 8

1 (30) AIR 1930 Bom 225 (227) (A prayer for continuation of application is a defect curable by Section 99)

2. (10) 7 Ind Cas 856 (857) 34 Mad 25
(88) 12 Bom 400 (406)
(06) 33 Cal 639 (643)
(29) AIR 1929 Nag 148 (150) 25 Nag L R 91
[illegible]

(35) AIR 1935 [illegible]

4 (26) AIR 1926 All 473 (474)
(33) AIR 1933 Oudh 131 (131 132)
(33) AIR 1933 Sind 78 (80) 27 Sind L R 109
(32) AIR 1932 Pat 309 (310) 11 Pat 785 (But an application for transfer to a Court which has no jurisdiction to execute is not a step in aid)
(37) AIR 1937 Bom 365 (368) I L R (1937) Bom 691

5. (32) AIR 1932 Pat 309 (311) 11 Pat 785.

O. 21 R. 10 Notes 8–9

Where a decree holder makes an application praying for a relief *not granted by the decree*, it is not an application which will save limitation under Article 182 of the Limitation Act[6] But an application which is merely incorrect in some respects would be one furthering execution[7]

Where a decree is transferred for execution to another Court, it is the application for execution that initiates the proceedings in execution The receipt of the decree on transfer is a mere ministerial act[8]

9. Dismissal of application for default. — A Court has inherent power to dismiss an application for execution when the applicant fails, through his own laches, to put the Court in a position to proceed with the application[1] But such dismissal does not bar a fresh application for execution[2]

As to whether a Court has power to restore to the file an application dismissed for default, see Notes to Order 9 Rule 9

Local Amendment

RANGOON

Add the following as Rule 10A

O. 21 R. 10A (Rangoon)

"10A If no application is made by the decree-holder within six months of the date of the receipt of the papers the Court shall return them to the Court which passed the decree with a certificate stating the circumstances as prescribed by Section 41"

O. 21 R. 11

R. 11. [Ss. 256, 235.] *(1)* Where a decree is for the payment of money the Court may, on the oral application of the decree-holder at the time of the passing of the decree, order immediate execution[3] thereof by the arrest of the judgment-debtor, prior to the preparation of a warrant if he is within the precincts of the Court.

Oral application.

(2) Save as otherwise provided by sub-rule *(1)*, every application for the execution of a decree shall be in writing, signed and verified[4] by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely :—

Written application.

(a) the number of the suit ;

Decree must be treated as a foreign decree in the Burman Court for purposes of execution and Burman Court could not execute it)

Note 9

1. (93) 15 All 84 (95) (F B)
(33) AIR 1933 Mad 418 (422) 56 Mad 490(F B)
2. (93) 15 All 84 (101) (F B)
(95) 18 Mad 131 (133)
[But see (82) 1882 All W N 97 (97) (Under Code of 1877 when decree holder did not use due diligence subsequent application could not be granted Not law under this Code) ('79) 2 All 384 (386) (Do)]

O. 21 R. 11

(*b*) the names of the parties;

(*c*) the date of the decree,[6]

(*d*) whether any appeal has been preferred from the decree;[7]

(*e*) whether any, and (if any) what, payment or other adjustment[8] of the matter in controversy has been made between the parties subsequently to the decree;

(*f*) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results;[9]

(*g*) the amount with interest (if any) due upon the decree,[10] or other relief granted thereby, together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed;

(*h*) the amount of the costs (if any) awarded;

(*i*) the name of the person against whom execution[11] of the decree is sought; and

(*j*) the mode in which the assistance of the Court is required,[12] whether—

(*i*) by the delivery of any property specifically decreed;

(*ii*) by the attachment and sale, or by the sale without attachment, of any property,

(*iii*) by the arrest and detention in prison of any person;

(*iv*) by the appointment of a receiver;

(*v*) otherwise, as the nature of the relief granted may require

(*3*) The Court to which an application is made under sub-rule (*2*) may require the applicant to produce a certified copy of the decree.[13]

[1877, Ss 235, 256; 1861, S 13; 1859, S 212 See Ss 38, and 51 and 135 and O 40 R 1]

Local Amendments

ALLAHABAD

(*1*) *For* clause (*f*) of sub rule (2) *substitute* the following

(*f*) The date of the last application, if any,' and

(*2*) *Add* the following proviso to sub rule (2)

Provided that when the applicant files with his application a certified copy of the decree, the particulars specified in clauses (*b*), (*c*) and (*h*) need not be given in the application'

O 21 R.11 **MADRAS**

(1) In sub rule (2) *between* clauses *(f)* and *(g)* *insert* the following new clause

(ff) whether the original decree holder has transferred any *part of his* interest in the decree and if so the date of the transfer and the name and address of the parties to the transfer

(2) *Add* the following to sub rule (2) (j)

In an execution petition praying for relief by way of attachment of a decree of the nature specified in sub rule (1) of Rule 53 of this Order there shall not be included any other relief mentioned in this clause

(3) *Add the following proviso at the end of sub rule (2)*

Provided that when the applicant files with his application a certified copy of the decree the particulars specified in clauses *(b)* *(c)* and *(h)* need not be given in the application

NAGPUR

After sub clause *(v)* of clause *(j)* of sub rule (2) *insert* the following proviso

Provided that when the applicant files with his application a certified copy of the decree the particulars specified in clauses *(b)* *(c)* and *(h)* need not be given in the application

OUDH

For clause *(f)* of sub rule (2) *substitute* the following

(f) the date of the last application if any

PATNA

(1) *Add* the following as sub rule (1A)

(1A) Where an order has been made under Section 39 for the transfer of a decree for the payment of money for execution to a Court within the local limits of the jurisdiction of which the judgment debtor resides such Court may on the production by the decree holder of a certified copy of the decree and an affidavit of non satisfaction forthwith order immediate execution of the decree by the arrest of the judgment debtor

(2) *Substitute* the words and figures sub rules (1) and (1A) *for* the word and figure sub rule (1) in sub rule (2)

SIND

Add the following as clause *(ff)* to sub rule (2)

(ff) Whether the original decree holder has transferred any part of his interest in the decree and if so the date of the transfer and the name and address of the parties to the transfer

Synopsis

Other Topics (miscellaneous)

1 **Legislative changes** — Sub rule (1) corresponds to Section 256 of the old Code and sub rule (2) to Section 235 Sub rule (3) is new and empowers the Court executing the decree to call upon the decree holder to produce a certified copy of the decree [1]

The following are the points of difference between sub rule (1) and Section 256 —

(1) Section 256 provided for immediate execution only where the amount decreed did not exceed the sum of one thousand rupees This rule fixes no such limit

(2) Under Section 256 the Court could order immediate execution only by the *issue of a warrant* Under this rule the order may be made even prior to the preparation of a warrant

(3) Under this rule execution cannot issue against the *moveable property* of the judgment debtor as was possible under the old Code

(4) Under the old Code execution could be ordered if the judgment debtor was within the local limits of the jurisdiction of the Court Under this rule it can be ordered only if he is within the *precincts of the Court*

The following are the important alterations in sub rule (2) —

(1) The words together with particulars of any cross decree whether passed before or after the date of the decree sought to be executed in clause (g) are new

(2) The words and sale or by the sale without attachment in clause (j) sub clause (ii) are new

(3) Sub clause (iv) clause (j) is new

2 **Scope of the Rule** — An application for execution should be in *writing* except in the case dealt with under sub rule (1) when it may be *oral* Sub rule (2) says what particulars a written application for execution shall contain But every omission to comply with the said requirements is not necessarily such a defect as will vitiate the execution proceedings [1] Informalities of an immaterial character will not vitiate the proceedings [2] Thus the omission to mention the amount of costs[3] or giving a wrong

Order 21 Rule 11 — Note 1

1 (32) AIR 1939 All 85 (88) 53 All 391

Note 2

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2 (??) AIR 19?? S d 99 (30) 15 S nd L R 156   3 (22) AIR 192? S nd 29 (30) 15 S nd L R 156

O. 21 R. 11
Notes 2-2a

suit number,[4] or making a mistake in the name of the judgment debtor,[5] or omitting to state the names of all the persons interested in the decree,[6] or wrongly calculating the pleader's fee,[7] or the failure to draw up the petition in a tabular form,[8] is only an irregularity of an immaterial character which will not vitiate the proceeding. Where however the omissions relate to *material* particulars, the application cannot be considered to be one in accordance with law and cannot save limitation.[9] Whether an omission is material or not will depend upon the particular facts of each case.[1]

Where an application for execution complies with the requirements of O. 21, Rules 11 to 14, it is in accordance with law. Although in the absence of a succession certificate the decree holder may not be entitled to realize the fruits of his decree, yet, the want of a succession certificate will not make the application for execution itself one not in accordance with law.[11] See also Note 2 to Order 21 Rule 10.

Where an application for execution is made, which is not in proper *form or is otherwise defective it is the duty of the Court to dispose of the application either by giving the decree holder an opportunity to amend his application or by rejecting it.*[12]

This rule prescribes the form for an application for *execution*. There is no particular form in which an application for the *transfer* of a decree for execution to another Court should be made. Such application need not contain the particulars mentioned in this rule. Where the application gives sufficient particulars of the decree sought to be transferred to indicate with precision the decree which the Court is to transfer, the application is one in accordance with law.[13]

2a. Applicability of the Rule to execution of decrees under other Acts.— Under the Oudh Rent Act, XXII of 1886 (Section 146), the Orissa Tenancy Act, II of 1913 [Section 195 (j)] and the Madras Estates Land Act, I of 1908 [Section 192 (g)], the Court may order immediate execution, on the oral application of the decree-holder, as enacted in sub-rule (1) of this rule.

In applications for execution of decrees relating to immovable property under the Chota Nagpur Tenancy Act, VI of 1908, Section 210 (3) (b), as amended by Act VI of 1920 [Section 50 (1)], the application shall be accompanied by a certified copy of the decree, as provided in sub-rule (3) of this rule.

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4. ('98) 25 Cal 594 (597, 601) (F B)
('84) 10 Cal 541 (544)

5. ('30) AIR 1930 Mad 172 (173)

6. ('32) 139 Ind Cas 151 (152) (Lah)
('31) AIR 1931 Lah 600 (601)

7. ('18) AIR 1918 Mad 1090 (1092), 40 Mad 949

8. ('21) AIR 1921 Low Bur 37 (39), 11 Low Bur Rul 163

9. ('31) AIR 1931 All 722 (723) (Incorrect entries in columns 2, 6 and 8.)
('26) AIR 1926 Pat 533 (534) (Flagrantly defective application.)
('74) 21 Suth W R 309 (310)
('68) 10 Suth W R 423 (428)

10. ('26) AIR 1926 Cal 1146 (1149)
('24) AIR 1924 Cal 393 (39-)
('34) AIR 1934 Bom 307 (310), 59 Bom 1 (*In accordance with law means that application though defective in some particular is one upon which execution can lawfully be ordered.*)
('34) AIR 1934 Cal 465 (466) (Application for execution not mentioning moneys realised by attachment of decrees obtained by judgment debtor—Omission does not vitiate application.)

11. ('35) AIR 1935 Nag 1 (2), 31 Nag L R 126

12. ('34) AIR 1934 All 481 (483), 56 All 791 (F B) (Defective application — If no order is passed by Court it should be deemed to be pending.)
('20) AIR 1920 Lah 122 (122)
(*See* ('37) AIR 1937 Sind 108 (110), 31 Sind L R 14 (Application presented by son of decree-holder on latter's behalf—No mention in application that son was acquainted with facts of case —Court returning application for amendment as not being made by proper person—Application *held rightly returned as not being proper under* O. 21 R. 11 (2)—Application cannot be said to be pending in Court when it is not filed after *amendment.*))

13. ('37) AIR 1937 All 397 (399)

O.21 R.11
Notes 2a–4

As to what particulars are necessary when an application is made under sub rule (2) of this rule to execute a decree against the immovable properties of the judgment debtor, under the Bengal Tenancy Act VIII of 1885 and the Orissa Tenancy Act II of 1913, see Sections 162 and 216 of those Acts respectively

See also the undermentioned case [1]

2b "Decree for payment of money." — A decree to come within the description of a decree for the payment of money need not state the exact amount due A decree under which the amount due has to be ascertained subsequently may be a decree for the payment of money [1]

See also Note 6 to Section 73 *ante*

3 Immediate execution — Sub-rule (1) — Privilege from arrest — S 135 *ante* deals with exemptions from arrest But sub section (3) thereof provides that 'nothing in sub section (2) shall enable a judgment debtor to claim exemption from arrest under an order for *immediate execution* [1]

4 Verification of application — The application for execution should be signed and verified by (a) the applicant or (b) some other person acquainted with the facts of the case Where there are *several* applicants it is not necessary that *all* of

with

other

that

he is acquainted with the facts of the case"

Although this rule permits the signing and verification of an application for execution by some person other than the decree holder the application itself must be that of the decree holder or his recognized agent or pleader [3]

An application not signed and verified as required by this rule is a defective application which ought to be rejected [4] Where the period of twelve years from the date

Note 2a

1 (39) AIR 1939 Bom 367 (369) (Consent order in proceedings under the Guardians and Wards Act for payment of schooling and maintenance expenses of minors by their father was held not to be a decree for the payment of money in favour of the wife and could not be executed as such)

Note 2b

1 (39) AIR 1939 Bom 367 (368) (In the circumstances of this case however it was held that the decree was not one for payment of money as the

Note 3

1 (69) 9 Suth W R 549 (551) (Case under Small Cause Courts Act S 19 of Act XI of 1865)

Note 4

1 (4) AIR 1924 Pat 23 (25) 2 Pat 809

2 (24) AIR 19 4 Cal 811 (811)

(20) AIR 1920 Bom 196 (196) (Verification by pleader)

(20) AIR 1920 Lah 129 (129) (Verification by decree hol r s son is sufficient)

(25) AIR 19 5 Lah 693 (693) (Do)

(01) 6 All 154 (155) (Verification by attorney)

(30) AIR 1930 Lah 603 (604) (Application by next friend of decree holder after his attaining majority — If *bona fide* will not be dismissed)

(36) AIR 1936 All 17 (18) (Application signed and verified by person purporting to be mukhtar i am of decree holder — Mukhtarnama not pro

Return of appl cation for amendment *held* proper)]

[**But see** (05) 28 Mad 396 (398) (Application by next friend after majority *held* to be not in accordance with law)]

3 (37) AIR 1937 Mad 760 (761)

4 [*See* (36) AIR 1936 All 17 (18) (Application signed and verified on behalf of decree holder by person purporting to be mukhtar i am of decree holder — Mukhtarnama not filed — Court not satisfied that he was authorized to sign—Rejection of application is proper)]

O.21 R.11
Notes 2-2a

suit number,[4] or making a mistake in the name of the judgment debtor,[5] or omitting to state the names of all the persons interested in the decree,[6] or wrongly calculating the pleader's fee[7] or the failure to draw up the petition in a tabular form[8] is only an irregularity of an immaterial character which will not vitiate the proceeding. Where however the omissions relate to *material* particulars the application cannot be considered to be one in accordance with law and cannot save limitation.[9] Whether an omission is material or not will depend upon the particular facts of each case.[10]

Where an application for execution complies with the requirements of O. 21 Rules 11 to 14 it is in accordance with law. Although in the absence of a succession certificate the decree holder may not be entitled to realize the fruits of his decree yet the want of a succession certificate will not make the application for execution itself one not in accordance with law.[11] See also Note 2 to Order 21 Rule 10.

Where an application for execution is made which is not in proper form or is otherwise defective it is the duty of the Court to dispose of the application either by giving the decree holder an opportunity to amend his application or by rejecting it.[12]

This rule prescribes the form for an application for *execution*. There is no particular form in which an application for the *transfer* of a decree for execution to another Court should be made. Such application need not contain the particulars mentioned in this rule. Where the application gives sufficient particulars of the decree sought to be transferred to *indicate with precision* the decree which the Court is to transfer the application is one in accordance with law.[13]

2a. Applicability of the Rule to execution of decrees under other Acts.— Under the Oudh Rent Act XXII of 1886 (Section 146) the Orissa Tenancy Act II of 1913 [Section 198 (j)] and the Madras Estates Land Act I of 1908 [Section 192 (g)] the Court may order immediate execution on the oral application of the decree holder as enacted in sub rule (1) of this rule.

In applications for execution of decrees relating to immovable property under the Chota Nagpur Tenancy Act VI of 1908 Section 210 (3) (b) as amended by Act VI of 1920 [Section 50 (1)], the application shall be accompanied by a certified copy of the decree as provided in sub rule (3) of this rule.

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4. ('98) 25 Cal 594 (597, 601) (F B)
('84) 10 Cal 541 (544)

5. ('30) AIR 1930 Mad 172 (173)

6. ('32) 139 Ind Cas 151 (152) (Lah)
('31) AIR 1931 Lah 600 (601)

7. ('18) AIR 1918 Mad 1090 (1092) 40 Mad 949

8. ('21) AIR 1921 Low Bur 37 (39) 11 Low Bur Rul 163

9. ('31) AIR 1931 All 722 (723) (*Incorrect entries in columns 2, 6 and 8.*)
('26) AIR 1926 Pat 533 (534) (Flagrantly defective application.)
('74) 21 Suth W R 309 (310)
('6) 10 Suth W R 428 (428)

10. ('26) AIR 1926 Cal 1146 (1148)
('24) AIR 19 4 Cal 838 (839)
('34) AIR 1934 Bom 307 (310) 59 Bom 1 (In accordance with law means that application though defective in some particular is one upon which execution can lawfully be ordered.)
('34) AIR 1934 Cal 465 (466) (Application for execution not mentioning moneys realised by attachment of decrees obtained by judgment debtor—Omission does not vitiate application.)

11. ('35) AIR 1935 Nag 1 (?) 31 Nag L R 176

12. ('34) AIR 1934 All 491 (489) 56 All 791 (F B) (Defective application — If no order is passed by Court it should be deemed to be pending.)
('20) AIR 19 0 Lah 142 (122)
[See ('3) AIR 1937 Sind 108 (110) 31 Sind L R 14 (Application presented by son of decree holder on latter's behalf—No ...
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13. ('37) AIR 1937 All 397 (399)

9 **Previous applications and their results.** — An omission to specify all the previous applications with their dates and their results is not a material defect such as would vitiate the application and render it one not in accordance with law within Article 182 of the Limitation Act [1] **O. 21 R. 11 Notes 9-11**

10. Amount due upon the decree — Clause (g) — A Court will be justified in declining to act on an execution petition when the decree holder does not state the amount due upon the decree [1] Where a decree awards interest and the application for execution specifies the interest from the date of the decree to the date of the application execution may be ordered for *future* interest also up to the date of sale, even though it is not specifically included in the application [2]

See also the undermentioned cases [3]

10a Amount of costs awarded — Clause (h) — The omission to mention the particulars mentioned in this clause is not a material omission and will not vitiate the application for execution [1]

11. Against whom execution is to issue — Clause (i) — An application for execution must state the name of the person against whom execution is sought [1] Where an application is made against a dead person it cannot be acted upon but it will be a step in aid of execution within the meaning of Article 182 of the Limitation Act if it has been made *bona fide* in ignorance of the death [2] Similarly where in an application for execution the guardian *ad litem* of a minor defendant is described by mistake as the judgment debtor the application will give a fresh starting point for limitation [3] But where a minor judgment debtor is not represented at all by a guardian the application is not one in accordance with law and is of no effect [4] A decree for

Note 9

1 (26) AIR 1926 Cal 1146 (1148)
(24) AIR 1924 Cal 398 (398)
(01) 23 All 162 (163)
(91) 1891 All W N 154 (155)
(28) AIR 1928 Mad 440 (442 444)
(93) 16 Mad 142 (143)
(92) 1892 All W N 114 (115)
As to the period of limitation for an application for execution see Articles 182 and 183 of the Limitation Act
[**But see** (22) AIR 1922 Sind 29 (30) 15 Sind L R 156 (Would be not in accordance with law where it is necessary to determine whether application is barred or not)]

Note 10

1 (21) AIR 1921 Nag 90 (91)
(22) 65 Ind Cas 120 (120) (Pat) (Such an application is not a step-in aid)
(90) 1890 All W N 93 (93) (Decree holder deliberately omitted to correct error in calculation of interest— Petition struck off for non prosecution is not an application in accordance with law)

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execution to describe the nature of the tenure or to do so necessarily according to the Record of Rights)
(32) AIR 1932 Cal 858 (863) 59 Cal 1450 (The

Note 10a

1 (28) AIR 1928 Mad 440 (441)
(22) AIR 1922 Sind 29 (30) 15 Sind L R 156

Note 11

1 (72) 18 Suth W R 55 (56)
2 (94) 17 Mad 76 (77)
(08) 35 Cal 1047 (1049)
(97) 19 All 337 (339) (Such application made with knowledge of death will not save limitation)
[**But see** (34) AIR 1934 All 463(464) 56 All 463]
For execution against legal representative of a deceased judgment debtor see S 50 Notes 12 13 and 14
Also see S 52 Notes 4 to 6 and 8 and the following case
(9) 1897 All W N 241 (242) (Application against wrong legal representative — Step-in-aid of execution)
3 (18) AIR 1918 All 289 (289)
(88) 12 Bom 427 (430)
4 (11) 12 Ind Cas 628 (629) (All)

O.21 R.11
Notes 11-13

costs passed against a minor represented by his father as guardian (or next friend) cannot be executed against the *father* [6]

12 Mode in which the assistance of the Court is required — Clause (j). — An execution application which does not specify the manner in which the assistance of the Court is required is not an application in accordance with law [1] So also is an application asking for a relief which the Court cannot grant inasmuch as the Court is asked to do something which it is not competent to do [2]

The words otherwise, as the nature of the relief granted may require' in clause (j) show that the modes of execution mentioned above are not *exhaustive* [3] But where the decree holder prays for a particular mode of execution he cannot ask the Court to give a different mode of execution upon that application [4]

This rule should be read with Section 51 *ante* and O 40 R 1, *infra* and an order for the appointment of a receiver by way of execution of a decree must be deemed to be made under O 40 R 1 and must satisfy the requirements thereof [5]

Where the property sought to be attached is inalienable under the law, the Court has no power to attach it the reason is that attachment will be futile in such a case [6]

13 Certified copy of decree to be filed — Sub-rule (3) — It is not imperative that an application for execution should in all cases be accompanied by a copy of the decree [1] The Court can order the execution to proceed without a copy of the decree

(18) AIR 1918 Pat 69 (69) 4 Pat L Jour 35 (But where a guardian is proposed though without an application it is a step-in aid)
[See however (36) AIR 1936 Nag 77 (78) (Decree against minor represented by guardian —Death of guardian subsequently—Execution taken out in ignorance of such death — *Held* that the application was a step-in aid of execution and could save limitation)]

5 (35) AIR 193_ All 359 (360)

Note 12

1 (95) 19 Bom 34 (35)
(11) 11 Ind Cas 696 (696) (Cal) (Unless the defect is remedied the application must be dismissed)
(69) 9 Suth W R 390 (391)
(75) 7 N W P H C R 79 (79)
(29) AIR 1929 Nag 148 (150) 25 Nag L R 94
(32) AIR 1932 Lah 534 (534) 14 Lah 6 (It was held on the facts that the mode of execution was sufficiently described and that therefore it was a step-in-aid of execution)
[*See also* (91) 18 Cal 462 (463) (But where it refers to previous application in which mode of execution is mentioned it is in accordance with law)]
[**But see** (83) 1883 Pun Re No 23 (Such an application received by Court without objection is in accordance with law)]

2 (05) 27 All 619 (621)
(90) 12 All 64 (65)
(82) 4 All 34 (35)
(18) AIR 1918 Bom 236 (240) 42 Bom 420
(10) 5 Ind Cas 601 (609) 34 Bom 189
(89) 13 Bom 237 (239)
(00) 2 Ind Cas 911 (912) (Cal)
(82) 8 Cal 174 (177)
(10) 7 Ind Cas 480 (189) (Cal)
(05) 1 Nag L R 61 (63, 64)
(31) AIR 1931 Sind 160 (161) 25 Sind L R 525 (May be in accordance with law if there is a *bona fide* belief about competency)
(14) AIR 1914 Mad 663 (664) (Do — In such a case the application can be amended)
(13) 17 Ind Cas 210 (212) 37 Bom 42
[**But see** (05) 96 Bom 233 (237)]

3 (13) 18 Ind Cas 691 (695) (Mad) (Case under old Code)
(20) AIR 1920 Lah 117 (118) (Temporary alienation)
[*See also* (39) AIR 1939 Oudh 116 (118) 14 Luck 538 (It is proper for the Court to order execution of a decree for the payment of money by means of appointment of a receiver when it is just and convenient from the point of view both of the decree holder as well as judgment debtor)

4 (99) 1899 Pun Re No 21 p 121
(11) 9 Ind Cas 240 (241) (Oudh)
[**But see** (06) 33 Cal 300 (303)]

5 (32) AIR 1932 Cal 189 (192) 59 Cal 20_
[*See also* (33) AIR 1933 Nag 266 (267) (Jabagir unattachable—Still receiver can be appointed on suitable allowance to judgment debtor)]

6 (35) AIR 1935 Nag 183 (185) 31 Nag L R 239 (Case under S 16 of the C P Land Alienation Act)

Note 13

1 (07) 31 Bom 162 (164)
(30) AIR 1930 Cal 804 (805 806) 57 Cal 996 (Especially when it is the Court which passed the decree or when the decree is voluminous)
(71) 16 Suth W R 25 (25)
(69) 11 Suth W R 23 (29)

being filed[2] An application not accompanied by a copy of the decree cannot be said to be one not in accordance with law for the purposes of limitation[3] It will be in accordance with law even if it is dismissed for non compliance with an order of the Court requiring a copy of the decree to be produced[4]

14. Concurrent applications for execution — See Note 10 to Section 38

15. Amendment of application. — See Notes to Rule 17 *infra*

R. 12. [S 236.] Where an application is made for the attachment of any moveable property belonging to a judgment-debtor but not in his possession, the decree-holder shall annex to the application an inventory of the property to be attached, containing a reasonably accurate description of the same.

Application for attachment of moveable property not in judgment debtor's possession

[1877, S. 236; 1859, S. 214. See Ss 2 (13) and 60.]

Synopsis

1 Scope of the Rule. | 2 Failure to annex inventory — Effect of

1. Scope of the Rule.—This rule applies to moveables in the possession of third parties When a third party has some moveables belonging to himself and others belonging to the judgment debtor, an inventory is obviously necessary before an attachment can be made[1] But, where a decree is passed under Section 52 of the Code against the legal representatives of a deceased debtor and the moveable property attached is in their possession, the rule has no application[2] The reason is that the legal representatives themselves are the judgment debtors and therefore the property sought to be attached cannot be said to be property belonging to, but not in the possession of, the judgment debtor No inventory is necessary where the property sought to be attached is in the possession of the judgment debtor himself[3]

2. Failure to annex inventory—Effect of.—Where a decree holder fails to annex to the application for execution of his decree an inventory of the property to be attached with a reasonably accurate description of the same as required by this rule,

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(68) 10 Suth W R 144 (145)
(68) 9 Suth W R 362 (362)
(1865) 4 Suth W R Misc 15 (16) (Original decree may not be filed)
(10) 5 Ind Cas 660 (669) (Cal)
(69) 11 Suth W R 271 (272)
2 (10) 11 Cal L Jour 243 (247) (Decree burnt or destroyed)
3
4. (18) AIR 1918 All 242 (243) 40 All 209
('18) AIR 1918 Pat 547 (548)

Order 21 Rule 12 — Note 1

1 ('30) AIR 1930 Bom 65 (66) (Execution againt legal representatives under S 50 of the Code—Inventory not necessary)
(93) 15 All 84 (86)
(81) 7 Cal 556 (559)
('11) 9 Ind Cas 729 (729) (Mad) (Inaccurate description—Wrong date—No prejudice—Sale valid —S 236 requires only a reasonably accurate description)
('69) 11 Suth W R 8 (16) (FB)
2. (27) AIR 1927 Bom 52 (52) 50 Bom 730 [*See also* (92) 1892 All W N 55 (56) 14 All 193. (Facts not clear)]
3. ('38) AIR 1938 Cal 235 (235)

O. 21 R. 12 Note 2 the application is not one in accordance with law within the meaning of Article 182 of the Limitation Act and cannot save limitation [1]

O. 21 R. 13

Application for attachment of immoveable property to contain certain particulars

R. 13. [S. 237.] Where an application is made for the attachment of any immoveable property belonging to a judgment-debtor, it shall contain at the foot —

(a) a description of such property sufficient to identify the same and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of such boundaries or numbers; and

(b) a specification of the judgment-debtor's share or interest in such property to the best of the belief of the applicant, and so far as he has been able to ascertain the same

[1877, Ss 237, 238; 1859, S. 213]

Local Amendment

RANGOON

The following shall be *substituted* for Rule 13

"R 13 (1) When application is made, for execution of a decree relating to immovable property included within the cadastral or Town Survey and the decree does not contain a plan of the property, or for execution of decree by the attachment and sale of such property, the application must be accompanied by a certified extract from the latest *kwin* or town map, with the boundary of the land in question marked with a distinctive colour The particulars specified in the annexed instructions, which have been issued regarding the filling up of forms of process concerning immovable property, must also be furnished so far as they are not given in the plan In the case of other immovable property, a plan is not required, but such of the particulars in the annexed instructions as can be given must be supplied —

1 If the property to be sold is agricultural land which has been cadastrally surveyed and of which survey maps exist, the area, *kwin* number, latest holding number (if different kinds of holdings, *e g*, rice land and garden holdings are numbered in different series, the kind of holding must be stated), field numbers (if the property does not coincide with one complete holding), year of *kwin* map from which the holding number is taken and revenue last assessed upon the land, must be given

2 In the case of other agricultural land, the area and village tract within which it falls, distance and direction from nearest town or village and boundaries should be specified

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Note 2

1 ('15) AIR 1915 All 320 (321) 37 All 527

('92) 1892 All W N 47 (47)

('92) 1892 All W N 70 (71) (Though the execution application expressly stated that it was filed to save limitation)

(See ('39) AIR 1939 Pat 75 (75) (In this case, it was held that it was not right to hold an application not in accordance with law merely because it did not contain an *inventory* of the property sought to be attached without considering whether such property was in the possession of the judgment-debtor or not)

3 In the case of land in large towns the area, block or quarter, name or number, the lot number (if there are separate series of lots the series should be stated, and where the land forms part only of a lot, particulars regarding that part), the holding number in the latest town survey map if any, and year of the map, the rent or revenue last assessed on the land, must be given

4 In the case of buildings situated in a large town when the land on which such buildings stand is not affected, the name or number of the street, or, if the street has neither name nor number the quarter or block name or number, the number of the building in the street or if it has no number, the lot number must be given

5 In the case of immovable property situated in a small town or village, such of the particulars in paragraphs 3 and 4 above as can be given should be given

6 The purpose to which land or buildings are put, the material and age of buildings, all incumbrances and municipal taxes should be stated

7 The judgment debtor s share or interest in the property should be specified.
(2) The cost of the certified extract should be reckoned in the costs of the application "

Synopsis

1 Legislative changes | 2. Specification of property.

1. Legislative changes. — This rule corresponds to the first paragraph of Section 237 of the old Code, except that the words "and in case such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of such boundaries or numbers have been newly added in clause (a)

The second paragraph of Section 237 requiring the list of properties to be verified has been omitted from this rule and reproduced in sub rule (3) of Rule 66 of this Order [1]

2. Specification of property. — The rule applies only to execution of money decrees and not to decrees made upon a charge or a mortgage [1]

The object of requiring the boundaries and numbers to be specified is to easily *identify* the property [2] Clause (b) imposes a duty on the decree holder to specify the judgment debtor s share or interest, to the best of his belief [3] Thus, where the share is undivided it should be so specified [4]

An application which does not contain the particulars required by this rule cannot be treated as an application in accordance with law within the meaning of Article 182 of the Limitation Act, unless the defects are remedied by amendment under Rule 17 [5] See also Notes to Rule 17, *infra*

Order 21 Rule 13 — Note 1

1 For cases under the old Code which required verification see (06) 28 All 244 (245)
(99) 2? All 65 (64)

Note 2

1 (16) AIR 1916 Pat 373 (373)
2 (69) 11 Suth W R 175 (176)
(69) 12 Suth W R 488 (488)
(72) 18 Suth W R 411 (411)

3 (88) 12 Bom 678 (68?)

by evidence)
(12) 14 In l Cas 588 (589) (Ma l) (Do)

O.21 R 13 Note 2

This rule applies to proceedings under the Chota Nagpur Tenancy Act 1908 Section 210 as amended by Act VI of 1920 Section 50

O.21 R.14

R. 14. [S 238] Where an application is made for the attachment of any land which is registered in the office of the Collector, the Court may require the applicant to produce a certified extract from the register of such office, specifying the persons registered as proprietors of, or as possessing any transferable interest in, the land or its revenue, or as liable to pay revenue for the land, and the shares of the registered proprietors

Power to require certified extract from Collector's register in certain cases

[1877, Ss 237, 238; 1859, S 213]

Synopsis

1 Legislative changes
2 Applicability of the Rule
3 Application for time to produce certified extracts is a step in aid of execution

1 Legislative changes — Section 238 of the old Code corresponding to this rule provided that the application *shall* be accompanied by an authenticated extract from the register of such office [1] The present rule leaves it to the *option of the Court* to require the applicant to produce a certified extract

2 Applicability of the Rule — Where an application for sale is made in pursuance of a mortgage decree a preliminary attachment of the mortgaged properties is not necessary and therefore this rule does not apply to such a case and a Court cannot dismiss the application for failure to produce the certified extract [1] This rule applies to the proceedings under the Chota Nagpur Tenancy Act 1908 Section 210 as amended by Act VI of 1920 Section 50

3 Application for time to produce certified extracts is a step-in-aid of execution —An application by a decree holder for time to produce the certified copies or extracts required by this rule is a step in aid of execution [1]

O.21 R.15

R. 15. [S 231.] *(1)* Where a decree has been passed jointly [3] in favour of more persons than one, any one or more of such persons may, unless the decree imposes any condition to the contrary,[5] apply for the execution

Application for execution by joint decree holder

(93) 15 All 84 (86)
(16) AIR 1916 Lah 316 (316)

Order 21 Rule 14 — Note 1

1 (69) 11 Suth W R 175 (176)
(69) 12 Suth W R 488 (489)

Note 2

1 (18) AIR 1918 Oudh 418 (418)

(37) AIR 1937 Oudh 233 (234) 13 Luck 169

Note 3

1 (12) 17 Ind Cas 969 (969) 37 Bom 317
(10) 5 Ind Cas 579 (581) (Cal) (Application returned for amendment is a step in aid)
(16) AIR 1916 Mad 510 (510) (Even application not re presented is a step-in aid)

of the whole decree[1] for the benefit of them all, or, where any of them has died, for the benefit of the survivors and the legal representatives of the deceased.

(2) Where the Court sees sufficient cause for allowing the decree to be executed on an application made under this rule, it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application

[1877, Ss. 230, 231; 1859, S 207]

Synopsis

1. Legislative changes —

1 The words or his or their representatives in Section 231 of the old Code, after the words 'one or more of such persons have been omitted as unnecessary in view of the provisions of Section 146 *ante*

2 The words unless the decree imposes any condition to the contrary are new See Note 6

2 Scope of the Rule. — There are two rules of general application governing the execution of joint decrees in favour of several persons —

(1) One of the decree holders alone cannot apply for execution of *his share* only of the decree leaving the other decree holders to take out execution for their shares [1]

(2) One of the decree holders alone cannot execute the *whole* decree so as to bind the other decree holders by the result of such execution

The first rule is based on the principle that the *judgment debtor* should not be harassed by a number of applications for execution As observed by Sir Barnes Peacock C J, in *Haro Shankar Sandyal* v *Tarak Chandra Buttacharjee*, 11 Suth W R 488 at page 490

Suppose there was a decree for a *lac* of rupees it could not be contended that the decree holder could assign it to a *lac* of assignees so as to give to each of them power to take out execution for one rupee his portion of it Otherwise there might be a *lac* of executions under the decree a *lac* of seizures and a *lac* of sales under each one of which there can be no doubt that the judgment debtor would suffer loss If this were allowed the judgment-debtor must necessarily be ruined

Order 21 Rule 15 — Note 2
1 (83) 5 All 27 (31)
(82) 4 All 72 (74)
(79) 1 All 231 (234)

O.21 R.15
Notes 2-3

The second rule is based on the principle that the interests of the other decree-holders should not be jeopardised, and also on the principle that all persons representing a *single and indivisible* right must be parties before the right can be adjudicated upon See Note 7 to O 1 R 1

This rule is an exception to the second of the two rules abovementioned, in that it provides that one of several joint decree holders can execute, under certain circumstances the *whole* decree In order, however, to prevent the interests of the other decree holders from being jeopardised, the Court is given power, and is indeed bound, to make such order as is necessary to safeguard such interests[7]

3. "Where a decree has been passed jointly." — A decree directing the defendant to pay a certain sum of money to several persons *specifying their shares* therein is not a joint decree, even though the amount is made payable as an entire sum[1] The High Court of Patna has, however, in the undermentioned case,[2] expressed an *obiter dictum* that a decree does not cease to be a joint decree merely because the shares of the decree-holders in the decretal amount have been determined by the decree According to the High Courts of Lahore and Madras where a suit is filed in the name of a firm, the decree passed in the suit in favour of the firm must be held to be a decree passed jointly in favour of all the partners, since a firm name is only a compendious method of writing the names of all the partners[3] But the Judicial Commissioner s Court of Sind has held that unless a declaration of the names of all the partners has been made under O 30 R 2, the decree in favour of the firm cannot be said to be a joint decree[4]

This rule can apply only where a decree has been *passed jointly* in favour of more persons than one[5] Where a portion of a decree is transferred to another, either by assignment in writing or by operation of law, the transferee is in the position of a joint decree holder and the Court has got the *inherent* power to grant him relief in

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(72) 4 N W P H C R 90 (9?)
(70) 2 N W P H C R 413 (413)
(91) 15 Bom 242 (244)
(69) 11 Suth W R 488 (490)
(69) 11 Suth W R 241 (24?)
(75) 23 Suth W R 342 (343)
(72) 17 Suth W R 19 (20)
(67) 7 Suth W R 10 (11)
(66) 6 Suth W R Misc 64 (65)
(75) 24 Suth W R 11 (12)
(95) 18 Mad 464 (465)
('19) AIR 1919 Pat 286 (287, 288) 4 Pat L Jour 575

appeal)]
[**But see** (69) 11 Suth W R 343 (344) (S 207 of the Code of 1859 did not contain the words ' the whole decree ')]

2 (05) 1 Nag L R 24 (30)
(67) 2 Agra 183 (185 186)
(18) AIR 1918 Cal 153 (154)
(75) 23 Suth W R 282 (282)
(74) 22 Suth W R 204 (201)
(73) 19 Suth W R 302 (30?)
(71) 15 Suth W R 159 (159)

(68) 1 Beng L R A C 28 (29)
(2?) AIR 1922 Pat 611 (612)
(19) AIR 1919 Pat 286 (287, 288) 4 Pat L Jour 575
(25) AIR 1925 Pat 591 (59?)
[*See* (33) AIR 1933 Pat 609 (611) (Heirs of deceased decree holder themselves parties to execution application—There is no question of any order having to be made under sub-rule (2))]

Note 3

1 (70) 13 Suth W R 244 (245)
(92) 2 Mad L Jour 14 (15) (Suit on a mortgage [illegible]

(25) AIR 1925 Mad 1?65 (1?6?) (Do)]

2 (32) AIR 1932 Pat 261 (265) 11 Pat 445

3 (31) AIR 1931 Lah 507 (508)
(32) AIR 1932 Lah 596 (597) 13 Lah 546 (Some of the partners can therefore execute for the benefit of all)
('34) AIR 1934 Mad 330 (331) 57 Mad 696

4 (28) AIR 1928 Sind 37 (38)

5 (34) AIR 1934 Pat 627 (628) (One of the several legal representatives of a deceased decree holder applying for execution — This rule does not apply)

execution by applying general principles of law analogous to this rule[6] It has been held that where a decree has been passed awarding separate amounts to several persons, they can all make a single application for execution[7]

See also the undermentioned case[8]

4. "Any one or more of such persons may apply for the execution of the whole decree." — As has been seen in Note 2 above, this rule makes an exception to the general rule that all decree holders must join in an application to execute the joint decree, and permits one or more of several joint decree-holders to apply for execution of the whole decree,[1] unless the decree imposes a condition to the contrary[2] But it does not confer an unconditional right on one of the decree-holders to execute the decree It is within the discretion of the Court to allow such execution and the Court will act only if it sees sufficient cause for allowing such a course to be taken[3] It may allow other decree holders to intervene in a pending execution, if it is not being properly conducted[4] It is also in the discretion of the Court whether or not notice should be given to the other decree holders or to the judgment debtor before making an order for

[See however ('29) AIR 1929 Pat 232 (232, 233) ('31) AIR 1931 Lah 5 (6) (Where it is assumed that O 21 R 15 applies to the legal representatives of a deceased decree holder)]

6 ('21) AIR 1921 Mad 599 (601, 605) 44 Mad 919 (FB)
('27) AIR 1927 Bom 123 (124) 51 Bom 143 (Petition for execution presented by one of the

on review)
('19) AIR 1919 Lah 429 (430) 1917 Pun Re No 15
('74) 22 Suth W R 354 (354) (One decree passed in favour of *B*—*B* transferring his decree in favour of three persons — One of such persons

holders)
('35) 39 Cal W N 961 (966) (One of two joint owners of a decree, though such decree was passed in favour of one single decree holder,

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8.

remaining absent — Decree in favour of father for one third share — Possession of remaining

('29) AIR 1929 All 953 (957) 51 All 998 (Deposit of pre-emption money is proceeding in execution and O 21, R 15 applies—Per Boys, J, Sulaiman J, *contra*)
('18) AIR 1918 Mad 56 (56) (One decree holder dying—Surviving decree holders may execute for benefit of all including that of legal representatives of deceased)
('68) 10 Suth W R 95 (96) (Joint judgment for damages obtained by several persons — Some of them dying— Execution may be carried by survivors under S 207)
('37) AIR 1937 Pat 253 (256)
('36) AIR 1936 Cal 571 (572) (All that he is required to do is to state to the Court the fact of death of his co decree-holder and the names of his legal representatives)
[*See also* ('06) 10 Cal W N 1000 (1002)
('32) AIR 1932 Pat 359 (360) 12 Pat 42 (Decree holders members of joint Hindu family—

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3.

1. ('80) 3 Mad 79 (81)
('73) 5 N W P H C R 16 (17)
('66) 5 Suth W R Misc 59 (58).
('20) AIR 1920 Pat 672 (673)
('97 01) 2 Upp Bur Rul 247
('07) 10 Oudh Cas 378 (381)

cution)]
[*See also* ('35) AIR 1935 Nag 25 (27) : 31 Nag L R 271]
4. ('21) AIR 1921 Mad 599 (601) : 44 Mad 919 (FB) (Similarly in the case of part transferee of a decree)

O. 21 R. 15
Note 4

execution under this rule? Where one of several decree holders applies for execution and the others do not object to execution being granted to him it is not for the judgment debtor to say that sufficient steps have not been taken to safeguard the interests of the other decree holders[6]

When one of several joint decree holders executes a decree, he executes the decree *prima facie* for the benefit of all, unless there is a direction by the Court or in the decree itself which permits execution for the benefit of the executing creditor alone[7] Therefore where one decree holder executes a joint decree and realizes the amount due under it the realization is made on behalf of, and for the benefit of all the joint decree holders and they are entitled to recover their respective shares from him by a separate suit[8]

The High Court of Lahore has held in the undermentioned cases[9] that it need not be stated in the body of the application that it is being made for the benefit of all the decree holders and that when the application is for execution of the entire decree it should be assumed that the person applying is attempting to execute it on behalf of all the decree holders But the High Court of Patna has held that such an application is invalid and must be disallowed[10]

The omission on the part of the decree holder to state in his application the names of all the persons who are interested in the decree is not such a defect as would invalidate the execution proceedings[11]

Where an application for execution is made by two persons the execution proceedings do not terminate automatically on the death of one of them The surviving

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5 ('06) 33 Cal 306 (310) (Notice is not necessary where the decree grants injunction—21 Suth W R 31 Distinguished)
('33) AIR 1933 Lah 655 (656) 14 Lah 212 (AIR 1931 Lah 600 Followed)
('26) AIR 1926 Cal 811 (812)
('31) AIR 1931 Lah 600 (601)
('74) 21 Suth W R 31 (32) (Notice is obviously desirable in the case of decree for money — See observations on this case in 33 Cal 306)
[*See also* ('80) 7 Cal L Rep 537 (538) (But ordinarily it should hear the other decree-holders)]

6 ('98) 8 Mad L Jour 91 (91)
('33) AIR 1933 Lah 655 (656) 14 Lah 212
('20) AIR 1920 Nag 40 (41)
('34) AIR 1934 Pesh 76 (77) (Decree in favour of joint Hindu firm—Execution application by one member)
('31) AIR 1931 Lah 600 (601)
('33) AIR 1933 Lah 655 (656) 14 Lah 212 33 Pun L R 549 (550)
... 338 (Judgment debtor cannot object to arrangement between decree holders permitting one of them to apply for execution—Judgment-debtor can only apply for the protection of his own interests.)]

7 ('28) AIR 1928 Mad 600 (601)
('71) 16 Suth W R 29 (30)
('35) AIR 1935 Lah 464 (486) 17 Lah 115 (Decree in favour of two brothers — Execution application signed by one alone — Purchase made by him in his name — Other brother is entitled to share)

('28) AIR 1928 Mad 800 (802 803)

9 ('30) AIR 1930 Lah 603 (604)
('33) AIR 1933 Lah 655 (656) 14 Lah 212 (AIR *1919 Pat 286 Not approved*)
('32) AIR 1932 Lah 596 (597) 13 Lah 546 (Decree in favour of dissolved firm — Such decree is in favour jointly of its partners)

10 (*'19*) *AIR 1919 Pat* 286 (287, 288) 4 Pat L Jour 575 (Application was not allowed to be amended)
('38) AIR 1938 Pat 457 (460) 17 Pat 223 (Application for execution alleged to have been on behalf of applicant and another person holding interest in portion of decree—It must be stated that application is also for benefit of other person — If not application cannot be regarded as having been on his behalf)

11 ('26) AIR 1926 Cal 811 (812)
('31) AIR 1931 Lah 600 (601)
('33) AIR 1933 Lah 655 (656) 33 Pun L R 549 (550) 14 Lah 212
('3) AIR 193? Pat 359 (360) 12 Pat 42 (Omission to mention the death of coparcener—Co-decree holder will not entail a rejection of the petition)

decree holder can continue the application for the benefit of himself and the legal representatives of his co decree holder [17]

5. Application by one of several decree holders for execution in respect of his share of the decree. — It has been seen in Note 2 above that it is not open to one of several joint decree holders to apply for execution in respect of *his share* only of the decree, and that the rule is based on the principle that the judgment debtor should not be harassed by a multiplicity of applications by different decree holders Where, therefore, there is no possibility of the judgment debtor being harassed by different applications, the bar against one of the decree holders applying for execution will not apply Thus where some of the joint decree holders apply for execution with regard to a certain portion only of the decree giving up the rest and the other decree holders, being made parties, do not object to such a giving up by the applicants, the execution asked for may be allowed and the other decree holders cannot subsequently apply for execution of the balance of the decree [1] Similarly, where one of the joint decree holders intimates to the Court satisfaction of his share in the decree, this rule does not bar an application by the others for execution for the balance remaining due under the decree [2] So also, where A and B jointly obtain a decree for money or for possession of immovable property against C, and C as judgment debtor either purchases his share in the decree or inherits such share from A, the result would be the extinguishment of the decree *pro tanto* and B can therefore, execute the decree in respect of his share [3]

6 Unless the decree imposes a condition to the contrary. — This rule is not applicable to the case of joint decree holders where the execution of a joint decree is made dependent upon all the decree holders joining in the application [1]

7. Execution against one of the joint judgment-debtors — Limitation. — See Article 182 of the Limitation Act

8 Payment by judgment-debtor out of Court to one of several decree-holders — One of several joint decree holders cannot, as a general rule, give a valid discharge of the entire decree without the concurrence of others A payment, there fore, to one of several decree holders out of Court is valid only to the extent of the *share* of that decree holder,[1] unless it can be proved that the decree holder who

[*See also* (39) AIR 1939 Mad 278 (280) ILR (1939) Mad 338 (One of several decree holders

Note 5

1 (28) AIR 1928 Cal 579 (760) 56 Cal 12 (Subsequent application for balance cannot be filed)
(34) AIR 1934 Cal 465 (467) (Rule does not apply where joint decree has been satisfied in part before application for execution — Notice given to other joint decree holders — No objection to

1 (83) 6 All 69 (70)

Note 8

1 (1865) 3 Cal L Rep 513 (514)
(35) AIR 1935 Nag 25 (27) 31 Nag L R 271
(69) 11 Suth W R 262 (263)

O.21 R.15 Note 8 granted the discharge was an agent of the other decree holders or otherwise had legal authority to bind them by his acts[2] On the same principle one of two or more joint decree holders is not competent without being authorized by the other or others to certify a payment made to him under O 21 R 2 so as to operate as a satisfaction of the entire decree and the others are not debarred from executing the decree as to their shares[3] The reason is that "when one of two or more joint decree holders takes it upon himself to certify satisfaction of the whole decree it is clear that no provision can be made by the Court for safeguarding the interests of the other decree holder or decree holders and that if a Court was bound to recognize such an adjustment out of Court the remaining decree holders might be driven to another suit to recover money for which a decree had already been passed in their favour[4]

Where the joint decree holders are *partners* or members of a *Hindu coparcenary* a payment to one of them or a certificate by him under O 21 R 2 cannot according to the High Court of Madras[5] be treated as satisfaction of the decree *even in part* This view is based on the ground that a decree debt in favour of a firm or of a coparcenary is only one asset out of the numerous other assets and that one of the decree holders cannot legally claim any definite share in the particular decree debt The same High Court has also held that the fact that the decree holder receiving payment is a partner or is the managing member of the joint family is not enough to clothe him with authority to act as the agent of the other decree holders in receiving such payment[6] The High Courts of Allahabad[7] and Patna[8] and the Judicial Commissioner s Court of Oudh[9] have on the other hand held that a *karta* of a joint Hindu family has legal authority to act on behalf of the family and that a payment to or a certificate by him will bind the other decree holders It has been held by the High Court of Lahore[10] and the Court of the Judicial Commissioner of Sind[11] that one

(30) AIR 1930 Lah 814 (815) (Shares can be ascertained in execution)
(92) 15 Mad 343 (345)
(05) 1 Nag L R 24 (30)
[*See* (06) 28 All 252 (255) (But payment to one

See also (35) AIR 1935 Oudh 313 (316) 11 Luck 116 (Joint decree in favour of several mortgagees — One of them cannot give valid discharge)]

[illegible]
[*See also* (35) AIR 1935 Nag 25 (27) 31 Nag L R 271]
3 (01) 26 All 334 (336)
(35) AIR 1935 Nag 25 (28) 31 Nag L R 271
(23) AIR 1923 All 494 (495) 45 All 401
(04) 26 All 316 (320)
(66) 1 Agra Misc App 16 (17)
(78) 5 N W P H C R 16 (17) (One of the joint decree holders forgoing right to execute the decree — Others are not bound by the compromise)
(98) 1898 Bom P J 4[illegible]
(30) AIR 1930 Cal 78 (79) (Extent of shares can be ascertained in execution)
(83) 9 Cal 831 (837) (Do)
(79) 4 Cal L Rep 70 (72)

[*See also* (19) AIR 1919 Mad 123 (126) (Where payment is in fact made to all certificate by one only will bind all)]
[**But see** (74) 22 Suth W R 77 (78) (Certification of satisfaction of the whole decree by some of the joint decree holders is binding on all the decree holders unless fraud is proved)]
4 (04) 26 All 334 (336)
5 (17) AIR 1917 Mad 983 (989)
(34) AIR 1934 Mad 330 (333) 57 Mad 69[illegible]
(25) AIR 1925 Mad 930 (23 933)
[**But see** (13) 21 Ind Cas 177 (178) (Mad) (There was no joint decree within the meaning of this rule but as regards the decree of th[illegible]

9 (13) 20 Ind Cas 457 (458) 16 O dh Cas 146
[*See also* (08) 11 Oudh Cas 246 (247)]
10 (27) AIR 1927 Lah 385 ([illegible])
11 (26) AIR 1926 Sind 167 (169)

partner is the *agent* of the others and that where a decree is obtained in the name of a firm, one of the partners can receive the entire money due under the decree and certify the payment

Although a payment to one of two joint decree holders of the whole decree amount does not, even when certified, absolve the judgment debtor from liability to the other decree holder, such decree holder is not bound to proceed against the judgment debtor in execution, but may sue to recover his share from the other decree holder [12]

See also Note 8 to Order 21 Rule 1, *ante*

9. Defective application under the Rule, if can be amended. — It has been held by the High Court of Patna in the undermentioned case[1] that where in an application for execution of a decree by one of several joint decree holders, it is not stated that the application is for the benefit of all the decree holders, the application is invalid and cannot be allowed to be amended It proceeds upon the view that the requirements of this rule go to the root of the execution of the decree and that while Rule 17 of this Order empowers the Court to allow a defect in the requirements of Rules 11 to 14 to be amended, it does not include this rule But the High Court of Allahabad[2] has taken a contrary view that there is nothing in Rule 17 which deprives the Court of its powers to allow amendments in relation to matters required to be mentioned by this rule The Calcutta High Court also holds a similar view [3]

10. Appeal. — The question whether an appeal lies from an order passed under this rule depends upon the consideration whether the question decided is one within Section 47 of the Code Thus, an order allowing or refusing execution in favour of one of the decree holders when an objection is raised by the judgment debtor is one falling under Section 47 and, therefore, appealable as a decree [1] But no appeal will lie against an order refusing to allow execution in favour of one joint decree holder on the objection of another joint decree holder[2] or against an order protecting the interests of the non applying decree holder [3]

11. Limitation. — An application for execution by one of several joint decree holders is an application in accordance with law and will afford a fresh starting point of limitation under Article 182 of the Limitation Act [1] It has been held by the High Courts of Calcutta, Bombay and Madras that although this rule does not allow one of such decree holders to apply for partial execution of a joint decree, yet such an

12. ('06) 29 Mad 183 (183)
('28) AIR 1928 Mad 800 (803) (Plaintiff is entitled to interest from date of plaint and not from the date of receipt of such amount by defendant)

Note 9

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Note 10

1 ('94) 17 Mad 394 (394)
('07) 2 Mad L Tim 307 (303)
('98) 1898 Pun Re No 23 p 66
2. ('99) 23 Bom 623 (625)
('72) 17 Suth W R 136 (136)
('72) 17 Suth W R 415 (415)
('24) AIR 1924 Mad 518 (519) (But if the Court purports to pass an order under S 47 of C P C an appeal lies)
3 ('80) 5 Cal 592 (593)

Note 11

1. ('26) AIR 1926 Pat 160 (161)
('22) AIR 1922 Pat 597 (597) 1 Pat 609 (Appl

('66) 6 Suth W R Misc 59 (59)
(1864) 1 Suth W R Misc 1 (2)
[*See also* ('83) 13 Cal L Rep 19 (22)]

O.21 R.15 Note 11

application may keep alive the right to execute the decree[2] But the High Court of Allahabad and Judicial Commissioner s Court of Oudh have taken the contrary view that such an application is not one in accordance with law and therefore will not save limitation[3]

Where there is a decree in favour of two or more joint decree holders and one of them is a minor, can the minor decree holder apply to execute the decree on behalf of *all*, more than three years after the last starting point of limitation but within three years of his attaining majority? There is a conflict of opinion on this question It has been held by the High Courts of Allahabad,[4] Bombay,[5] Calcutta[6] and Lahore[7] that the ex minor decree holder can apply to execute the *whole* decree even though the other decree holders would be barred by limitation But the High Court of Madras[8] has held that the decree cannot be executed as a joint decree See Section 7 of the Limitation Act

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O.21 R 16

R. 16. [S 232] Where a decree or, if a decree has been passed jointly[7] in favour of two or more persons, the interest of any decree-holder in the decree is transferred[3] by assignment in writing[4] or by operation of law,[5] the transferee may apply for execution of the decree to the Court which passed it; and the decree may be executed[11] in the same manner and subject to the same conditions[21] as if the application were made by such decree-holder :

Application for execution by transferee of decree

Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice[14] of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections[15] (if any) to its execution :

Provided also that, where a decree for the payment of

2 (28) AIR 1928 Cal 861 (862)
(91) 15 Bom 242 (244)
(99) 26 Cal 888 (890)
(76) 25 Suth W R 70 (70)
(71) 16 Suth W R 267 (268)
(71) 16 Suth W R 29 (30)
(71) 15 Suth W R 449 (450)
(77) 8 Mad 79 (81)
(66) 6 Suth W R Misc 76 (77)
3 (75) 1 All 231 (234)
(81) 4 All 72 (74)

tation))

[See however (85) 7 All 28? (283) (If not ... subsequent

4 ... 1884 All

5 (96) 20 Bom 383 (385)
(01) 6 Bom L R 647 (648)
6 (01) 28 Cal 465 (468)
(08) 7 Cal L Jour 308 (309) (Joint and several decree)
(87) 14 Cal 50 (54 55)
7 (31) AIR 1931 Lah 5 (6) (Original decree holder deceased — Application for execution of the whole decree by one of his sons who was a minor after attaining majority)
8 (02) 25 Mad 431 (435) (FB) (The ex minor decree holder can execute the decree *qua* his interest)
(90) 13 Mad 236 (241)
[*See also* (05) 28 Mad 479 (485)]

money[17] against two or more persons has been transferred to one of them,[16] it shall not be executed against the others. **O. 21 R. 16**

[1877, S. 232; 1859, S. 208.]

Local Amendments

CALCUTTA

In the first proviso *cancel* the words "and the decree shall not be executed until the Court has heard their objections (if any) to its execution" and *substitute* therefor the following words

"and until the Court has heard their objections (if any) the decree shall not be executed provided that if, with the application for execution, an affidavit by the transferor admitting the transfer or an instrument of transfer duly registered be filed, the Court may proceed with the execution of the decree pending the hearing of such objections"

LAHORE

In the first proviso *omit* the words "and the judgment debtor," and for the word "their" *substitute* the word "his"

NAGPUR

After the words, "which passed it," *insert* the words "or to any Court to which it has been sent for execution"

N-W F P

For the first proviso, *substitute* the following proviso

"Provided that where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor, and unless an affidavit by the transferor admitting the transfer is presented with the application, the decree shall not be executed, until the Court has heard his objections (if any) to its execution"

PATNA

Add the words "or to the Court to which the decree has been sent for execution, as the case may be" after the words "to the Court which passed it,"

Delete the words "and the judgment debtor" from the first proviso, and in the said proviso after the word "transferor,' *insert* the words "unless an affidavit of the transferor admitting the transfer is filed with the application," and *substitute* the word "his" for the word "their" and the word "objection" *for* the word "objections".

RANGOON

For the first proviso, *substitute* the following, namely

"Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor, and, unless an affidavit by the transferor admitting the transfer is filed with the application, the decree shall not be executed until the Court has heard his objections (if any) to its execution"

Synopsis

1. Legislative changes.
2. Decree
3. Where a decree has been transferred.
   4. Transfer by assignment in writing.
   5. Transfer by operation of law.
   6. Benamidar.
   7. Part transfer of a decree.
8. Pledge of decree.
9. Assignment of rent decrees under the Tenancy Acts
10. Transfer, when takes effect.
11. Rights of the transferee.
12. Application for execution must be made to the Court which passed the decree.

O 21 R 16
Notes 1-3

Other Topics (miscellaneous)

1 Legislative changes. —

1 The words or if a decree has been passed jointly in favour of two or more persons the interest of any decree holder in the decree are new See Note 7, *infra*

2 The words if that Court thinks fit which occurred in the old Section 232 before the words the decree may be executed in the same manner . have been omitted See Note 11 *infra*

3 The words decree for money in the second proviso have been changed into 'a decree for the payment of money ' See Note 17 *infra*

2 Decree — The provisions of this rule in the first paragraph as well as in the first proviso *are not restricted to money decrees but apply to mortgage decrees also* As to the applicability of the second proviso, see Note 17, *infra*

3. Where a decree has been transferred — The principle of this rule is that no one can execute a decree except the decree holder or a person to whom the decree has been *transferred* by assignment in writing or by operation of law [1] A third person cannot therefore, apply for execution of a decree unless there is a transfer to him of the decree by the original decree holder [2] Where on the death of *A*, the plaintiff in a suit his widow *B* continues the proceedings as his legal representative and obtains a decree, *C* claiming to be the real heir of *A* cannot apply to execute the decree inasmuch as there is no *transfer* of the decree by *B* in his favour [3] The rule is however intended primarily for those cases where the applicant for execution does not *appear as decree holder in the decree* and he applies for execution on the basis of a transfer of the decree [4] it does not therefore apply where the applicant is one whose name is already in the decree as one of two persons in whose favour the decree has been passed and who claims on the death of the other decree holder to execute the decree as the surviving decree holder [5]

Order 21 Rule 16 — Note 3

1 (??) AIR 19?? All 98 (99)
(37) AIR 193? Nag 30 (30) I L R (1937) Nag 62 (*A* advancing money to *B* to be lent by latter to *C*—*C* executing mortgage in favour of *B* and *B* obtaining decree on mortgage—*A* has no interest in the mortgage decree and he cannot execute it)

2 (77) 2 Cal 3?7 (334) 4 Ind App 6? (PC)

3 (7?) 2 Cal 327 (334) 4 Ind App 66 (PC)

4 (39) AIR 1938 Pat 462 (464) 17 Pat ?06

5 (32) 13 Pat L Tim 5?9 (590 591)

A transfer in writing of the *property* dealt with by the decree is not a transfer of the decree itself and the transferee cannot apply under this rule[6] It has, however, been held by the High Court of Rangoon[7] that it is a matter of construction of the deed of transfer whether the decree also was intended to be transferred by the transfer of the property, and the words of the rule relating to the transfer of a decree cannot be construed so as to apply to a case where there was no decree in existence at the time of the assignment The assignee of a decree to be subsequently passed cannot apply for execution under this rule[8] Thus, a person who obtains a transfer, pending suit, of the property forming the subject matter of the suit is not entitled to execute the decree subsequently passed unless his name has been substituted in place of his vendor under O 22 R 10[9] Similarly, the assignee of a preliminary decree who has not taken steps to be impleaded in the suit cannot apply to execute the final decree in the suit[10]

The High Court of Bombay has, however, held in the undermentioned case[11] that the effect of the transfer was, in equity, to vest in the transferee, the interest in the decree which was afterwards obtained and that the decree must be taken to have been transferred by *operation of law* The High Court of Rangoon[12] has dissented from the above reasoning of the High Court of Bombay and has held that the words "by operation of law" cannot be invoked so as to make an assignment in writing, an assignment by operation of law

When a decree is assigned, what is really transferred is not the decree alone but the interest of the decree holder in the decree as may be finally determined Therefore, an assignment of the decree of the trial Court carries with it the right to execute the decree passed in appeal[13]

It has been held by the High Court of Calcutta in the undermentioned case[14] that the transferee of a decree for future maintenance is entitled to apply for execution in respect of the amounts that fall due from time to time and that Section 6 of the Transfer of Property Act will not apply when the cause of action has merged in the decree But the High Court of Madras[15] has held that only that portion of the maintenance decree which related to the arrears of maintenance already accrued due can legally be transferred

4. Transfer by assignment in writing. — An assignee of a decree under an *oral* transfer has no *locus standi* to apply for execution under this rule[1] In order to

[*See also* (38) AIR 1938 Pat 462 (464) 17 Pat 206 (Where a preliminary decree for mesne

6 (27) AIR 1927 Mad 940 (941)
(09) 30 All 28 (30)
(85) 7 All 107 (110) (Purchaser from pre emptor decree holder)
(22) AIR 1922 All 98 (99) (Transfer after decree but pending appeal)

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subsequent to the assignment is binding on him]
14 (10) 6 Ind Cas 826 (829) 38 Cal 13
15 (09) 3 Ind Cas 444 (444 445) 33 Mad 80

Note 4

1. (91) 15 Bom 307 (309)

O 21 R. 16
Notes 4-5

enable a transferee to apply the transfer must be effected by an instrument in *writing*[2] A mere *contract* for sale of a decree without an assignment in writing in favour of the purchaser is not enough[3] The High Court of Patna[4] has held that a release of his rights by a decree holder in favour of another does not operate as an assignment But the High Court of Allahabad[5] has held that a release may operate as an assignment of the decree

It has been held by the High Courts of Allahabad Calcutta and Lahore that a decree for sale of immovable property is itself not immovable property and therefore an assignment of such a decree does not require to be registered[6] But the High Court of Bombay has taken a contrary view[7] In any view a *personal* decree against a defendant is transferable without registration even though the decree may be a mortgage decree as against the other defendants[8]

The rule does not require any particular form of writing[9] In the under mentioned case[10] an order of the Court acting on behalf of the decree holders and directing the sale of the decree by auction to the highest bidder was held sufficient to constitute an assignment in writing for the purposes of this rule But the assignment of certain funds recoverable under a decree is not an assignment of the *decree*[11]

5 Transfer by operation of law — Ordinarily transferees by operation of law would include the following persons[1]

(1) In the case of a deceased decree holder his legal representatives

(2) In the case of an insolvent debtor the Official Assignee or Official Receiver

(3) The purchaser of a decree at a court sale

('86) 9 Bom 179 (181)
('24) AIR 1924 Cal 661 (662) 51 Cal 703
('19) 16 Ind Cas 807 (807) (Mad)
('12) 13 Ind Cas 78 (79) (Mad)

2 ('16) AIR 1916 PC 147 (147) 43 Cal 990 43 Ind App 108 (PC)
('34) AIR 1934 Lah 328 (329) (A mere receipt acknowledging payment of money therefor is not enough)
('84) 1884 All W N 39 (39) (In life-time of father sons not competent to apply in the absence of assignment in writing)
('39) AIR 1939 Bom 84 (87) (But an agreement to transfer a decree need not be in writing)
[*See* ('25) AIR 1925 Oudh 417 (417 418) 29 Oudh Cas 98 (Assets of decree holder bank transferred to another)]

3 ('16) AIR 1916 P C 147 (148) 43 Cal 990 43 Ind App 108 (P C)
('25) AIR 1925 Bom 472 (472) (Similarly a person entitled to obtain an assignment of a decree under another decree cannot apply)

4 ('27) AIR 1927 Pat 170 (171)

5 ('33) AIR 1933 All 188 (189)

6 ('13) 21 Ind Cas 169 (173) 35 All 521
('91) 13 All 89 (91 97)
('96) 23 Cal 450 (453 454)
('08) 12 Cal W N 695 (697)
('28) AIR 1928 Lah 70 (71)
[**But see** ('83) 9 Cal 639 (642) (Entitled to execute it only as a money decree)]

7 ('75) 1 Bom 267 (268)

8 ('28) AIR 1928 Mad 142 (142)

9 ('36) AIR 1936 Mad 543 (545)
('39) AIR 1939 Bom 221 (224) ILR (1939) Bom 271 (Decree obtained by sons—In suit by father against sons for declaration of his title to decree joint application signed by both parties stating that sons had no objection to surrender decree to father and requesting Court to pass a decree for father declaring his title to that decree—Writing *held* amounted to assignment of decree)

10 ('36) AIR 1936 Mad 543 (545) (Anything in writing which transfers a decree and clearly shows that the intention was to assign the decree is sufficient)

11 ('37) AIR 1937 Cal 570 (572)

Note 5

1 ('24) AIR 1924 Cal 661 (662 663) 51 Cal 703
('33) AIR 1933 Bom 367 (368) 57 Bom 513
('34) AIR 1934 Mad 471 (472)
('77) 2 Cal 327 (334) 4 Ind App 66 (PC)
('08) 31 Mad 77 (79) (Legal representative)
('12) 13 Ind Cas 321 (326) (Purchaser of decree in court sale)
(1900) 4 Cal W N 785 (787) (Decree in favour of insolvent transferred to surety on annulment of adjudication)
('36) AIR 1936 Mad 543 (543) (The words operation of law apply to cases where the decree has been transferred from one to another by way of succession or where there is bankruptcy or any similar event which has the effect in law of bringing about such a transfer)
[*See* ('30) AIR 1930 Cal 614 (615) 57 Cal 1137 (Legal representative)]
[*See also* ('39) AIR 1939 Bom 221 (224) I L R (1939) Bom 271 (The transfers by operation of law are obviously intended to be confined to testamentary and intestate succession forfeiture insolvency and the like)]

The following are also some of the instances of transfer by operation of law

(1) *A* obtains a decree against *X* *B*, his son, sues *A* for partition and obtains a decree for 1/5th share of the decree obtained by *A* *B* is entitled to apply for execution as transferee by operation of law [2]

(2) *A*, a trustee, obtained a decree for rent against certain tenants *A* filed another suit and obtained therein a declaration that the trust was incapable of being executed It was held that thereafter the original owner of the properties could apply to execute the decree for rent without actual assignment [3]

(3) Where on the revocation of a probate of a will, the minor son of the testator succeeds to the estate, he is entitled to execute the decree obtained by the executrix [4]

(4) A mortgagee who has obtained a final decree for foreclosure against the mortgagor who in turn has obtained a decree for possession of the immovable properties comprised in the mortgage is an assignee by operation of law [5]

(5) Where a mortgage is foreclosed and a pre emptor obtains a decree for pre emption of the same properties, he is a transferee of the foreclosure decree [6]

(6) A holder of a certificate of administration granted under Section 3 of the Bombay Regulation VIII of 1827 is a transferee by operation of law [7]

For other instances, see the undermentioned cases [8]

The words 'operation of law' cannot apply to a case where a person has become the owner of a decree by some transaction *inter vivos* [9] If a decree obtained by a member of a joint Hindu family is allotted to another member at a family partition, the latter is not a transferee by operation of law and, therefore, must get an assignment in writing from the decree holder to enable him to apply under this rule [10] The High Court of Lahore has held in the undermentioned case[11] that where three brothers obtained a joint decree in their favour and at a family partition the decree was allotted to the share of one of the brothers, he could apply under this rule to execute the whole decree and that Rule 15 *ante* would not apply to such a case A person does not become a transferee by operation of law from a decree holder by merely obtaining another decree against him [12] Thus, where *R*, the widow of *G*, obtained a decree in respect of a debt due to the estate of *G* and in a separate suit against *R*, *D* obtained a declaration that he was adopted to *G*, and that he was entitled to his estate, it was held that *D* was not an assignee by operation of law and was not therefore entitled to

2 [illegible]

3 [illegible]

4 [illegible]

5 [illegible]

6 [illegible]

7 [illegible]

8 [illegible]

[illegible] is transferee of decree by operation of law)

(38) AIR 1938 All 256 (258) ILR (1939) All 425 (*A* manager of joint family, missing and lost for a number of years—His eldest son as manager [illegible]

execute the decree obtained by *R*.[13] The only course open to *D* in such a case is either to apply in execution of his own decree for the appointment of a receiver of *R*'s decree or to follow the procedure laid down in Rule 53, *infra*, if the decree in his favour gives him the right to proceed in accordance with that rule.[14] Similarly, it has been held that a person in whose favour a decree has been passed declaring his title to a certain decree previously passed is not a transferee of the decree by operation of law.[15]

The Official Liquidator of a company is merely an agent of the Court for the purposes of the liquidation of the company; he is not a *transferee* of any decree that may have been passed in favour of the company.[16]

6. Benamidar. — *A* obtains a decree against *B* and transfers it to *C* *benami* for *D*. It has been held by the High Court of Calcutta[1] that *D* is the person entitled to execute the decree, that *C*, not being the *real* transferee, cannot apply under this rule, and that a mere application by him for execution cannot be held to be one in "accordance with law" for the purposes of limitation, but that it will be one in "accordance with law" if, *with the permission of the Court, he is allowed to execute the decree*.[2] On the other hand, the High Courts of Madras,[3] Lahore[4] and Patna[5] and the Judicial Commissioner's Court of Sind[6] have held that the "transferee" referred to in this rule is the transferee *named as such* in the transfer, and that the real owner is not entitled to apply. The High Courts of Allahabad[7] and the Chief Court of Lower Burma[8] have also held that the *benamidar* is entitled to apply, without deciding whether the *real* owner can or cannot do so. The Calcutta High Court also has held in a recent case, a similar view.[9]

Where the transferee of a decree dies and thereupon his heirs and a person alleging that the transferee was only a *benamidar* for him apply separately to execute the decree, the Court has got power under Section 47, sub section (3) to enquire who is the representative of the deceased and the question of *benami* can be gone into in execution proceedings.[10]

Where the decree itself is obtained by a *benamidar*, the Chief Court of Oudh[11]

decree against A in respect of the same land—B is not transferee of A's decree.)

('34) AIR 1934 Mad 471 (472) (Decree declaring that assignment of another decree is benami for plaintiff—Declaratory decree does not operate as assignment in writing or by operation of law—He must have obtained a decree for compulsory assignment under Order 21 Rule 31.)

13. ('33) AIR 1933 Bom 367 (368) 57 Bom 513. [See also ('34) AIR 1934 Mad 471 (472).]

14. ('33) AIR 1933 Bom 367 (368) 57 Bom 513.

15. ('39) AIR 1939 Bom 221 (225) ILR (1939) Bom 471 (Nor does the decree ipso facto constitute an assignment. At best, it creates a right to obtain an assignment of the decree—A person who obtains a right to obtain an assignment of a decree or the monies recoverable thereunder is not a transferee "by operation of law.") [See also ('37) AIR 1937 Oudh 471 (473) 13 Luck 549 (Decree for A against B—C subsequently obtaining decree against A and declaration that he was entitled to part of decretal amount recoverable by A from B — C held was not transferee by operation of law.)]

16. ('36) AIR 1936 Lah 152 (153).

Note 6

1. ('59) 16 Cal 333 (363).

[illegible] Mad 553

[illegible] 339) Mad 1001 [See also ('07) 6 Mad L Jour 31 (32).]

4. ('27) AIR 1927 Lah 110 (110) 8 Lah 35.

5. ('38) AIR 1938 Pat 457 (459) 17 Pat 223 (The mere fact that the real assignee gets a decree in a suit declaring that he is the real owner of the decree or the real assignee cannot entitle him to apply in execution or make his application [illegible]

6. [illegible]

7. [illegible]

8. [illegible] ow Bur Rul 280.

9. ('35) 163 Ind Cas 618 (619) (Cal).

10. ('27) AIR 1927 Mad 903 (905, 907) 51 Mad 219.

11. ('31) AIR 1931 Oudh 69 (69).

has held that the *benamidar* has the right to execute the decree The High Court of Calcutta[12] is on the other hand of opinion that he cannot so apply and that his application will not therefore be one in accordance with law

7 Part transfer of a decree — Under Section 232 of the old Code it was held that the transferee of the interest of any one of several joint decree holders in the decree could apply to execute the decree[1] This principle has been given effect to in the present Code by adding in this rule the words or if a decree has been passed jointly in the decree (see Note 1 *supra*) Similarly there is nothing in this rule or elsewhere which prohibits the transferee of a *portio* *i* of the decree from applying under this rule[2] The only qualification in such a case is that the transferee is in the position of a *joint decree holder* and can execute the decree only subject to general provisions of law analogous to Rule 15 *supra*[3] But the High Court of Bombay has in the undermentioned case[4] taken the contrary view that a transferee of a part of a decree is not entitled to execute his part of the decree nor even the whole decree since he cannot be regarded as a joint decree holder See also Notes to O 21 R 15

8 Pledge of decree — The transfer of a decree by way of a mortgage is an assignment in writing of a fractional interest in the decree and the mortgagee is therefore entitled to apply under this rule[1]

9 Assignment of rent decrees under the Tenancy Acts — Section 148 clause (o) of the Bengal Tenancy Act (VIII of 1885) provides that notwithstanding anything contained in Section 232 Civil Procedure Code (of 1882) an appl cation for the execution of a decree for arrears of rent shall not be made by an assignee of the decree unless the landlord s interest in the land has become vested in him[1] The

[*See also* (23) AIR 1923 Mad 317 (317) (Wh le benamidar s applicat on was pending real owner impleaded as a party)]

12 (14) 25 Ind Cas 555 (556) (Cal)
[*See also* (28) AIR 1928 Cal 835 (836) (Real owner can apply)]

Note 7

1 (96) 19 Mad 306 (307)
(87) 11 Bom 153 (158)
(86) 1886 Bom P J 287 (287)
[**But see** (75) 24 Suth W R 11 (12) (D sented from in 17 Cal 341)]

2 (90) 17 Cal 341 (343)
(26) AIR 1926 All 346 (348) 48 All 437
(28) AIR 1928 Lah 70 (71) (D ssent ng from AIR 1919 Lah 429)
(21) AIR 1921 Mad 599 (601) 44 Mad 919 ent tl 1 to apply for execut on of a part of the lecree)
[*See also* (80) 5 Cal 592 (593)
(28) AIR 1928 Mad 713 (716) (FB) (Part al transf r of a decree is val d)
(33) AIR 1933 Lah 473 (473) (Decree in favour of several persons — As gnment of decree by one of them — Ass gnment pa ses only interest of as gnor decree-hol ler)]
[**But see** (20) AIR 1920 Lah 324 (325) (This r le does not contemplate a transf r of a part of a decree)
(19) AIR 1919 Lah 429 (429) 1917 Pun Re
(74) 24 Suth W R 245 (246) (Must execute the whole decree)
(73) 20 Suth W R 51 (51) (Court should protect the interest of others)

4 *(34) AIR 1934 Bom 59 (62) 58 Bom 226*

Note 8

1 (26) AIR 1926 All 346 (348) 48 All 432 (AIR 19 2 All 101 D sented from)
(9) AIR 19 9 Cal 676 (6 9) 57 Cal 549
(09) 1 Ind Cas 535 (538) 34 Mad 442

Note 9

1 (31) 54 Cal L Jour 596 (597 600) (Cannot be executed e en as a s mple money decree)
(13) 18 Ind Cas 689 (690) 40 Cal 462 (Land lord s interest defined)
(14) AIR 1914 P C 111 (114) 41 Cal 926 41 Ind App 91 (P C) (The relat onsh p of landlord and tenant mu t ex t)
(99) 26 Cal 176 (1 8)
(9) 1 Cal W N 183 (184)
(97) 1 Cal W N 694 (694)
(02) 6 Cal W N 91 (91)

O.21 R.16
Notes 9–11

word 'assignee' in that Section refers only to purchasers for consideration and does not include a person in whom the legal estate is vested by an act of the owner, as for instance, a trustee, who has no independent interest in the property[2] It has been held in the undermentioned case[3] that a Court executing a rent decree cannot refuse execution when the assignment had been recognised by the Court before the Tenancy Act came into force

A provision similar to that in Section 148 of the Bengal Tenancy Act has been made also by Section 198 (k) of the Orissa Tenancy Act (II of 1913) By Schedule II, List II of the Agra Tenancy Act (III of 1926) it is provided that no application for the execution of a decree shall be made by an assignee of the decree unless the assignor s interest in the land to which it relates has become and is vested in such assignee

10. Transfer, when takes effect. — The transfer of a decree made by an instrument in writing takes effect from the date of such instrument, irrespective of its recognition by the Court on an application made to it under this rule[1]

Illustrations

1 *A* brought certain properties to sale in execution of a decree obtained by him against *F* Pending execution proceedings *A* assigned his decree to *D* Subsequently two days before sale *A* reported that the decree had been satisfied by payment *D* intervened and objected to the record of satisfaction being made It was held that if his transf r was true he was a representative of *A* and the matter must be enquired into *Duar Buksh* v *Fatik Jali* I L R 26 Calcutta 250

2 *M* had obtained a money decree against *H* *R* in execution of a decree obtained by him against *M* applied under O 21 R 53 and recovered the amount due under *M* s decree Thereupon *C* claiming under an assignment of the decree in writing from *M* prior to *R* s attachment sued *R* for the recovery of the money drawn by him It was held that *C* s title to the decree was complete on the date of the assignment and therefore prevailed as against *R* s attachment *Co operative Town Bank of Padigan* v *Raman Chettiar*, I L R 5 Rangoon 595 A I R 1928 Rangoon 25 (26) [Reversing A I R 1927 Rangoon 55]

11 Rights of the transferee. — Section 232 of the old Code contained the words and if that Court thinks fit, the decree may be executed It was, therefore held that the executing Court had a discretion to allow or to refuse an application made by the transferee[1] Under the present Code, those words have been omitted and the transferee s right to execution does not depend upon the discretion of the Court[2]

[*See* (09) 3 Ind Cas 324 (329) (Cal) (A case where landlord s interest vested by operation of law)]

2 *(99) 26 Cal 750 (757)*

3 (87) 14 Cal 380 (381 382)

Note 10

1 (87) 9 All 46 (51)
(94) 16 All 483 (492)
(99) 26 Cal 250 (253)
(09) 3 Ind Cas 938 (939) 33 Mad 62
(09) 1 Ind Cas 353 (353) (Mad) (An attachment after date of assignment does not prevent recognition of the transferee as such)
(07) 2 Mad L Tim 93 (93)
(28) AIR 1928 R[illegible] 25 (26) 5 R[illegible] 595 (Revers[illegible]
[illegible]
after transfer)
[*See also* (32) AIR 1932 Sind 164 (164) 26 Sind L R 158

(28) AIR 1928 Mad 478 (478) 51 Mad 681 (Auction sale of decree in favour of company by liquidator — Deed of transfer after dissolution — *Held* valid)]
[But see (80) 5 Cal 869 (870 871)]

Note 11

1 (91) 15 Bom 307 (309)
(85) 9 Bom 179 (181)
(93) 20 Cal 388 (395)
(88) 15 Cal 446 (448 449)
(71) 15 Suth W R 283 (283)
(70) 13 Suth W R 224 (225)
(70) 13 Suth W R 207 (207)
(68) 10 Suth W R 354 (355)
(67) 8 Suth W R 202 (202)
(96) 19 Mad 306 (307)
(85) 8 Mad 455 (463)
(83) 2 C P L R 45 (46) (And the Appellate Court will not interfere unless it is shown that the discretion is improperly exercised)

2 (10) 6 Ind Cas 826 (828) 38 Cal 13

Where a transfer is recognized by the Court on an application under this rule the transferee is entitled to execute the decree as if the application were made by the original decree holder [3] The absence of consideration for the assignment of a decree is immaterial and will not deprive the assignee of his rights to execute the decree provided the assignment is not a sham transaction [4]

It has already been mentioned in Notes to O 21 R 10 *ante* that the person appearing on the face of the decree as the decree holder is the person entitled to execution Therefore where the transferee of a decree does not apply under this rule for execution the executing Court is bound to allow execution at the instance of the transferor even after the date of the transfer till the transfer is recognized by the Court [5]

The assignee of a decree can transfer it to another although the name of such assignee has not been substituted on the record [6]

As to the right of the transferee to apply for execution where the decree has been attached by the holder of a decree against the transferor see Notes to O 21 R 53 *infra*

Where an *ex parte* decree was assigned and the assignee did not take any step under this rule and thereafter on an application made by the defendant as against the original decree holder alone the *ex parte* decree was set aside it was held that the transferee could not proceed with the execution until he got an order cancelling the order setting aside the *ex parte* decree [7]

See also Note 9 to O 21 R 2

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(32) AIR 1932 Cal 439 (440) 59 Cal 297
(34) AIR 1934 Lah 648 (651) 16 Lah 63
(37) AIR 1937 Bom 365 (367) I L R (1937) Bom 691

3 (67) 7 Suth W R 205 (205)
(34) AIR 1934 All 209 (211) 56 All 694 (Judgment debtor cannot set up an uncertified payment as against transferee also)
(87) 11 Bom 153 (158)
(94) 16 All 183 (185) (Entitled to the benefit of attachment effected before transfer)

(24) AIR 1924 Lah 615 (616) (Pre emption decree)
(13) 18 Ind Cas 97 (98) 16 Oudh Cas 70
(21) AIR 1921 Low Bur 37 (39) 11 Low Bur Rul 163

5 (17) AIR 1917 Mad 691 (692)
(33) AIR 1933 Lah 638 (639) 14 Lah 744 (Decree handed over to trustee by decree holder —No legal application by trustee under O 21 R 16 — Joint application by decree holder and trustee—Decree holder can be allowed to execute decree)

execute it subsequently)

7 (16) AIR 1916 Cal 323 (324)

O.21 R 16
Notes 12-13

12 Application for execution must be made to the Court which passed the decree — An application by the transferee of a decree under this rule can be entertained only by the Court which passed the decree, the Court to which the decree has been transferred has no jurisdiction to entertain the same[1] The reason is as stated in *Sheo Narain Singh v Hurbans Lall* (1870) 14 W R 65 (66), that

> It would lead to the greatest difficulties if in one Court one party was recognised as being the holder of and having the control over, a decree and at the same time in another Court another party was recognised as being in that position

Where however an application under this rule is made to the transferee Court and it recognises the transfer it is only an irregularity which may be waived by acquiescence and if the judgment debtor has as a matter of fact, waived it, he cannot subsequently turn round and question the jurisdiction of the executing Court[2]

As to whether a transferee can *continue* the execution proceedings initiated by the original decree holder without a fresh application see Note 19 *infra*

Where a decree is passed in favour of a company which afterwards goes into liquidation, the Official Liquidator is not a *transferee* of the decree and hence he can apply for the execution of the decree to the Court to which the decree has been transferred for execution[3]

See also the undermentioned case[4]

13 Award — *A* having obtained an award against *B* and filed it in Court assigned the same to *C* *C* applied to execute it under Section 15, Arbitration Act (IX of 1899) which provides that the *award* on being filed in Court shall be enforceable as a decree It was held that *C* could execute it and that the Court in which the award

Note 12

1 (1900) 27 Cal 488 (491) (If entertained by transferee Court the order is without jurisdiction — Objection to execution by transferee of decree cannot be entertained by the transferee Court)

(02) 29 Cal 235 (236) (Notice under this rule must also be issued by the executing Court)
(70) 14 Suth W R 65 (66)
(31) AIR 1931 Lah 499 (499 500)
(31) AIR 1931 Lah 690 (690 691) (Transferee Court can entertain the objection that R 16 has not been complied with before transfer)
(18) AIR 1918 Lah 211 (213) 1918 Pun Re No 92 (Sections 200 and 201 Companies Act of 1913 are subject to Order 21 Rule 16)
(07) 17 Mad L Jour 300 (301) (But it may be waived)
(03) 26 Mad 258 (259)
(20) AIR 1920 Nag 174 (175)
(32) AIR 1932 Pat 168 (169) 11 Pat 94
(78) 2 All 283 (283)
(37) AIR 1937 Bom 365 (369) I L R (1937) Bom 691 (Notice cannot be issued by Court to which

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of the decision in the analogous case AIR 19 8 P C 162 arising under Section 50)

2 (07) 17 Mad L Jour 300 (301)
3 (36) AIR 1936 Lah 152 (153)
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193? has been transmitted for execution has jurisdiction to recognise an assignment of the award under O 21 R 16 C P Code Under the

executing Court must be presumed to be empowered to recognize the transfer—In any case where assignment was recognized after due notice to judgment debtor it is only an irregularity)

was filed must be deemed to be the Court which passed the decree for the purposes of this rule[1]

14. Notice to transferor and judgment-debtor. — The provisions of this rule as to notice are imperative, the giving of notice of the application, to the assignor and to the judgment debtor, is an indispensable condition of jurisdiction and the failure to give it renders all the proceedings in execution void as against them[1] It has, however, been held that if the persons directly interested waive their right, acknowledge the validity of the assignment and raise no objection so far as the execution proceedings are concerned, non compliance with the technical requirements of this rule will not render an execution sale a nullity[2] Under the amendment of this rule by the Lahore High Court, notice to the *judgment debtor* is not necessary[3]

Where the assignee applied under this rule for notices to the assignor and the judgment debtor and also for *attachment* of a certain property, and the notice as well as the warrant of attachment were issued together, it was held that the attachment was illegal inasmuch as the objections of the judgment debtor were not heard at that time[4] Where, in an application under this rule by the assignee of a mortgage decree, notice is given only to the mortgagor and not to the subsequent mortgagee who was also a judgment debtor under the decree, the latter will not be bound by such execution and the auction purchaser will acquire only the rights of the mortgagor, but not those of the subsequent mortgagee[5]

The notice that is to be given under this rule is of the *application* for execution and not of the *assignment*[6] But a written notice is not always necessary, if the *judgment debtor is present in Court at the time the order on the application is made*, and has thus notice of the application, the fact that no written notice was given will not vitiate the proceedings[7]

Note 13

1 .

Note 14

1. (27) AIR 1927 Cal 781 (782) 54 Cal 624 (Want of notice to the transferor)
('10) 6 Ind Cas 262 (263) (Cal) (Do)
('21) AIR 1921 Lah 143 (144) 2 Lah 230 (Want

(The fact that a notice purporting to be under S 158B (2) Bengal Tenancy Act (1885), has been shown to the assignor will not dispense with the necessity of complying with the rule)
(17) AIR 1917 Lah 195 (196) (Want of notice to judgment debtor)
(37) AIR 1937 Bom 365 (367) ILR (1937) Bom 691
('38) AIR 1938 Cal 781 (786) (The non service of such notice makes the sale held in execution of that decree void *ab initio* although the purchaser is not the decree holder himself but an absolute stranger)
[*See* ('33) AIR 1933 Lah 432 (433) (Though failure to give notice will affect the validity of the proceedings, it does not warrant dismissal of application)
('34) AIR 1934 Pat 9 (10) (Execution application by assignee—Notice sent to assignor and judgment debtor under O 21 R 22 but not under R 16—Assignment not impugned by judgment debtor — Assignee can proceed with execution without first proving assignment)]
[**See however** (87) 9 All 46 (49) (Judgment-debtor cannot object on the ground of want of notice to the transferor)]

2. ('39) AIR 1939 Cal 419 (421) (Notice to which reference is made in O 21 R 16 is merely for the benefit of the transferors and the judgment debtors)

3. ('37) AIR 1937 Lah 465 (467) I L R (1937) Lah 162

4 ('11) 12 Ind Cas 547 (547) . 36 Bom 58

5. ('30) AIR 1930 All 627 (627, 628) 52 All 893 (Reversing AIR 1929 All 437)

6 ('24) AIR 1924 Pat 576 (578, 580) 3 Pat 596

7. (24) AIR 1924 Pat 576 (580) 3 Pat 596
[*See also* (33) AIR 1933 Pat 130 (131)]

O 21 R 16
Notes 14-15

The object of issuing notice under this rule is to determine once for all and in the presence of all the parties the validity of the instrument of transfer It is therefore not necessary that notice must be issued on *every* subsequent application by the transferee under this rule [8]

Where the Court which passed the decree substitutes the name of the alleged transferee of the decree on the record and transfers the decree to another Court for execution the latter Court must presume that the Court passing the decree has complied with the provisions of this rule [9]

If the judgment debtor is dead when the assignee applies for execution the notice required by this rule may be served on his legal representatives [10] If the original decree holder becomes insolvent the Official Receiver will be entitled to notice [11]

In the case of a transfer by operation of law, it is not necessary that the notice referred to in the first proviso to this rule should be given [12]

15 Objections to be heard — After the service of the notice mentioned in the first proviso to this rule the Court is bound to hear the objections if any of the transferor and of the judgment debtor [1] As has been already mentioned in Note 11 it is not a valid objection that the assignment is not supported by consideration [2] Nor can the judgment debtor raise the plea that the *decree* is not valid [3] As to the right of the judgment debtor to plead an uncertified payment or adjustment see Note 23 to O 21 R 2

A held a decree against *B* and *B* had a decree against *A* *A* attached in execution of his decree the decree which *B* had against him Thereafter *B* assigned the decree to *C* *C* applied under this rule It was held that *A* could take objection to the execution of the decree on the ground that under Section 64 *ante* the assignment of the decree to *C* was void [4]

An assignment of a decree is not valid as against the judgment debtor until the debtor has had notice of the assignment and therefore any payment made to the original decree holder before notice is valid as against the transferee [5]

The failure of the judgment debtor to object to the validity of the assignment when an application under this rule is made will preclude him under general principles of *res judicata* from raising such objection at a subsequent stage of the proceedings [6]

8 (27) AIR 1927 Cal 694 (696)
(34) AIR 1934 Rang 101 (103)
[*See also* (30) 1930 Mad W N 166 (168)]
9 (36) AIR 1936 Sind 191 (193) 30 Sind L R 249
10 (87) 11 Bom 727 (730)
[*See also* (??) AIR 19?? Lah 396 (397)]
2 (13) 20 Ind Cas 685 (689) (Cal)
(32) AIR 193? Mad 3?7 (3 7 3?8)
(15) AIR 1915 Mad 1138 (1140) (In the absence of fraud)

is barred by S 47)

As to objections to the executability of the decree under similar circumstances see Note 23 to Section 11 *ante* and also the undermentioned cases [7]

16 Transfer of decree for payment of money against two or more persons to one of them — It is a general principle of law that when one of the persons jointly liable under a decree unites in himself the two opposite characters of creditor and joint debtor in respect of the whole decretal debt the effect is to extinguish the liability of all the co judgment debtors under the decree [1] The second proviso to this rule is based on this general principle and provides that in such a case the transferee cannot enforce the decree by execution against his co debtors [2] On the same principle where a decree has been passed jointly in favour of two or more persons and the interest of one of such decree holders devolves upon a judgment debtor the decree is extinguished *pro tanto* [3] When the alleged transferee of a decree for money is found to be the *benamidar* of one of the judgment debtors the Court is bound under the second proviso to this rule to refuse to allow the assignee to execute the decree against the other judgment debtors [4] But it has been held that where the judgment debtor did not raise the objection when notice was issued to him under the first proviso to this rule he cannot subsequently raise the objection [5] But an agreement between the decree holder and some of the judgment debtors that the decree holder should execute the decree against the other judgment debtors and pay the amount realized to them in consideration of the fact that they have paid the

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ment de tor not contesting ass gnment—Judgment-debtor and execut ng Court cannot question validity of ass gnment)

[*See also* (20) AIR 19 0 Pat 146 (147) 5 Pat L Jour 639 (Object on as to want of proper not ce under th s rule not taken in first execu tion—Objection not allowed in an application for setting aside sale under O 21 R 90)

(25) AIR 1925 All 206 (208)

7 that decree is nullity is barred by res judicata)

(32) AIR 1932 Pat 168 (169) 11 Pat 94 (Transferee put on record by Court passing decree — Decree transferred to Court of another district—Objection as to transferee s right to execution cannot be taken in transferee Court)

(39) AIR 1939 Pat 411 (412) 18 Pat 318 (In execution proceed ngs it is not open to the judgm nt debtor to assert that the real holder of the decree is any per on other than the person named as decree-holder in the decree unless there has been a valid a gnment or devolution by process of law)

(33) AIR 1933 Cal 919 (9??) 60 Cal 1181 (Appli cat by a s gnee for substitution in place of

(This principle will not apply to a converse ca e where decree holder acquires a share in the estate of one of the judgment debtors)]

2 (68) 9 Suth W R 230 (234)

(26) AIR 1926 Mad 1141 (114?) (Transfer of personal decrees brought about by death is not excluded from the operation of Proviso 2)

(15) AIR 1915 Mad 799 (800)

3 (76) 25 Suth W R 343 (343)

(83) 5 All 27 (34)

(94) 1894 All W N 15 (16)

(67) 7 Suth W R 136 (136)

4 (2?) AIR 1922 Mad 510 (510)

(17) AIR 1917 Mad 590 (591) 40 Mad ?96

(17) AIR 1917 Mad 889 (889)

(20) AIR 1920 Lah 431 (43? 433)

(21) AIR 19?1 Nag 41 (4?) 19 Nag L R 151

[*See* (29) AIR 19 9 All 79? (79?) (Transfer of

(26) AIR 19?6 Lah 666 (66) (Do)

(89) 2 C P L R 45 (47) (Assignee benamidar for judgment debtor—His right to execute decree doubted)]

5 (37) AIR 1937 Oudh 111 (11?) 1? Luck ?55

Note 16

1 (83) 5 All 27 (33)

[*See* (3?) AIR 1932 All ?01 (?0?) 54 All 418

[**See however** (39) AIR 1939 Rang 245 (?4?) 1939 Rang L R 15?]

O. 21 R 16
Notes 16-17

amount in advance, does not fall under the prohibition in this rule[6]

This proviso does not make the assignment of a decree in favour of one of several judgment debtors invalid in law, it only provides that the transferee is not entitled to enforce his rights by execution[7] His remedy is therefore to sue his co judgment debtors for contribution having regard to the proportion in which they were bound *inter se* to satisfy the decree[8]

The words ' decree for the payment of money against two or more persons mean a decree against two or more persons *jointly*

Illustration

A decree directed that N should pay Rs 90 and Rs 11 5 3 as costs and *A* should pay Rs 30 with Rs 3 12 4 as costs *A* afterwards took an assignment of the decree in writing and applied to execute it against *N* to the extent of Rs 90 and costs It was held that the decree for money so far as it related to Rs 90 and costs was not a decree against several persons but against one person N and therefore *A* could execute it[9]

The second proviso to this rule does not apply to the converse case of the decree holder acquiring a share in the estate of one of the judgment debtors The decree holder is however bound to give credit for a *proportionate* amount of the decree[10]

The proviso applies whether the transfer of the decree is by act of parties or by operation of law[11]

It has been held by the Rangoon High Court that where a decree for the payment of money has been passed against two or more persons and one of them dies his legal representative does not become a 'judgment debtor and the transfer of the decree t h n is not a transfer to which proviso 2 applies[12]

17 "Decree for the payment of money" — The second proviso to this rule does not apply to decrees other than *money* decrees[1] Thus, it does not apply to mortgage decrees for sale and therefore, an assignment of a mortgage decree in favour of one of the judgment debtors does not extinguish the decree[2] But in such cases the decretal amount that can be recovered from the other judgment debtors will be reduced proportionately[3]

The expression decree for money in Section 232 of the old Code (corresponding to this rule) was interpreted by the High Courts of Bombay and Calcutta to mean a personal decree for the payment of money Thus a decree against a legal

6 [illegible]

7 [illegible]

8 [illegible]
(74) 6 N W P H C R 1 (?)
(89) 1889 Bom P J 262 (263)
(13) 20 Ind Cas 569 (570) (Cal)

9 [illegible]

10 [illegible]
1141)
(35) AIR 1935 Oudh 449 (450) 11 Luck 409

11 (38) AIR 1938 Mad 814 (814) I L R (1939) Mad 73

12 (39) AIR 1939 Rang 82 (84) 1938 Rang L R 699

Note 17

1 (83) 13 Cal L Rep 272 (274)
(12) 17 Ind Cas 323 (327) (Mad)
(38) AIR 1938 Pat 462 (463) 17 Pat 206

2 [illegible]
execu e against the other judgment debtors)
(37) AIR 1937 Sind 112 (113) 31 Sind L R 47
(37) 1937 Mad W N 384 (385)
(20) AIR 1920 All 129 (131) 42 All 544
(39 AIR 1939 [illegible] of mort

3 [illegible]
(Person acquiring a portion of the mortgaged property subsequently becoming a transferee of

representative for payment of money out of the assets of the deceased,[4] or a decree against a purchaser of the equity of redemption in a mortgage suit,[5] was held not to come within that Section The High Court of Allahabad[6] has in the undermentioned case held that the substitution of the expression "for the *payment* of money" for the words "for money" in the proviso is intended to emphasise the fact that the proviso is confined to cases of personal decrees On the other hand, the Judicial Commissioner's Court of Nagpur[7] has held that this is an unduly narrow interpretation of the rule and that it is immaterial whether the assignee decree holder is one against whom a personal money decree has been passed or one who has been directed to pay the decretal debt out of the assets in his hands

For meaning of ' decree for payment of money, see Note 6 to Section 73 *ante*

18. Attachment of decree by co-judgment-debtor. — One *S* obtained a decree against *A*, *B* *C* and *D* *A* obtained decree against *S* and attached the decree of S and applied under O 21 R 53 for execution of *S* s decree against his co judgment debtors *B*, *C* and *D* It was held that *A*, by attaching *S* s decree, did not become an assignee thereof, that the prohibition in this rule did not therefore apply to such a case and that *A* was entitled to execute the decree [1]

19. Application for substitution by transferee. — A transferee from a decree holder can only apply under this rule to *execute* the decree, an application *merely for recognising* him as transferee is legally incompetent and must be rejected [1] It is not also necessary for the validity of the proceedings that the substitution of the name of the transferee is actually made [2] All that is necessary is that the transferee should merely file his application for execution of the decree setting out either in it or in an affidavit filed in support thereof that he is such a transferee, thereupon the Court orders the application for execution to proceed or rejects it [3] But, although a separate application by the transferee of a decree merely for substitution in place of the original decree holder is not formally required under the Code, the prayer for such substitution is necessarily implied in an application by him for execution of the decree under O 21 R 16 and the substitution of his name is, in practice, generally

4. (07) 31 Bom 308 (312, 313)
5. ('85) 11 Cal 393 (396)
6 (32) AIR 1932 All 704 (707) 54 All 448
7. ('24) AIR 1924 Nag 41 (41) 19 Nag L R 151

Note 18

1 (09) 2 Ind Cas 626 (627) (All)

Note 19

by assignee to be recognized as decree holder and for transmission of decree for execution is a

[*See also* (09) 29 Cal 235 (236) (Application to transmit to another Court treated as an application under this rule)]

2. (09) 3 Ind Cas 324 (326) (Cal)
(09) 1 Ind Cas 168 (174) 36 Cal 513
[*See also* (73) 19 Suth W R 255 (260)]

3. (25) AIR 1925 Mad 701 (702) 48 Mad 553
('38) AIR 1938 Bom 309 (310).
(See however (37) AIR 1937 Bom 365 (368) I L R (1937) Bom 691 (Transferee must first apply for execution to Court passing decree praying for notice — After notice is made absolute, he must apply for execution under O 21 R 11)]

O 21 R. 16 Note 19

made before the execution is proceeded with [4]

Where during the pendency of execution proceedings the decree holder dies or transfers the decree by an assignment in writing can the transferee apply under this rule to continue the execution proceedings? It has been held by the High Courts of Bombay Calcutta Madras and Patna and the Judicial Commissioner s Courts of Sind and Peshawar that it is open to the transferee either to apply for continuing the proceedings in execution or to make a fresh application [5] The reason is that a pending execution application does not abate by reason of the death or devolution of any interest of the decree holder and therefore the transferee can apply by virtue of Section 146 and this rule Similarly where the decree holder dies while his application is pending in a Court to which the decree has been transferred for execution his legal representatives may either apply to the Court which passed the decree for fresh execution after bringing their names on the record or may apply to the executing Court for continuing the proceedings subsequently producing from the Court which passed the decree the necessary order under this rule [6] According to the High Court of Allahabad [7] however the transferee must apply whenever he does apply for *fresh execution* even when the application by his predecessor is pending

Though an application by the transferee *merely* for substitution of his name is not competent still it is a step in aid of execution within the meaning of Article 182 of the Limitation Act so as to give a fresh starting point of time [8] In cases governed by Article 183 of the Limitation Act the order of the Court allowing the transferee to execute the decree after recognition of his transfer will operate as a revivor and be a fresh starting point of limitation [9] The mere issue of a notice under this rule without a decision of the Court that the decree is executable will not however operate as a revivor [10]

See also the undermentioned cases [11] holding that an application under this rule is an application in accordance with law within the meaning of Article 182 of the Limitation Act

4 (35) AIR 1935 Nag 230 (233) 31 Nag LR Sup 111

Bench ruling in AIR 1927 All 165)]

8 (07) 29 All 301 (302)

(35) AIR 1935 Nag 230 (233) 31 Nag L R Sup 111
(38) AIR 1938 Bom 300 (311) (Although such application is dismissed for non payment of process fees and for failure to serve notices on the judgment debtors)
[But see (34) AIR 1934 Pat 662 (666) (Application under O 21 R 16 C P C 1908 is not a step in-aid)
(33) AIR 1933 Sind 341 (343) 27 Sind L R 314)]

9 (29) AIR 1929 Mad 252 (256) 52 Mad 590
[But see (36) AIR 1936 Pat 398 (399) 15 Pat 102]

10 (03) 30 Cal 979 (982)
(25) AIR 1925 Cal 23 (25) (As to the meaning

20. Transfer of decree against company in liquidation — An application by a transferee of a decree obtained against a limited company which has since gone into liquidation, for substitution of his name as decree holder must in spite of the provisions of Section 171 of the Companies Act be made to the execution Court and not to the Court in which the winding up proceedings are pending [1]

21. Equities enforceable against the original decree holder. — See Notes to Section 49 As to whether the prohibition under O 34 R 14 applies to the assignee of a decree see Note 4 to Section 49 and O 34 R 14 and also the undermentioned case [1]

22 **Appeal** — An order allowing or dismissing an application by a transferee from a decree holder made under this rule is appealable as a decree [1] The reason is that, as mentioned already in Note 24 to Section 47, the transferee is a representative of the decree holder and therefore a decision on a question whether any person is a representative or not of a party is one within the scope of Section 47 sub section (3) Sub section (3) to Section 47 was first introduced in Section 244 of the old Code by the Amending Act VII of 1888 and the undermentioned decisions[2] prior to that Act holding that no appeal lay in such a case are no longer good law

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sion certificate is obtained)

(99) 1899 All W N 16 (16)
(80) 5 Cal L Rep 253 (256)

Note 20

1 (19) AIR 1919 All 337 (337) 41 All 43?

Note 21

1 (01) 14 C P L R 35 (36) (Assignee cannot bring to sale the equity of redemption)

Note 22

1 ...

(16) AIR 1916 Cal 471 (472) (Genuineness of purchase between assignee and attaching creditor of the decree)
(1900) 27 Cal 670 (672 673)
(99) 26 Cal 250 (252 253)
(07) 11 Cal W N 239 (241) (Question between

(17) AIR 1917 Mad 605 (605 606) (The subsequent dismissal does not take away the right of the judgment debtor to appeal)
(15) AIR 1915 Mad 1138 (1140)
(02) 25 Mad 383 (385)
(01) 25 Mad 545 (546)
(06) 16 Mad L Jour 27 (28)
(98) 21 Mad 388 (390) (Real transferee applying for execution of decree — Question determining whether he is real transferee is one falling under Section 47)

incompetent)
(*See* (85) 11 Cal 150 (152) (Person adversely claiming against decree holder is not a representative of the decree holder)]
[But see (98) 20 All 539 (542)
(96) 1896 Pun Re No 78 page 245
(33) AIR 1933 Lah 473 (473) (Order recognizing transfer — Appeal by non assigning co decree holder *held* to be not competent)
(35) AIR 1935 Lah 609 (611) (Reversing on ...

2 (85) 7 All 451 (453)
(89) 12 Mad 511 (511)

O. 21 R. 16
Note 19

made before the execution is proceeded with[4]

Where, during the pendency of execution proceedings, the decree holder dies or transfers the decree by an assignment in writing, can the transferee apply under this rule to continue the execution proceedings? It has been held by the High Courts of Bombay, Calcutta, Madras and Patna and the Judicial Commissioner s Courts of Sind and Peshawar that it is open to the transferee either to apply for continuing the proceedings in execution or to make a fresh application[5] The reason is that a pending execution application does not abate by reason of the death or devolution of any interest of the decree holder and, therefore, the transferee can apply by virtue of Section 146 and this rule Similarly, where the decree holder dies while his application is pending in a Court to which the decree has been transferred for execution, his legal representatives may either apply to the Court which passed the decree for fresh execution after bringing their names on the record, or may apply to the executing Court for continuing the proceedings, subsequently producing from the Court which passed the decree the necessary order under this rule[6] According to the High Court of Allahabad,[7] however, the transferee must apply, whenever he does apply, for *fresh execution*, even when the application by his predecessor is pending

Though an application by the transferee *merely* for substitution of his name is not competent, still it is a step in aid of execution within the meaning of Article 182 of the Limitation Act so as to give a fresh starting point of time[8] In cases governed by Article 183 of the Limitation Act, the order of the Court allowing the transferee to execute the decree after recognition of his transfer will operate as a revivor and be a fresh starting point of limitation[9] The mere issue of a notice under this rule without a decision of the Court that the decree is executable will not, however, operate as a revivor[10]

See also the undermentioned cases[11] holding that an application under this rule is an application in accordance with law within the meaning of Article 182 of the Limitation Act

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4 (35) AIR 1935 Nag 230 (233) 31 Nag LR Sup 111

5 [illegible]

7 [illegible]

Bench ruling in AIR 1927 All 165)]

8. (07) 29 All 301 (302)
[illegible]
(07) 30 *Mad 541* (543)
(80) 5 Bom 246 (248)
(35) AIR 1935 Nag 230 (233) 31 Nag L R Sup 111
('38) AIR 1938 Bom 309 (311) (Although such application is dismissed for non payment of process fees and for failure to serve notices on the judgment debtors)
[**But see** (34) AIR 1934 Pat 662 (666) (Application under O 21 R 16 C P C, 1908 is not a step in aid)
(33) AIR 1933 Sind 341 (343) 27 Sind L R 314)]

9 ('29) AIR 1929 Mad 252 (256) 52 Mad 590
[**But see** (36) AIR 1936 Pat 398 (399) 15 Pat 102]

1[illegible]

11 [illegible]

as ineffectual and to maintain a suit, unless he has taken steps to have his transfer recognized Thus where, after a transfer was effected the decree was attached at the instance of a third person, and the assignee's application for execution was dismissed wrongly on the ground that the decree had been attached, and thereupon the assignee filed a suit for refund of the purchase money, it was held that it was his duty to have the attachment removed by presenting a claim to the attaching Court on the strength of his assignment and that, unless such a claim was presented and rejected, he could not succeed in the suit [9] **O. 21 R. 16 Note 23**

R. 17. [S. 245.] *(1)* On receiving an application for the execution of a decree as provided by rule 11, sub-rule (2), the Court shall ascertain whether such of the requirements of rules 11 to 14 as may be applicable to the case have been complied with; and, if they have not been complied with, the Court may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it. **O. 21 R. 17**

Procedure on receiving application for execution of decree

(2) Where an application is amended under the provisions of sub-rule (1), it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented.

(3) Every amendment made under this rule shall be signed or initialled by the Judge.

(4) When the application is admitted, the Court shall enter in the proper register a note of the application and the date on which it was made, and shall, subject to the provisions hereinafter contained, order execution of the decree according to the nature of the application:

Provided that, in the case of a decree for the payment of money, *the value of the property attached shall*, as *nearly as may* be, correspond with the amount due under the decree.

Local Amendments

ALLAHABAD

Between the words "been complied with" and "the Court may" *insert* the words 'and if the decree holder fails to remedy the defect within a time to be fixed by the Court"

CALCUTTA

In sub rule (1) *cancel* the words "the Court may reject the application or may allow the defect to be remedied then and there or within a time to be fixed by it" and *substitute* therefor the following

"the Court shall allow the defect to be remedied then and there or within a

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9. ('09) 3 Ind Cas 938 (939) 32 Mad 62

O 21 R 17 time to be fixed by it If the defect is not remedied within the time fixed the Court may reject the application

LAHORE

For the words and if they have not been to be fixed by it in sub rule (1) *substitute* the following words

and if they have not been complied with the Court shall fix a time within which the defect shall be remedied and if it is not remedied within such time may reject the application

MADRAS

(1) For the words or may allow fixed by it in sub rule (1) *substitute* the words if the defect is not remedied within a time to be fixed by it

(2) Add the following proviso at the end of the rule

Provided that where an execution application is returned on account of inaccuracy in the particulars required under Rule 11 (2) (g) the endorsement of return shall state what in the opinion of the returning officer is the correct amount

NAGPUR

In sub rule (1) for the words and if they have not been complied with within a time to be fixed by it *substitute* the words and if they have not been complied with the Court may allow the defect to be remedied then and there or may fix a time within which it should be remedied and in case the decree holder fails to remedy the defect within such time the Court may reject the application

OUDH

In sub rule (1) *delete* the last sentence beginning with the words and if they and ending with the words to be fixed by it and *substitute* the following sentence in lieu thereof

and if they have not been complied with the Court may allow the defect to be remedied then and there or may fix a time within which it should be remedied and in case the decree holder fails to remedy the defect within such time the Court may reject the application

PATNA

In sub rule (1) *substitute* the following for the words the Court may reject the application etc to the end of the sub rule

the Court shall allow the defect to be remedied then and there or within a time to be fixed by it and if the decree holder fails to remedy the defect within such time the Court may reject the application

RANGOON

In sub rule (1) for the words the Court may reject the application or may allow the defect to be remedied then and there or within a time to be fixed by it the following shall be *substituted* namely

the Court may reject the application if the defect is not remedied within a time to be fixed by it

Synopsis

Other Topics (miscellaneous)

1. Legislative changes. —

1. The words "may allow it to be amended have been replaced by the words "may allow the defect to be remedied' The object is to make the rule clear and comprehensive so as to include cases of *defects* such as omission to file a copy of the decree

2 Sub-rule (2) is now See Note 3, *infra.*

2. Procedure on receiving an application for execution. — Sub-rule (1) prescribes the procedure to be followed on receiving an application for execution of a decree It casts a duty upon the Court to ascertain whether such of the requirements of Rules 11 to 14 as are applicable have been complied with or not. If they are not complied with, the Court can either reject the application at once or allow the defect to be remedied then and there or within a time fixed [1] If it does neither, it cannot, after the period of limitation for execution has expired, reject the application without giving the decree-holder an opportunity to amend the application [2] Under this rule the executing Court has got a discretion to allow the necessary amendments [3]

3. Amendment and limitation. — This rule contemplates the amendment of defects in the execution application before *admission and registration* But supposing the Court overlooks the defects and registers the application, can they be subsequently amended during the pendency of the application? The answer to this depends upon the question whether the decree is or is not barred by limitation on the date of the amendment If there is no bar of limitation, the amendment can, according to the Patna High Court, be allowed [1] The reason is that a substantive fresh application can be entertained on that date, and that there is nothing which prevents the Court from treating the amended application as a fresh application for execution [2] A Full Bench of the Calcutta High Court has, on the other hand, held in *Asgar Ali* v *Troilokyanath*, I L R 17 Calcutta 631 (F B), that "Section 245 by implication excludes the power of the Court to amend after admission and registration" It was held by the Patna High Court in *Ram Sumran* v *Ram Bahadur*, AIR 1923 Patna 224, that the said observations should be understood only as referring to the particular case before the Full Bench where the decree was *barred* on the date when the defect (*viz*, omission to file a list of property) was sought to be amended The decision in *Asgar Ali's* case

Order 21 Rule 17 — Note 2

1 [illegible]

refused to interfere)

(21) AIR 1924 Mad 367 (367)

Note 3

[illegible]

O. 21 R. 17
Note 8

was distinguished by the Calcutta High Court itself in a recent decision[3] in which it was held that even after an execution application is registered, the Court has jurisdiction to allow an amendment of the application, provided the period of limitation for the application for execution has not expired.

Where, however, on the date when the defect is sought to be amended the decree would be barred by limitation, there is a conflict of opinion as to whether or not an amendment can be allowed. On the one hand, the High Court of Calcutta[4] holds that no amendment is permissible on the ground that the Court is not empowered under the rule to allow such an amendment. The Sind Judicial Commissioner's Court[5] also has held that an application for execution cannot be allowed to be amended after the period of limitation for the application has expired. On the other hand, the High Court of Madras[6] holds that the Court can allow such an amendment under sub rule (1) and that such amendment relates back to the date of the application. The reasoning of the Madras High Court is that the law casts a duty upon the Court to notice the defects in the application before admission and if the Court had done its duty properly the defects could have been remedied within time, and that the decree holder should not be *made* to suffer for the failure of the Court to do its duty. The High Courts of Allahabad[7] Lahore[8] and Patna[9] and the Judicial Commissioner's Court of Peshawar[10] have also allowed the defects to be amended, though the decree had become barred on the date of the amendment. The Bombay High Court[11] has also held that the Court has power to allow an application for execution to be amended even after the expiry of the period of limitation for such application.

Sub rule (1) refers only to the requirements of Rules 11 to 14. Consequently the rule does not apply where the defect in the execution application is one which has no

3. ('35) AIR 1935 Cal 614 (617)
[*See also* ('35) 39 Cal W N 1144 (1145) (The Court has always got the power to make an

4.
14 Cal 124)
('14) AIR 1914 Cal 359 (360)
('25) AIR 1925 Cal 1048 (1050) (Following 17 Cal 631 (FB))
('86) 12 Cal 161 (165)
[But see ('19 AIR 19

631)]

5. ('35) AIR 1935 Sind 26 (26)
[*See also* ('39) AIR 1939 Sind 272 (278) (It can

from the ordinary consequences which follow when his request to the Court for its assistance is barred by time)]

6. ('24) AIR 1924 Mad 867 (868) (Following 17 Mad 67)
('25) AIR 1925 Mad 161 (162)

from date of original presentation)
('28) AIR 1928 Mad 24 (25) (Following A I R 1924 Mad 867)

(The petitioner is not entitled to insist for amendment as of right)
('11) 9 Ind Cas 760 (760) (Mad) (Amendment cannot be allowed to the prejudice of the judgment-debtor by inserting a prayer for attachment after the decree is barred)

Followed)]

7. ('93) 1893 All W N 112 (113)
('98) 20 All 478 (480)

8. ('20) AIR 1920 Lah 122 (122)

546.

1937)

('38) AIR 1938 Bom 405 (405) I L R (1938) Bom 709 (Application for execution by attachment—Particulars of property to be attached not speci-

reference to Rules 11 to 14[12] The Court can however amend such defects under its general powers[13] As to whether a defect by reason of non compliance with O 21 R 15 can be amended under this rule see Rule 15 *ante*

Effect of amendment — In the absence of any provision under the old Code corresponding to sub rule (2) there was a conflict of opinion as to whether an amendment took effect only from the date of the *amendment* or from the date of the *application* and whether the original application which was defective could be considered as being in accordance with law within the meaning of Article 179 clause 4 of the Limitation Act of 1877 (Article 182 clause 5 of the present Limitation Act of 1908) so as to operate as a fresh starting point of limitation[14] Under sub rule (2) of this rule it is now clear that the application though defective when presented should be deemed to be in accordance with law when the defect is subsequently amended and the amendment dates back to the original date of the application[1] The effect of the sub rule is to preclude the judgment debtor from raising any objection at a later stage on the ground that the application was not in accordance with law at the time it was presented[16] If however the Court without giving an opportunity to amend *rejects* the application the rejected application cannot be considered to be in accordance with law[17] Similarly where the subsequent application is not one for *amendment* of the original application but is really an independent application for execution asking for a relief not included in the original application sub rule (2) cannot apply and the subsequent application cannot be deemed as presented on the date of the original application[18]

As to whether an application returned for amendment and not re presented is one in accordance with law see Note 4 below

4 Non compliance with the order of amendment within the time fixed — Sub rule (1) empowers the Court to fix a time for the amendment of the execution application If the party fails to amend within the time fixed or such further time as the Court may extend the proper course is to reject the application[1] If notwithstanding the decree holder s failure to amend the defect within the time fixed the Court does not reject the application it is not precluded from allowing a fresh application for amendment at a subsequent stage[2]

If the Court returns an application for amendment of the defects and the

fied—Application to amend by giving particulars after limitation can be allowed)

12 [*See* (33) *AIR 1933 Oudh 288 (289)* (Execution application filed within time illegally returned by Court for correction — Application filed after some months is not fresh but same application)]

13 (32) AIR 1932 Cal 766 (768) 59 Cal 1266 [*See* (35) AIR 1935 Sind 26 (26) (Application by assignee merely asking for assignee to be brought on record without prayer for execu

18 (38) AIR 1938 Cal 169 (163) (Application

Note 4

1 (90) 17 Cal 631 (635) (FB)
(84) 10 Cal 541 (544)
(96) 23 Cal 217 (221)
(16) AIR 1916 Cal 356 (357) (Court can extend time under S 148)
(21) AIR 1921 Nag 28 (29) 17 Nag L R 1 9
2 (84) 10 Cal 541 (544)

O. 21 R. 17
Note 3

was distinguished by the Calcutta High Court itself in a recent decision[3] in which it was held that even after an execution application is registered, the Court has jurisdiction to allow an amendment of the application, provided the period of limitation for the application for execution has not expired

Where, however, on the date when the defect is sought to be amended the decree would be barred by limitation, there is a conflict of opinion as to whether or not an amendment can be allowed On the one hand, the High Court of Calcutta[4] holds that no amendment is permissible on the ground that the Court is not empowered under the rule to allow such an amendment The Sind Judicial Commissioner s Court[5] also has held that an application for execution cannot be allowed to be amended after the period of limitation for the application has expired On the other hand, the High Court of Madras[6] holds that the Court can allow such an amendment under sub rule (1) and that such amendment relates back to the date of the application The reasoning of the Madras High Court is that the law casts a duty upon the Court to notice the defects in the application before admission and if the Court had done its duty properly the defects could have been remedied within time, and that the decree holder should not be made to suffer for the failure of the Court to do its duty The High Courts of Allahabad[7] Lahore[8] and Patna[9] and the Judicial Commissioner s Court of Peshawar[10] have also allowed the defects to be amended, though the decree had become barred on the date of the amendment The Bombay High Court[11] has also held that the Court has power to allow an application for execution to be amended even after the expiry of the period of limitation for such application

Sub rule (1) refers only to the requirements of Rules 11 to 14 Consequently the rule does not apply where the defect in the execution application is one which has no

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3 (35) AIR 1935 Cal 614 (617)
[*See also* ('35) 39 Cal W N 1144 (1145) (The [illegible]

4 [illegible]
14 Cal 121)
(14) AIR 1914 Cal 359 (360)
('25) AIR 1925 Cal 1048 (1050) (Following 17 Cal 631 (FB))
(86) 12 Cal 161 (165)
[**But see** (18) AIR 1918 Cal 73 (74) (Where the original application was one in accordance with law, and a supplementary list of properties was allowed to be filed Distinguishing 17 Cal 631)]

5 (35) AIR 1935 [illegible]

[illegible] Mad [illegible])
('35) AIR 1935 Mad 161 (163) (Execution application filed *bona fide* against wrong legal representative within time—Amendment allowed but after 12 years' time — Amendment takes effect from date of original presentation)
(28) AIR 1928 Mad 24 (25) (Following A I R 1924 Mad 367)
[*See also* (15) AIR 1915 Mad 337 (337) (Court has wide powers of amendment under S 153 and under such powers execution application prayer [illegible]

[illegible]) (260) [illegible] ist for [illegible]

(14) AIR 1914 Mad 663 (664)]
[**But see** (13) 21 Ind Cas 609 (609) (Mad) [illegible]

7. (93) 1893 All W N 112 (113)
('98) 20 All 478 (480)
8 ('20) AIR 1920 Lah 122 (122)
[illegible] 546
[illegible] 937)
[illegible]
(38) AIR 1938 Bom 405 (408) I L R (1938) Bom 708 (Application for execution by attachment—Particulars of property to be attached not speci-

reference to Rules 11 to 14[14] The Court can, however, amend such defects under its general powers[13] As to whether a defect by reason of non compliance with O 21 R 15 can be amended under this rule, see Rule 15, *ante*

Effect of amendment — In the absence of any provision under the old Code corresponding to sub rule (2), there was a conflict of opinion as to whether an amendment took effect only from the date of the *amendment* or from the date of the *application*, and whether the original application which was defective could be considered as being in accordance with law within the meaning of Article 179, clause 4 of the Limitation Act of 1877 (Article 182 clause 5 of the present Limitation Act of 1908) so as to operate as a fresh starting point of limitation[14] Under sub rule (2) of this rule it is now clear that the application though defective when presented should be deemed to be in accordance with law when the defect is subsequently amended and the amendment dates back to the original date of the application[15] The effect of the sub rule is to preclude the judgment debtor from raising any objection at a later stage on the ground that the application was not in accordance with law at the time it was presented[16] If, however the Court without giving an opportunity to amend *rejects* the application, the rejected application cannot be considered to be in accordance with law[17] Similarly, where the subsequent application is not one for *amendment* of the original application but is really an independent application for execution asking for a relief not included in the original application, sub rule (2) cannot apply and the subsequent application cannot be deemed as presented on the date of the original application[18]

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4. Non-compliance with the order of amendment within the time fixed. — Sub rule (1) empowers the Court to fix a time for the amendment of the execution application If the party fails to amend within the time fixed or such further time as the Court may extend the proper course is to reject the application[1] If notwithstanding the decree holder s failure to amend the defect within the time fixed, the Court does not reject the application it is not precluded from allowing a fresh application for amendment at a subsequent stage[2]

If the Court returns an application for amendment of the defects, and the

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fied—Application to amend by giving particulars after limitation can be allowed)

('37) AIR 1937 Bom 365 (370) I LR (1937) Bom 691
16 ('28) AIR 1928 Mad 440 (443)
('30) AIR 1930 Cal 353 (355)
17. ('18) AIR 1918 Cal 245 (246)

Note 4

1 ('90) 17 Cal 631 (635) (FB)

O. 21 R. 17
Notes 4-6

decree holder does not re present it within the time fixed the question arises whether such an application can be treated as one in accordance with law within the meaning of Article 182 clause 5 of the Limitation Act so as to operate as a fresh starting point of limitation for execution The answer to this question depends upon another question namely whether the defect for the amendment of which the application was returned was a *material* defect without the amendment of which further proceedings could not be taken or was only a *formal* defect [3] In the latter case the application will be one in accordance with law [4] while in the former case it will not [5]

Where the application is returned not for any defect in Rules 11 to 14 but for some other defect it has been held by the Allahabad and the Patna High Courts that the application will be one in accordance with law [6]

5 **Procedure on admission of application** — Sub rule (4) prescribes the procedure to be followed after admission of the application If it is not in any way defective the Court is bound to order execution according to the nature of the application [1] Thus if the decree holder prays for the arrest of the judgment debtor, the Court cannot refuse the same and direct him to proceed against the property in the first instance [2] No enquiry as to whether the property sought to be proceeded against belongs to the judgment debtor is contemplated under the rule before execution can be ordered [3]

6 **Execution of declaratory decree** — See Note 33 to Section 47 and Note 5 to Section 38 and the undermentioned cases [1]

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(83) 12 Cal L Rep 279 (?80)
(82) 8 Cal 479 (481)
3 (93) 16 Mad 142 (143)
(94) 17 Mad 76 (77)
(83) 6 Mad 250 (251)
(14) AIR 1914 Mad 632 (633)
(16) AIR 1916 Mad 356 (358)
(98) 25 Cal 591 (597 598) (FB) (Explaining 23 Cal 217)

5 (90) 17 Cal 631 (637) (FB) (List of property not filed)

cree and costs not shown—*Held* ...

6 (32) AIR 1932 All 484 (484)
(24) AIR 1924 Pat 23 (24) 2 Pat 803

Note 5

1 (26) AIR 1926 Lah 110 (110) 6 Lah 548
(67) 8 Suth W R 28? (284)
(96) 18 All 482 (486)
2 (82) 8 Cal ?97 (209) (The word granted is equivalent to admitted)
3 (6.
(35) A
attach
name
debtor — Court has no power to do so where the third person does not take any objection)

Note 6

1 (85) 9 Bom 109 (110) (Declaratory decree can not be executed)
(94) 21 Cal 784 (789) 21 Ind App 89 (PC) (Do)

7. Execution of rent decrees under the Tenancy Acts. — A landlord who obtains a decree for arrears of rent of an under-tenure is not restricted by the provisions of the Bengal Tenancy Act to execute the decree in the first instance by sale of the under-tenure He is at liberty to execute it in the ordinary manner against the person or property of his judgment-debtor [1] Section 163 of the Bengal Tenancy Act, VIII of 1885, and Section 217 of the Bihar and Orissa Tenancy Act, II of 1913, prescribe that the Court shall, on the admission of the application for execution, order the issue simultaneously of the order of attachment and the proclamation for sale **O.21 R.17 Notes 7-10**

8. Execution of maintenance decree. — A decree declaring a person's right to maintenance at a certain rate and also directing the payment of such maintenance by future instalments is not a mere declaratory decree and can be executed as each instalment falls due [1]

Where a decree awarding future maintenance also charges certain property for the due payment thereof, the decree-holder can, if there is default, apply for an order for the sale of the property or file a fresh suit to enforce the charge [2] The High Court of Calcutta[3] has held that, to avoid the difficulty of a further suit, the Court can provide in the decree for maintenance for the appointment of a receiver with directions to take possession of the property in case of default and sell the same and pay the maintenance from out of the sale proceeds

9. Value of property attached. — Under the proviso to the rule the Court should call upon the decree-holder to specify the approximate value of the property to be attached, to see that the value of the property to be attached corresponded as nearly as may be with the amount due under the decree [1] But, if more property than is necessary is attached and sold and a purchaser buys the same without notice of the fact that the amount realized by sale of the other plots was more than sufficient to satisfy the decree, the sale in his favour cannot be set aside [2]

10. Appeal. — An appeal lies against an order returning an execution application on the ground that the decree holder is not entitled to calculate the amount due to him on the basis adopted in the petition, and directing him to amend the same [1] But an order allowing the decree holder to withdraw the execution proceedings does not determine anything under Section 47 and is not appealable.[2]

Note 7

1. ('88) 15 Cal 492 (494, 496)
('90) 17 Cal 301 (303)
('99) 26 Cal 103 (108)
('04) 8 Cal W N 575 (577)

Note 8

1 [illegible] n be the

2. ('97) 2 Cal W N 33 (33).
[See however ('95) 22 Cal 903 (908)]

3. ('99) 26 Cal 441 (448)

Note 9

1. ('29) AIR 1929 Nag 305 (306, 308)
('98) 20 All 412 (418) 25 Ind App 146 (PC).
[*See* ('35) AIR 1935 Pat 143 (144) (Execution [illegible] diction)]
[*See also* ('92) 16 Bom 91 (114)]

2. ('19) AIR 1919 Cal 1095 (1096)

Note 10

1. ('14) AIR 1914 Mad 532 (533) 18 Ind Cas 607 (607) 37 Mad 314

2. ('13) 19 Ind Cas 904 (905) (Cal).

O.21 R.18
Notes 2-4

stranger[4] Similarly, where A, B, C and D hold decrees against X, and X holds a decree against A and the circumstances are otherwise such that the two decrees can be set off against each other, B C and D cannot object to such setting off on the ground that X s decree against A should be executed and the proceeds of execution should be rateably distributed among all the decree holders of X[5]

Where an application is made for the execution of a decree and a suit which is capable of resulting in a cross decree of the kind contemplated by this rule is at that time pending in *the Court which passed that decree*, the execution may be stayed under Rule 29 But if such suit is pending in any *other Court*, Rule 29 will not apply[6]

In *Hazariram* v *Bansidhar*,[7] their Lordships of the Privy Council observed as follows 'It is true that under Rules 18 to 20 the set off of decrees is not a discretionary matter depending upon equitable considerations such as may emerge from the circumstance that both decrees arise out of the same transaction Whatever they arise from circuity of proceedings thereunder can be avoided and should be avoided this is the principle of the rules

It has been held that apart from the provisions of this rule and Rule 19 *infra* the Court has inherent power to allow a set off in execution proceedings[8]

3 Cross-decrees for the payment of two sums of money. — The first condition for claiming a set off under this rule is that the decrees should be for the *payment of money* and that the amounts under each decree should be *definite and ascertained*[1] A decree directing recovery of money by sale of immovable property is a decree for the payment of money under this rule[2] even though it may be in enforcement of a charge[3] But a mortgage decree in which there is no *personal* liability does not fall within this rule[4] See Notes to Rule 20 *infra*

A decree for mesne profits of which the amount has not been ascertained cannot be set off under this rule as the amount is not *definite*[5]

4. Cross-decrees in separate suits. — The second condition is that there must be cross *decrees* and they must have been passed in *separate suits* An adjudication under Section 144 of the Code is a *decree* to which this rule will apply,[1] but a private *award* is not an adjudication[2]

[illegible] AIR 19?5 Cal 102 (104)
[illegible]t see (37) AIR 1937 Pesh 83 (84)]

Note 3

[illegible]

[illegible]re amount is not ascertained if the parties [illegible]e to a mode of execution involving a set-off [illegible]ould be allowed)

Note 4

[illegible]5) AIR 19?5 Cal 102 (103 104)
[illegible]9) 11 Suth W R 144 (144)

Cross claims in the *same suit* do not fall within this rule but come under Rule 19[3]

5 "Between the same parties" — It is necessary that the parties should be the same in both suits[1] For this purpose it is the party *on the record* that has to be considered

Illustrations

1 *A* holds a decree against *B* *B* holds a decree against *C* The two cannot be set off on the ground that in respect of the first decree *A* is *benamidar* for *C*[2]

2 *A* holds a decree against *B* *B* holds a decree against *A* A set off between the two cannot be objected to on the ground that in respect of the first decree *A* is a *benamidar* for *C*[3]

6 Same character in both suits necessary —

Illustrations

1 *A* holds a decree against *B personally* *B* files a suit on a mortgage executed by *C*, impleading *A* as a purchaser of a portion of the equity of redemption and obtains a decree The two decrees cannot be set off[1] In this illustration *A* is no doubt acting in his own interest But his *character* in the mortgage suit is *different* from that in the other suit inasmuch as the mortgage decree is as against him not a decree for payment of money *personally* If he had himself been the mortgagor there would have been his personal liability and the two decrees could have been set off (See for fuller discussion Notes to O 21 R 20) The expression same character etc does not mean that the liability to pay which resulted in the decree should have been incurred by the parties themselves in both suits Thus a decree against a widow in respect of a debt contracted by her deceased husband can be set off against a decree obtained by the widow on a debt due to herself[2] But in the undermentioned case[3] it was held that a decree obtained against the assets in the hands of the heir of a deceased person and a decree obtained by such heir against the holder of the former decree personally cannot be set off against each other

2 A decree against a firm is binding on the partners personally It can be set off against a decree obtained by one of the partners against the holder of the former decree[4]

7. Decrees must be capable of execution at the same time — It is necessary that the decrees should be capable of execution at the *same time*[1] Thus there can be no set off if one of the decrees is only a preliminary decree[2] or if its execution is time barred[3] or if its execution is expressly postponed till the happening of a certain contingency and the contingency has not happened[4] or if it has already been satisfied[5] But the fact that the judgment debtor under one decree intends appealing against the decree will not make it inexecutable so as to prevent a set off being allowed[6]

It has been held in some decisions that apart from this rule and Rule 19 *infra*, the Court has inherent power to allow a set off in execution proceedings even if the

3 (83) 5 All 272 (273)
[*See also* (32) AIR 1932 Lah 537 (537) (Costs in Letters Patent Appeal and under the decree in same suit—Neither Rule 18 nor Section 151 applies)]
4 (27) AIR 1927 Bom 255 (256)

Note 5

1 (66) 5 Suth W R Misc 12 (12)
(66) 5 Suth W R Misc 22 (23)
(87) 9 All 64 (67)
2 (68) 10 Suth W R 450 (451)
3 (93) 3 Mad L Jour 220 (221)

Note 6

1 (16) AIR 1916 All 290 (293) 38 Mad 669
2 (1864) 1 Suth W R Misc 23 (23)
(14) AIR 1914 Mad 2 (3) (A decree obtained against husband can after his death be set off against a decree obtained by the widow against holder of decree against the husband)
3 (39) AIR 1939 All 25 (27)

Note 7

1 (31) AIR 1931 Cal 23 (24) 57 Cal 855
(33) AIR 1933 Lah 372 (373)
2 (31) AIR 1931 Cal 23 (24) 57 Cal 855
3 (33) AIR 1933 Lah 372 (373) (Maintenance decree in favour of one of the parties payable periodically)
(66) 5 Suth W R Misc 16 (16)
(66) 5 Suth W R Misc 43 (43)
(71) 16 Suth W R 308 (309)
(18) AIR 1918 Cal 631 (632)
4 (67) 7 Suth W R 535 (536)
5

O 21 R. 18
Notes 2-4

stranger[4] Similarly where *A* *B*, *C* and *D* hold decrees against *X*, and *X* holds a decree against *A* and the circumstances are otherwise such that the two decrees can be set off against each other *B* *C* and *D* cannot object to such setting off on the ground that *X* s decree against *A* should be executed and the proceeds of execution should be rateably distributed among all the decree holders of *X*[5]

Where an application is made for the execution of a decree and a suit which is capable of resulting in a cross decree of the kind contemplated by this rule is at that time pending in *the Court which passed that decree* the execution may be stayed under Rule 29 But if such suit is pending in any *other Court* Rule 29 will not apply[6]

In *Hazariram* v *Bansidhar*,[7] their Lordships of the Privy Council observed as follows It is true that under Rules 18 to 20 the set off of decrees is not a discretionary matter depending upon equitable considerations such as may emerge from the circumstance that both decrees arise out of the same transaction Whatever they arise from circuity of proceedings thereunder can be avoided and should be avoided this is the principle of the rules

It has been held that apart from the provisions of this rule and Rule 19 *infra* the Court has inherent power to allow a set off in execution proceedings[8]

3 Cross-decrees for the payment of two sums of money — The first condition for claiming a set off under this rule is that the decrees should be for the *payment of money* and that the amounts under each decree should be *definite and ascertained*[1] A decree directing recovery of money by sale of immovable property is a decree for the payment of money under this rule[2] even though it may be in enforcement of a charge[3] But a mortgage decree in which there is no *personal* liability does not fall within this rule[4] See Notes to Rule 20 *infra*

A decree for mesne profits of which the amount has not been ascertained cannot be set off under this rule as the amount is not *definite*[5]

4. Cross-decrees in separate suits. — The second condition is that there must be cross *decrees* and they must have been passed in *separate suits* An adjudication under Section 144 of the Code is a *decree* to which this rule will apply[1] but a private *award* is not an adjudication[2]

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4 (80) 2 All 806 (808) (Case under S 209 of the Code of 1859)

[illegible]

(25) AIR 1925 Cal 102 (104)
[**But see** (37) AIR 1937 Pesh 83 (84)]

Note 3

1 (66) 5 Suth W R Misc 12 (12)

2 [illegible]

where amount is not ascertained if the parties agree to a mode of execution involving a set-off it should be allowed)

Note 4

1 (25) AIR 1925 Cal 102 (103, 104)

2 (69) 11 Suth W R 144 (144)

Similarly, the assignee of a decree is entitled to set off such decree against a decree which the judgment debtor has obtained against such *assignee*[2]

Illustrations

1 *A* holds a decree against *B* for Rs 5,000 *B* holds a decree against *A* for Rs 3,000 *A* assigns his decree to *C* *B* can claim a set off to the extent of Rs 3,000 even as against *C*, and *C* will be entitled to execute the decree only for Rs 2,000[3]

2 *A* holds a decree against *B* for Rs 5,000 *B* holds a decree against *A* for Rs 6,000 *A* assigns his decree to *C* *B* can claim a set off and *C* will not be entitled to execute his decree for any amount[4]

The fact that the assignment took place before the one or the other decree had been passed will not affect the right to set off, provided that the assignee had notice thereof

Illustrations

1 *A* who holds a decree against *B* assigns it to *C* Before the assignment *B* has filed a suit against *A* and the suit results in a decree *B* can set off the decree even as against *C*[5]

2 *A holds a decree against B B who has filed a suit against A assigns his interest in the* suit to *C* The suit is decreed *A* can set off his decree as against the decree in favour of *C*[6]

This right to set off will be available even though the judgment debtor had filed an appeal against the assigned decree and the assignee had not been made a party to the appeal[7]

In the undermentioned case[8] it was held by the Nagpur High Court that the assignee of a decree is not entitled to a set off under this rule unless the decree was assigned to him before applications were made for the execution of the two decrees sought to be set off against each other Thus where *A* had a decree against *B*, and *C* had a decree against *A* and after applications had been made for the execution of both the decrees, *C* assigned his decree to *B*, it was held that *B* was not entitled to claim that such decree should be set off against the decree which *A* had obtained against him The decision proceeds on the ground that under sub rule (1) the right to claim a set off arises when applications for execution are made and that unless the right to set off existed at such time, it cannot be claimed

An attaching decree holder is an "assignee" within the meaning of this rule[9]

11. Sub-rule (4). — This sub rule is new Where a person holds a decree against several persons *jointly and severally* and is *singly* liable under another decree in favour of one or more of such persons, he can claim a set off between the two decrees[1] He cannot, however, do so if his decree is not a *joint and several* decree as

(72) 18 Suth W R 442 (442 443)
(73) 19 Suth W R 85 (87)
(74) 21 Suth W R 141 (143)
(11) 12 Ind Cas 205 (206) (Low Bur)
(74) 22 Suth W R 235 (237, 238)
(36) AIR 1936 Pesh 33 (34) (Where the assignee of a decree has at the time of assignment

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Note 11

1 (92) 14 All 339 (340 341)
(83) 9 Cal 479 (480, 481)
(37) AIR 1937 P C 39 (41) 64 Ind App 67 : 16 Pat 127 (PC)

O 21 R 18 Note 11

against his judgment-debtors[2] or if he is not the sole decree-holder in his decree[3] This sub-rule deals with a case where there is a single decree holder and several judgment debtors under the same decree In the converse case viz where there is a joint decree *in favour* of several persons against a single judgment debtor, the latter is not entitled to set off against such joint decree a decree obtained by him against any one of the decree holders Thus where X obtains a decree against A and A and B obtain a decree against X X cannot insist on a set-off[4] (See Illustration (b) to the rule) But where X's decree against A is based on a debt incurred by A on behalf of himself and B, and both A and B claim to set off their joint decree against X's decree (against A) the set-off must be allowed[5]

0.21 R.19

R. 19. [S 247] Where application is made to a Court for the execution of a decree under which two parties are entitled to recover sums of money from each other, then,—

Execution in case of cross claims under same decree

(*a*) if the two sums are equal, satisfaction for both shall be entered upon the decree, and,

(*b*) if the two sums are unequal, execution may be taken out only by the party entitled to the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered upon the decree

[1877, S 247]

Synopsis

1 Scope and object of the Rule
2 " Two parties."
3 Two sums unequal — Procedure
4 Set-off of costs.

Other Topics (miscellaneous)

"Are entitled to recover sums of money from each other" See Notes 1 and 4

Costs more than the amount decreed—Court-fee whether recoverable from the amount decreed. See Note 4

Execution by party entitled to the larger sum. See Note 3

Execution for difference only See Note 3.

Of a decree See Note 1

1 Scope and object of the Rule — This rule provides a set off in the case of cross-claims contained in the *same* decree[1] The object of the provision is to prevent each side taking out execution in respect of sums due under the same decree[2] It is however not necessary that the remedy of each party against the other should be *identical* In an old Allahabad case it was held that a set off could not be ordered unless

2 (17) AIR 1917 All 30 (308 309) (A mortgage decree can never be termed a joint and several decree within O 21 R 18 (4) and therefore there cannot be a set-off of two mort [illegible]

16 Pat 1? (PC)

5 (3) AIR 193? P C 39 (41) 64 Ind App 67 16 Pat 12 (PC)

3 [illegible]

(1) 15 Suth W R 19? (1?)

4 (3) AIR 1937 P C 39 (41) 64 Ind App 67

the parties had identical rights of execution in respect of their claims[3] This is no longer good law and it is now well settled that a set off under this rule will be ordered even though the remedy of each party against the other is not precisely of the same nature[4] Thus costs awarded can be set off against —

(1) Money directed to be realized by sale of hypothecated property[5] or against redemption amount awarded by the decree[6]

(2) Against mesne profits decreed[7]

(3) Against pre emption amount to be deposited under the decree[8] But in pre emption suits under Sections 14 and 15 of the Oudh Laws Act the purchase money must be deposited else, the right is lost In such suits it has been held that the costs cannot be set off against the pre emption amount[9]

(4) Amount decreed as rent and directed to be realised by sale of property[10]

It has been held by the High Court of Allahabad in the undermentioned case[11] that where *A*, a mortgagee, sues *B*, the mortgagor and *C* a subsequent mortgagee, and a decree is passed in favour of *A* but awarding costs to *C*, *A* cannot set off the costs against his decree inasmuch as *A* could not have recovered any amount from *C*

Set off under this rule and Rule 18 *ante* is not a discretionary matter depending on equitable considerations[12]

On general principles and in exercise of its inherent power, an executing Court can entertain and give effect to a claim of set off even in cases which do not come strictly within the provisions of this rule[13]

The rule applies to cases in which two parties are entitled to recover sums of money from each other under the *same* decree In the undermentioned case[14] it was held by the Allahabad High Court that an order against a garnishee in proceedings under O 21 Rr 131 to 139 of that High Court directing him to pay a certain sum to the decree holder forms part of the original decree and hence the garnishee is entitled to set off against such sum the amount awarded to him as costs by the original decree

3 (83) 5 All 272 (274)
4 (94) 16 All 395 (396)
(38) AIR 1938 Mad 638 (639 640)
5 (94) 16 All 395 (397)
(14) AIR 1914 Oudh 416 (417)
[*See* (03) 16 C P L R 73 (75) (Decree for fore closure—Execution for costs—Doctrine of set off not applicable)]
6 (93) 17 Bom 3? (34)
(1900) ?3 Mad 121 (123)
7 (15) AIR 1915 Bom 226 (226 227) 40 Bom 60
8 (30) AIR 1930 All 413 (413) 52 All 539
(22) AIR 19?2 Lah 142 (143) 2 Lah 294
(03) 6 Oudh Cas ?3 (24)
(39) AIR 1939 All 2?8 (229) I L R (1939) All 261 (Plaintiff awarded certain sum as costs—Defendant awarded a less sum as costs—Plaintiff [illegible] (Plaintiff required to deposit amount in Court and defendant required to execute [illegible] deed of re conveyance to plaintiff — Defendant also to pay costs — Plaintiff depositing amount deducting costs—Claims *held* to be in nature of cross demands — Doctrine of equitable set off applied)
(39) AIR 1939 Lah 85 (86) (Even if the right [illegible] ff is bar [illegible]
9 [illegible] 345
10 (38) AIR 1938 Mad 638 (639 640)
11 (34) AIR 1934 All 8 (9 10)
12 (37) AIR 1937 P C 39 (41) 64 Ind App 67 16 Pat 127 (PC) (But the circuity of proceedings can be avoided and should be avoided this is the principle of the rules)
13 (36) AIR 1936 Cal 409 (412) I L R (1937) 1 Cal 57
[illegible]

O. 21 R. 19
Notes 1-3

By Section 265 (3) of the Chota Nagpur Tenancy Act (VI of 1908), this rule has been made applicable to execution of decrees under that Act, subject to the other provisions of the Act and the rules that may be made under sub section (1)

2. "Two parties." — The expression "two parties" includes two sets of parties[1] It also includes the legal representatives of a party but not *two different legal representatives* of the *same* party[2] See also the undermentioned case[3]

3. Two sums unequal — Procedure. — If the amounts under the two claims are unequal, the claim for the smaller amount is automatically satisfied and no execution should be allowed in respect of it[1] Execution under the claim for the larger amount should be allowed only to the extent of the *difference*[2] The Court should first ascertain the amounts due, enter satisfaction in respect of the claim for the smaller amount and enforce execution for the *balance* of the amount due under the larger claim[3] Since the two claims form a single indivisible decree, and only enforceable for the difference, the fact that one of the claims is barred by limitation, does not alter the position[4]

If in executing the decree for the larger claim, no deduction is made for the amount due under the smaller claim and the claim is executed in full, the Court may order refund of the excess under Section 151[5]

Where a plaintiff obtained against the defendants a decree for costs and realized the same and in appeal by the defendant the High Court vacated the decree for costs and in a further appeal to the Privy Council the appeal was dismissed and the defendant was ordered to pay the costs of the plaintiff, it was held that the defendant could, in answer to the execution of the decree for costs by the plaintiff, claim to set off the amount of costs recovered from him under the decree of the trial Court which was later on set aside[6]

As seen in Note 1 above, where under a decree for pre emption, the plaintiff is awarded costs, he is entitled to deduct such costs from the pre emption money which he is required to deposit under the decree Where in such a case, a certain sum is awarded to the plaintiff as costs and a smaller sum is awarded to the defendant as costs and the decree does not direct the plaintiff to deposit the costs of the defendant also in Court, it has been held that a deposit made by the plaintiff deducting the *whole* amount awarded to him as costs and without giving credit for the sum awarded as costs to the defendant is not bad and that clause (b) of this rule does not strictly apply

Note 2

1. ('17) AIR 1917 Mad 226 (227) (A plaintiff who holds a joint and several decree against two defendants (who under the same decree are individually entitled to different amounts for costs which in the aggregate exceed the amount due to the plaintiff) can take out execution of the decree against one defendant alone for the balance due to him by both defendants until the other defendant makes an application in execution to recover the amount due to him by the plaintiff under the decree)

money from each other — As such it cannot cover a case in which the creditors of one of the parties are also concerned)

Note 3

1 ('70) 13 Suth W R 105 (107)
('18) AIR 1918 Cal 153 (154)
('18) AIR 1918 Cal 133 (134)
('23) AIR 1923 Mad 638 (639, 640)
('38) AIR 1938 Mad 638 (640)
2 ('01) 5 Cal W N 497 (507)
('20) AIR 1920 Cal 438 (439)
('23) AIR 1923 Lah 151 (153)

powers)

to such a case, inasmuch as there is no question of the plaintiff taking out *execution* for the larger sum [7] O.21 R.19 Notes 3-4

4. Set-off of costs. — From the illustrations given in Note 1 above it is seen that an award of costs is a claim to "recover money within the meaning of this rule Thus, costs awarded to one party in a suit may be set off either against costs awarded to the other party in the suit[1] or against other sums awarded to the latter party [2] Such costs should, however, have been *actually* awarded [3]

When costs have been awarded on interlocutory matters in the same suit between the same parties and against each other they will be deemed to be incorporated in and to form part of, the final decree in the suit and will therefore be set off against each other under this rule [4]

Cross decrees and cross claims in mortgage suits

R. 20. [New] The provisions contained in rules 18 and 19 shall apply to decrees for sale in enforcement of a mortgage or charge O.21 R.20

1. Scope and object of the Rule. — This rule makes the provisions of Rules 18 and 19 applicable to cases where the decrees are, or one of the decrees is a mortgage decree [1] Thus

(1) a simple money decree can be set off against a mortgage decree if the other conditions laid down in Rule 18 are satisfied [2] and

(2) costs awarded to a judgment debtor may be set off against a mortgage decree obtained against him in the suit if the other conditions laid down in Rule 19 are satisfied [3]

The Rangoon High Court has however held that a set off cannot be allowed if there is no *personal liability* under the mortgage decree [4] The High Court of Patna has held that it is not necessary that the mortgage decree should be actually one for

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7 (39) AIR 1939 All 228 (229) I L R (1939) All 261 (Reversing on Letters Patent Appeal AIR 1937 All 756)

Note 4

1 (06) 28 All 676 (677)

2 (14) AIR 1914 Oudh 416 (417)

(11) 10 Ind Cas 454 (455) (All) (On this principle where a pauper suit was decreed only partially and the amount decreed to the plaintiff was less than what plaintiff had to pay to

must yield to the right of the Government for a first charge for court fee on amount decreed in pauper suit)]

3 (71) 16 Suth W R 308 (309)

4 (17) AIR 1917 Pat 259 (260)

[*See also* (35) AIR 1935 Cal 225 (226) 62 Cal 298 (Decree for costs awarded by the trial Court set aside on appeal to High Court—Appeal to Privy Council dismissed with costs—In execution of decree for costs in Privy Council judgment debtor is entitled to set off costs in trial Court realized by decree holder)]

Order 21 Rule 20 — Note 1

1 [illegible]

decrees for sale but not for possession in enforcement of mortgage or charge)

(

before sale)

(37) AIR 1937 P C 39 (40) 16 Pat 127 64 Ind App 67 (P C) (Contention that R 20 only applies where both the decrees are mortgage decrees rejected)

[**But see** (36) AIR 1936 All 639 (641) 58 All 907 (Submitted not correct)]

3 (14) AIR 1914 Oudh 416 (417)

4 (30) AIR 1930 Rang 68 (70 71) 7 Rang 505

O. 21 R. 22

Local Amendments

ALLAHABAD

(1) For the words 'one year", wherever they occur in this rule, *read* the words "three years

(2) To sub rule (2) of this rule shall be added the following proviso

' Provided that no order for the execution of a decree shall be invalid by reason of the omission to issue a notice under this rule, unless the judgment debtor has sustained substantial injury by reason of such omission

BOMBAY

The words "two years ' shall be *substituted* for the words "one year' wherever they occur

CALCUTTA

Add the following sub rule (3)

(3) Omission to issue a notice in a case where notice is required under sub rule (1) or to record reasons in a case where notice is dispensed with under sub rule (2), shall not affect the jurisdiction of the Court in executing the decree '

LAHORE

(1) The words 'two years shall be *substituted* for the words "one year ' wherever they occur

(2) Add the following at the end of the rule

Failure to record such reasons shall be considered an irregularity not amounting to a defect in jurisdiction '

MADRAS

(1) In sub rule (1) the words "two years ' shall be *substituted* for the words one year wherever they occur

(2) In sub rule (1) after clause *(b)*, *insert* the following

'or *(c)* where the party to the decree has been declared insolvent, against the Assignee or Receiver in insolvency

(3) Between sub rules (1) and (2) *insert* the following

(1a) Where from the particulars mentioned in the application in compliance with Rule 11 (2) *(ff)*, *supra*, or otherwise the Court has information that the original decree holder has transferred any part of his interest in the decree, the Court shall issue notice of the application to all parties to such transfer, other than the petitioner, where he is a party to the transfer '

(4) Add the following proviso to sub rule (2)

Provided that no order for execution of a decree shall be invalid owing to the omission of the Court to record its reasons unless the judgment debtor has sustained substantial injury as the result of such omission

NAGPUR

(1) For the words "one year wherever they occur, *substitute* the words "three years

(2) To sub rule (2), *add* the following proviso

' Provided that no order for the execution of a decree shall be invalid by reason of the omission to issue a notice under this rule unless the judgment debtor has sustained substantial injury by reason of such omission '

N.-W. F. P.

For the words "one year," wherever they occur, *read* ' two years '

OUDH

(1) *For* the words 'one year,' wherever they occur in this rule *read* the words 'three years'

(2) To sub rule (2) of this rule *add* the following proviso

'Provided that no order for the execution of a decree shall be invalid by reason of the omission to issue a notice under this rule unless the judgment debtor has sustained substantial injury by reason of such omission'

PATNA

For sub rule (1) *substitute* the following

'Where an application for execution is made in writing under Rule 11 (2) the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause on a date to be fixed why the decree should not be executed against him'

RANGOON

(1) In clause *(a)* of sub rule (1) *for* the words 'one year' the words 'three years' shall be substituted

(2) In the second line of the proviso to sub rule (1) *for* the words 'one year' the words 'three years' shall be substituted

Synopsis

Other Topics (miscellaneous)

1 Legislative changes —

1 The words 'of any decree passed on appeal from the decree sought to be executed or' which occurred in the proviso to the old Section 248 have been omitted as being unnecessary because the decree to be executed in such cases will be the appellate decree as held in the undermentioned cases [1]

2 The Explanation contained in the old Section has also been omitted in view of the definition of 'Court' given in Section 37 [2]

3 Sub rule (2) is new *Vide* Note 16 *infra*

2 Scope and object of the Rule. — The object of the notice required to be given under this rule is not only to furnish an opportunity to the person concerned to urge any objection he may have to the maintainability of the execution application,

Order 21 Rule 22 — Note 1

1 ('72) 14 Moo Ind App 465 (483 484) (P C)

('89) 11 All 267 (274) (F B)

2 The Report of the Special Committee.

O 21 R 22
Notes 2–2a

but also to prevent his being taken by surprise and to enable him to satisfy the decree before execution is issued against him [1] The rule is imperative and notice *shall* be issued —

(1) where the application is made *one year after* the date of the decree [2] or

(2) where it is made against the *legal representatives* of a party to the decree [3]

An amendment after one year of an application for execution made within one year does not render the application one made after one year for the purposes of this rule [4] The necessity for notice in an application for execution against the legal representatives of the judgment debtor is not confined to cases where execution is taken out against them in the *first instance* it equally applies to cases where execution had been previously taken against the judgment debtor himself and on his death the execution is sought to be taken out against the legal representatives [5]

A notice under this rule may be issued by the Court *executing* a transferred decree while a notice under O 21 R 16 should be given only by the Court which *passed* the decree [6]

The issue of a notice under this rule to the guardian of a minor judgment debtor raises no presumption that he has been appointed guardian by implication by the Court [7]

The rule does not apply to summary proceedings like those contained in Section 111 of the Madras Estates Land Act [8]

2a Legal representative — For definition of the expression legal representative see Section 2 clause (11) See also Note 10 to O 22 R 3 According to that definition a legal representative is a person who represents the estate of a *deceased* person Hence on the adjudication of a person as an insolvent the Official Receiver cannot be said to be his legal representative [1] But under the amendment of the rule by the Madras High Court notice is required to be given to the Official Receiver where the judgment debtor has been declared an insolvent [2] In the undermentioned decision[3] of the Calcutta High Court it was assumed that the Official Receiver is a legal representative of an insolvent judgment debtor to whom notice must issue under this rule It is submitted that the assumption is not correct It may be noted in this connexion that the decision of the Privy Council in *Raghunath Das* v *Sundar*

Note 2

1 ('97) 21 Bom 424 (432) (F B)
('33) AIR 1933 Lah 826 (827) (But he is not bound at that stage to object to the mode of execution

3 ('21) AIR 19?1 Nag 126 (126 127)
('14) AIR 1914 P C 1?? (131) 42 Cal 72 41 Ind App 251 (P C)

4 See Rule 17 sub-rule 2 *ante*

5 ('32) AIR 1932 Pat 199 (200 201) 11 Pat ?11
('36) AIR 1936 Mad ?05 (211 212) 59 Mad 461 (F B)
See also Section 50 Note 12

6 ('?5) AIR 19 5 Oudh 449 (450) ?8 Oudh Cas 330

7

8

30S) (Sub

Note 2a

1

2

O. 21 R. 22 Notes 2a–5

Das[1] in which it was held that a notice to the Official Receiver was necessary was a decision under the Code of 1882 which did not contain a definition of 'legal representative'"[5]

3. "Shall issue notice" — The provisions of this rule are mandatory[1] and the issue of the notice is a *condition precedent* to the validity of the execution proceedings[2] It is the duty of the Court to issue the notice whether the decree holder has asked for it or not[3] and the failure to do so will render the proceedings *null and void*[4] See Note 5 below

The rule is, however, sufficiently complied with if notice has been given to all persons interested, and the fact that some of them were minors for whom guardians had not been appointed will not invalidate the execution proceedings if the others sufficiently represented them[5] Where the Court executing the decree is also the Court which passed the decree there is nothing in this rule to prohibit the issue of a combined notice under this rule and Rule 16 *ante*[6]

A minor who attained majority pending execution proceedings is not entitled, on that ground, to a fresh notice under this rule[7]

A notice under the rule should be to specifically show cause why the decree should not be executed[8]

4. Proof of notice. — Where an execution is impeached on the ground of want of notice under this rule, the onus of proving the want of notice will be on the party setting it up[1] The reason is that the issue of a notice under the rule being the duty of Court it will be presumed that the Court has done all that it was legally bound to do In this connection an entry on the order sheet[2] or a report of the Nazir[3] to the effect that notice has been served will be *prima facie* evidence of the service of notice

5. Effect of omission to give notice. — Before the date of the Privy Council decision in *Malkarjun* v *Narhari*[1] it was held by the High Courts of Allahabad and Calcutta that a sale in execution without giving the notice required by this rule was absolutely void and without jurisdiction[2] The High Court of Madras on the other hand held that the absence of notice was only a *material irregularity* and that the

4 (14) AIR 1914 P C 129 (131) 42 Cal 72 41 Ind App 251 (PC)
5 (36) AIR 1936 Mad 205 (207) 59 Mad 461 (FB)

Note 3

1 (17) AIR 1917 Cal 728 (731) 44 Cal 954
2 (93) 21 Cal 19 (22 23)
(70) 13 Suth W R 400 (401)
(81) 3 All 424 (426)
(81) 6 Cal 103 (105)

7 (25) AIR 1925 Mad 158 (159)
8 (32) AIR 1932 Pat 199 (201 203) 11 Pat 241 (A notice calling upon the legal representative to show cause why his name should not be substituted in the place of the judgment debtor is not enough)

Note 4

1 (02) 29 Cal 580 (582)
(74) 22 Suth W R 5 (6)
[*See* (34) AIR 1934 Pat 211 (211) (Order sheet stating issue of notice and service thereof — Judgment debtor can show that provisions of Code were not complied with)]
2 (17) AIR 1917 Cal 84 (86)
(32) AIR 1932 Cal 627 (628)
3 (71) 15 Suth W R 203 (204)
[*See also* (14) AIR 1914 Mad 153 (154)
(73) 19 Suth W R 102 (103)]

Note 5

1 (01) 25 Bom 337 (348) 27 Ind App 216 (PC)
2 (81) 3 All 424 (426)
(93) 20 Cal 370 (373)

O 21 R. 22
Note 5

sale was only *voidable*, and not *void*[3] In this state of conflict of authorities the Privy Council decided the case of *Malkarjun* v *Narhari*[4] There a judgment debtor having died the decree was executed against his estate A notice under the rule was issued and served on a person as the legal representative of the judgment debtor He appeared and objected that he was not the legal representative The Court, however, decided that he was the legal representative and proceeded with the execution The properties of the judgment debtor were sold in court auction It was ultimately found that the person to whom the notice was sent was not the proper legal representative The question before the Privy Council was whether the sale was under the circumstances *void for want of jurisdiction* or *only voidable on the ground of material irregularity* Their Lordships decided that the Court had jurisdiction to decide whether a person was a legal representative of a party or not, that having decided it in a particular manner, the decision could not be said to be without *jurisdiction*, that the case was only one of material irregularity in the *exercise* of jurisdiction and that the sale was therefore not void

Notwithstanding the above points of distinction the decision came to be regarded in India as one equally applying to a *total omission to issue notice* and as laying down the law that even in the absence altogether of any notice there was only a *material irregularity* and *not a want of jurisdiction* and that the sale was *voidable* and *not void* Accordingly the Calcutta High Court[5] changed its original view and held that an omission to give notice under the rule was only a *material irregularity* rendering the execution sale *voidable* The Allahabad and Madras High Courts also began to hold the same view[6] This view held the field till the Privy Council had occasion to clarify the whole position in *Raghunath Das* v *Sundar Das*[7] In that case, the judgment debtor having become insolvent his properties had vested in the Official Assignee When the decree holder took out execution a notice was issued to the Official Assignee to show cause why he should not be substituted for the debtor but there was no notice to show cause *why the decree should not be executed* It was, therefore a case of omission to issue notice under the rule The execution proceeded and the properties of the debtor were sold in court auction The question before the Privy Council was whether the sale was *void* or only *voidable* Their Lordships of the Privy Council held that a *notice under the rule was necessary in order that the Court should obtain jurisdiction to sell the property* that the notice to show cause against substitution was not enough and that the sale was therefore *void and the purchaser obtained no title* Their Lordships pointed out —

(1) that in *Malkarjun's case* a notice having been issued and served though on a wrong person the Court had acquired jurisdiction to deal with the matter

(2) that the Court in deciding upon a wrong person as the legal representative nevertheless acted with jurisdiction

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(80) 6 Cal 103 (105 106)
3 (99) 15 Mad 399 (400)
[But see (83) 6 Mad 180 (181)]
4 (01) 25 Bom 337 (347 348) 27 Ind App 216 (PC)

[*See also* (10) 8 Ind Cas 22 (24) (Cal) (If an ... to

7 ... AIR 1914 P C 129 (129 ... 42 Cal 72 41

(3) that in so deciding erroneously, the Court acted only with *material irregularity* and not without jurisdiction

Since the said decision in *Raghunath Das's case*, all the High Courts[9] except the Madras High Court veered round to their old view, *viz*, that the sale was without jurisdiction and therefore void The Madras High Court,[9] however, still continued to hold that the sale was only voidable and not void distinguishing *Raghunath Das's case* on the ground that it was a case under the old Code which contained no provision similar to that contained in the present sub-rule (2), and that in view of the recognition in the present sub rule (2) of the Court's *discretion* in the matter of issuing notice there was no longer any question of want of jurisdiction.[10] The matter came up before a Full Bench of the same High Court which finally laid down that a sale held under the circumstances mentioned above was *void for want of jurisdiction* and *not merely voidable*[11] This view was affirmed by another Full Bench of the same High Court in *Kanchamalai* v *Shahaji Raja*[12] in which it was held that even if the judgment-debtor died *after* the property had been attached and ordered to be sold, the absence of notice to the legal representative under this rule would render the sale void

Thus, it may now be taken as well settled that in cases of a *total omission to issue a notice* under the rule the sale is *absolutely void* and not *merely voidable* It is immaterial whether the property sold is immovable or moveable[13] Nor is it material whether the purchaser is the decree-holder himself[14] or a stranger.[15] The Nagpur High Court has, however, held in the undermentioned case[16] that the failure to

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in insolvent — Execution proceedings become nullity after adjudication—Purchaser gets no interest unless Official Assignee made party to execution)]

8. ('28) AIR 1928 All 74 (76) 49 All 830.
('32) AIR 1932 Cal 381 (381)
('33) AIR 1933 Pesh 41 (43)
('33) AIR 1933 Pesh 71 (72)
('15) AIR 1915 Cal 268 (270)
('18) AIR 1918 Cal 913 (915)

[illegible]

any such process)
('32) AIR 1932 Pat 199 (201) 11 Pat 241 (A notice upon legal representative of a deceased [illegible]

[illegible]

[*See also* ('17) AIR 1917 Mad 42(43) (Sale vitiated [illegible]

O. 21 R. 22
Notes 5-6

bring the legal representative of the judgment debtor on the record does not necessarily make the proceedings in execution a nullity It is submitted that the decision is not correct

However, the only object of the rule is to give the person concerned an opportunity to show cause against execution Consequently, if though no notice is served, he appears and contests the application[17] or if he was served with a notice under Rule 66 and was thus aware of the application pending against him,[18] the object of the rule is achieved and the proceedings are valid It has been held by the Judicial Commissioner s Court of Oudh[19] that the omission to issue notice under this rule does not render the sale in execution of a *mortgage decree* void, inasmuch as the jurisdiction to sell the property is derived from the decree itself and not by reason of the notice See also the undermentioned cases [20]

6. Notice to wrong person. — In *Mallarjun* v *Narhari*,[1] their Lordships of the Privy Council held that if a notice is as a fact, issued but served on a wrong person and on the objection of the latter the Court decides that he is the right legal representative it acts only in the exercise of jurisdiction and the sale is only *voidable* In such cases the proper legal representatives are equally bound by the execution proceedings though they were not parties thereto [2] Similarly, where owing to the fact that both the decree holder and the Court are not aware of the true age of the judgment debtor a notice is issued to a major judgment debtor as if he were a minor, the issue of such notice only amounts to an irregularity and no question of jurisdiction arises [3] But if the decree holder was aware of the proper legal representatives and deliberately gets notice served on a wrong person and there is no *adjudication* by

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17 (31) AIR 1931 Cal 476 (478)
(29) AIR 1929 Pat 79 (80) 7 Pat 790
(69) 11 Suth W R 329 (329)
(36) AIR 1936 Mad 99 (100) (AIR 1931 Cal 476, Followed)
[*See also* (32) AIR 1932 Pat 244 (245 246)
(Del ery of po

[illegible]

under O 21 R 66 and judgment debtor appearing and contesting execution proceedings — Failure to give notice under O 21 R 22 and omission to record reasons dispensing with notice is mere irregularity and does not vitiate proceedings)
[*See also* (25) AIR 1925 Mad 158 (159)
(33) AIR 1933 Rang 52 (53 54) 11 Rang 79]

19 (18) AIR 1918 Oudh 379 (388)

[illegible]

becomes his legal representative to whom notice should be given under this rule but it is held that failure to give such notice does not render

[illegible]

Note 6

1 (01) 25 Bom 337 (347 352) 27 Ind App 216 (PC)
[*See also* (38) AIR 1938 Mad 945 (946) (Death [illegible]

[illegible]

3 (39) AIR 1939 Mad 5 (F)

the Court as to who is the legal representative, the sale will be void [4]

7. Irregular service of notice. — The notice issued under this rule must be in accordance with law and must satisfy the requirements laid down in sub rule (1) [1] Thus, a day must be specified for the appearance of the person to whom the notice is issued[2] allowing sufficient time to enable him to come and oppose the application,[3] and the notice must be signed by the Judge or other officer [4]

But an irregularity in the service of notice is quite different from an *omission* to issue notice, and will not make the subsequent proceedings void [5] The judgment debtor or the legal representative will not be precluded from setting up his defence of objections at a later stage [6] The irregularity may also furnish a ground for avoiding a sale under Rule 90 [7]

As regards the *mode* in which service should be effected it is a matter for the Court to determine in every case whether there has been sufficient service and it is not every departure from the prescribed mode of service that will invalidate the service [8]

8. Objection as to notice, when may be taken — Since the question of the issue of notice is one affecting the jurisdiction of the Court an objection that no notice was issued is entertainable at any time, even in appeal[1] but not if it is likely to take the other side by surprise [2]

But an *irregular or insufficient service* of such notice is only an irregularity and an objection based on the ground of non service or insufficient service should be taken at the earliest possible opportunity [3]

9. More than one notice, if contemplated by the Rule. — The provisions of the rule as to *notice* are not confined to the *first* execution application They apply to every subsequent application also [1] The only exception in the latter case is that contained in the proviso [2] *viz*

(1) If on a prior execution application an order has been passed against the judgment debtor (or his legal representative) no notice will be necessary on a

4 (21) AIR 1921 Bom 385 (387) 45 Bom 1186 (The [illegible]

[illegible]

Note 7

1 (16) AIR 1916 Cal 511 (51? 513)
2 (09) 5 Ind Cas 400 (410) 37 Cal 122
3 (28) AIR 1928 Mad 1052 (1054)
4 (85) 7 All 506 (508 509)
(86) 8 All 293 (294) (Signature was in initials— Though it is proper that the person signing [illegible]

5 [illegible]

(34) AIR 1934 Pat 274 (78 279) 13 Pat 467
6 (10) 8 Ind Cas 2? (95) (Cal)
(11) 9 Ind Cas 213 (214) (Cal)
(11) 11 Ind Cas 21? (21?) (Cal)
7 (30) AIR 1930 Pat 153 (154)
8 (36) AIR 1936 Pat 593 (594)

Note 8

1 (11) 9 Ind Cas 584 (85) (Cal)

(38) AIR 1938 Pat 162 (164) (Objection can be [illegible]

2 [illegible]

point not having been taken at any stage of the suit and no opportunity having been given of showing that the surviving judgment-debtor was entitled to represent the heirs of the deceased it was impossible to say that the sale was a nullity)
3 (74) 21 Suth W R 148 (148)
[*See also* (20) AIR 1920 Cal 530 (530)]

Note 9

1 (25) AIR 1925 Pat 474 (476)
[**See however** (29) AIR 1929 Mad 275 (279 280)]
2 (25) AIR 1925 Pat 474 (476) 5 Pat 1 (F B) (Overruling AIR 1924 Pat 111)

O.21 R.22 Notes 9-12

subsequent execution application presented within one year after that *order*, though more than one year might have elapsed from the date of the *decree*[3]

(2) If on a prior execution application execution has been ordered to issue against the legal representative of a deceased judgment debtor, no notice will be necessary (on the ground of the application being one against a legal representative) for a subsequent execution application against the same legal representative

Consequently if the subsequent execution application is presented more than one year after the decree and after the last order against the judgment debtor made on an application for execution notice is necessary[4] It is, however, unnecessary that the order should be a *subsisting* one[5]

An order directing the execution proceedings to be struck off for the default of the decree holder is not an order against the judgment debtor and hence does not furnish a fresh starting point for the calculation of the period of one year under the proviso to this rule[6]

But the rule will apply only to a *fresh application for execution* Where the proceedings are but a *continuation* of a prior execution case no notice of such proceedings is necessary[7] Acting on this principle the High Court of Madras[8] has held that where properties have been attached in a prior execution application and the application has been dismissed leaving the attachment subsisting a *subsequent application for sale of the property* will not require a notice under this rule

10 Remedy when property has been sold without notice under this Rule — When a sale is held without the issue of a notice under this rule, the party aggrieved will be entitled to have the sale declared void and will be further entitled to claim damages[1] This he may do by means of an application under Section 47[2] See Note 61 to Section 47 As to the period of limitation for such application, see Note 88 to Section 47 and the undermentioned cases[3]

11. Date of the decree. — The period of one year is to be computed from the date of the decree capable of execution Thus, if the decree of the first Court is affirmed or modified in appeal the date of the decree is the date of the appellate decree But if the appeal is dismissed for default, the date of the decree is that of the decree appealed against[1]

Where a decree provides for the payment of money in instalments, the period of one year should be computed from the date of the decree and not from the date of *default* in payment of the instalment[2]

12 Notice, when not necessary. — The principle underlying the mandatory provision of the rule is that the interests which *would* be affected by the execution

for showing

this rule)

Note 10

1. (1865) 3 Suth W R 120 (122)

(... 1939 Rang ...2 (...) (Application to set aside sale on ground of want of notice under this rule is one under S 47))

3 (18) AIR 1918 Cal 171 (172 173)

(26) AIR 1926 Pat 397 (398)

Note 11

1 (17) AIR 1917 Cal 729 (791) 44 Cal 9 4

2 (21) AIR 1921 Lah 384 (385) (The *terminus a quo* is the date of the decree and not the date of default in paying the instalment which gave the right to execute the decree)

cause if any, against the execution A notice should therefore be insisted on only to the extent necessary for that purpose Therefore in cases falling under clause (a) of sub rule (1), no notice need be issued to a judgment debtor who has no interest in the property against which execution is sought [1] And in cases falling under clause (b) of sub rule (1) it is enough if notice has gone to an adult legal representative capable of representing the estate notice to the other legal representatives is not essential [2] Nor is any notice essential where the legal representative is already a party on the record though in another capacity [3]

13 Notice and limitation. — By virtue of clause (5) column 3 Article 182 of the Limitation Act of 1908 a notice issued under this rule will be a step in aid of execution in the case of decrees of Courts other than Chartered High Courts [1] For this purpose it is not necessary that the application on which the notice was issued should be a *bona fide* application [2] Nor is it material that the application was defective or irregular [3] or that it was not actually served [4] But it is necessary that the notice should have been *issued* on an application which was not time barred [5] On the question as to the date from which the period of three years is to be computed there was a conflict of views under the Limitation Act of 1877 the High Courts of Allahabad[6] and Bombay[7] holding that time should be computed from the date when the Court *ordered* the notice to issue the Calcutta and Madras High Courts holding that it should be computed only from the date when the notice was *actually issued* [8] The word

Note 12

1 ('26) AIR 1926 Cal 86 (86 87)
2 ('29) AIR 1929 Mad 275 (282)
3 ('25) AIR 1925 Cal 1227 (1228)
('04) 14 Mad L Jour 342 (343)
[*See also* ('36) AIR 1936 Pat 253 (254) (Decree

Note 13

1

('74) 22 Suth W R 484 (484)
('74) 22 Suth W R 512 (517) (F B)
('75) 23 Suth W R 327 (328)
The following cases cannot be considered to be good law
('67) 8 Suth W R 306 (307)
(1865) 4 Suth W R Misc 6 (6)
('66) 6 Suth W R Misc 97 (97)
('66) 6 Suth W R Misc 98 (101)
('67) 8 Suth W R 268 (268)
('68) 9 Suth W R 330 (331)
('68) 9 Suth W R 443 (444)
(2) 18 Suth W R 193 (194)
(3) 19 Suth W R 107 (109)
('05) 2 Cal L Jour 544 (545)
('08) 35 Cal 1047 (1049)
('09) 2 Ind Cas 941 (942) (Cal)
('11) 10 Ind Cas 411 (412) (Cal)
('22) AIR 1922 Cal 44 (46)
('27) AIR 1927 Lah 106 (107)
('94) 17 Mad 76 (77)
('08) 31 Mad 68 (70)
('08) 18 Mad L Jour 14 (15)
('09) 2 Ind Cas 433 (434) (Mad)
('14) AIR 1914 Mad 435 (435) 15 Ind Cas 738 (739) 37 Mad 231

notice cannot cure the invalidity of the execution application)]
4 ('03) 27 Bom 622 (625)
('17) AIR 1917 Mad 363 (364)
[But see ('16) AIR 1916 Oudh 278 (279) 18 Oudh Cas 374]
5 ('05) 2 All L Jour 67 (68)
('78) 3 Cal 518 (521)
('78) 2 Mad 1 (3 5)
6 ('81) 1881 All W N 120 (120)
('90) 1890 All W N 244 (245)
('08) 30 All 536 (537)
7 ('03) 27 Bom 622 (625)
('04) 28 Bom 416 (420)
8 ('02) 6 Cal W N 656 (657)
('06) 4 Cal L Jour 530 (531)
('07) 30 Mad 90 (92)
See also the following cases under the Act of 1871 ('75) 23 Suth W R 195 (195)

O. 21 R. 22 Note 13

"issuing" which occurred in clause (6) of Article 179 of the Limitation Act of 1877 corresponding to Article 182 clause (6) was changed into the word "issue" in the Act of 1908 and it was held by the High Court of Bombay[9] that the effect of the change was to give effect to the Calcutta and Madras view. Under the Act of 1908, it was held by all the High Courts except the High Court of Allahabad and by the Chief Court of Oudh that it is the date of the *issue* of the notice that is the starting point of limitation.[10] The Allahabad High Court, and following it the Oudh Chief Court were, however, of opinion that the new Act did not make any change in the law. They therefore held the same view as that of the Allahabad High Court before the Act of 1908.[11]

Article 182 of the Limitation Act of 1908 has now been amended by Act IX of 1927 by which clauses (5) and (6) of the Article have been amended and substituted as follows:

> Clause 5 (*where the application next hereinafter mentioned has been made*) *the date of the final order passed on an application made* in accordance with law to the proper Court for execution or to take some step in aid of execution of the decree or order, or
>
> Clause 6 (in respect of any amount recovered by execution of the decree or order, which the decree holder has been directed to refund by a decree passed in a suit for such refund) *the date of* the last mentioned decree or in the case of an appeal therefrom, the date of the final decree of the Appellate Court or of the withdrawal of the appeal, or."

Under the present Act, as amended, therefore, the time is to be computed from the date of the *final order passed* on such an application. Where no notice has been issued at all, a mere *order* for issuing notice will not, however, be a step in-aid of execution.[12]

In respect of decrees of Chartered High Courts the limitation for execution is prescribed in Article 183 of the Limitation Act. The said Article makes no specific mention of a notice under this rule, but it contains a provision that such *decrees* may be executed within 12 years from the date when they have been "*revived*." The term "revivor" has nowhere been defined. It was introduced on the basis of the English Common Law Practice (which prevailed in the Supreme Courts of India) under which, if a writ of *execution was not served out* within a year and a day, it was necessary to revive the decree by a *process* known as *scire facias*. Till then the decree would be in a "dormant" condition. It will have to be "revived" so as to be made *executable*. The "revivor," therefore, consists in getting a declaration recorded that execution is intended to be enforced under the decree.

The question, therefore, is whether a *notice under this rule will operate* as a "revivor." In this connection it has been held that an *order for execution* made *after the issue of a notice under this rule* will operate as a revivor.[13] It is important to note that to constitute a revivor the following three conditions must be satisfied, *viz* —

('75) 24 Suth W R 227 (227)
('76) 25 Suth W R 249 (249)
('76) 25 Suth W R 546 (547)
9. [illegible]

[**But see** ('10) 8 Ind Cas 377 (378): 13 Oudh Cas 203 (Date of issue of notice was held to be starting point of limitation.)]

12. ('99) 23 Bom 35 (38)
('10) 6 Ind Cas 746 (748): 13 Oudh Cas 90
('16) AIR 1916 Oudh 278 (279): 18 Oudh Cas 374.

13. ('04) 26 All 361 (364)
('81) 6 Cal 501 (511)

(1) There must be an application for execution An application for transmission of decree is not enough[14]

(2) There must be an order for execution passed on the application The mere fact that an application has been made and notice has been issued to the judgment debtor is not enough[15]

(3) The said order for execution should have been passed after the issue of a notice under this rule[16] If there were several judgment debtors and notice under this rule was issued to only one or some of them there will be a revivor only against them and not against the other judgment debtors[17]

See also Note 10 to Art 183 in the Authors Commentaries on the Limitation Act

13a Failure to show cause why decree should not be executed — Effect. — See Note 23 to Section 11 *ante* and the undermentioned cases[1]

14 Court executing the decree — The rule provides that the notice shall be issued by the Court executing the decree The expression will include the Court to which the decree has been transferred for execution In cases therefore where the decree is transferred for execution the transferee Court can and in fact is the only Court competent to issue the notice[1]

But an *application* to execute against the legal representatives has to be made to the Court which passed the decree[2] In such cases therefore the application will be made to the Court which passed the decree but notice under the rule will be issued by the transferee Court[3]

15 Revivor of decree by notice to one judgment-debtor — *Vide* under Note 13 above

16 Sub-rule (2) — The mandatory character of the rule is not in any way abrogated by sub rule (2)[1] The sub rule gives a discretion to the Court to *dispense* with the notice under certain circumstances[2] If such notice is dispensed with the

(16) AIR 1916 Cal 488 (494) 43 Cal 903
(84) 7 Mad 540 (542 543)
(90) 17 Cal 491 (497) (But if such order itself s

Mad 1109
(18) AIR 1918 Mad 513 (518) 40 Mad 1197

Note 13a

1 (35) AIR 1935 Cal 306 (307) (Failure of judgment debtor to appear on date fixed in notice under R 22 Court ordering notice

(9 AIR 93

objection subsequently as Courts action is without jurisdiction)

Note 14

1 (08) 12 Cal W N 897 (899)
(18) AIR 1918 Mad 580 (584 585) 40 Mad 1069 (FB)
(10) 8 Ind Cas 22 (25) (Cal)
(22) AIR 1922 Cal 3 (4)
(25) AIR 1925 Oudh 448 (450) 28 Oudh Cas 330
2 (93) 18 Bom 224 (226)

by the legal representatives)
3 (05) 28 Mad 466 (469) (FB)

Note 16

(Do)
2 (33) AIR 1933 Cal 560 (561)

O.21 R.22
Notes 16-17

reasons should be recorded[3] The Rangoon High Court[4] is of opinion that the omission to record reasons is not a mere irregularity but a defect which goes to the very root of the proceedings and renders them void for want of jurisdiction The Bombay,[5] Calcutta,[6] Madras,[7] Patna[8] and Oudh[9] Courts have, however, held that such omission will be a mere irregularity and that the proceedings will not be totally invalid merely by reason of the omission The rule as amended by the Lahore High Court expressly provides that a failure to record reasons is only an irregularity not affecting jurisdiction[10]

17. Appeal. — An order on a question of notice under the rule will come under Section 47 and is therefore, appealable as a decree[1] But an order of arrest without notice is not a *final* order and is not, therefore, appealable[2] Even in such cases the High Court will interfere in its revisional jurisdiction in extreme cases[3]

An order allowing or refusing an application to set aside a sale for want of a notice under the rule comes under Section 47 and is, therefore, appealable as a decree[4]

O.21 R.23

R. 23. [S 249.] *(1)* Where the person to whom notice is issued under the last preceding rule does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed.

Procedure after issue of notice

(2) Where such person offers any objection to the execution of the decree, the Court shall consider such objection and make such order as it thinks fit.

[1877, S 249; 1859, S. 247. See Ss. 38, 47, 51 and Rr. 24 and 57 below]

Synopsis

1 Scope of the Rule.
2 "The Court shall consider such objection"
3 Appeal

Other Topics (miscellaneous)

r

ion See Note 2

recorded und r
Illegal)
26 Oudh Cas

cation)

10 (39) AIR 1939 Lah 473 (474)

Note 17

1

4 (

ttachment issued without notice under O 21,

1. Scope of the Rule. — If the person to whom notice is issued under Rule 22 does not appear and show cause against execution, the Court is bound to order execution Thereupon such person will be concluded and bound by the order and cannot go behind it.[1] If, however, the execution application is subsequently dismissed under Rule 57 of this Order, the dismissal has been held to have the effect of vacating the previous order for execution [2]

If, on the day fixed, neither party appears, the application can be dismissed [3]

2. "The Court shall consider such objection." — If the person to whom the notice is issued appears and offers objections, the Court is equally bound to consider those objections [1] There is no particular form in which the objections are to be presented and, if in writing, they need not be verified [2]

Such objections should, however, go to the root of the executability of the decree,[3] and not be merely formal or immaterial ones which do not prevent execution,[4] for, apart from considering whether the decree is executable or not, the executing Court cannot go behind the decree See Section 38, Note 8.

3. Appeal. — An order allowing or refusing execution under this rule is appealable as a decree.[1]

Process for execution

R. 24. [Ss. 250, 251, para. 1.] *(1)* When the preliminary measures (if any) required by the foregoing rules have been taken, the Court shall, unless it sees cause to the contrary, issue its process for the execution of the decree.

Process for execution.

(2) Every such process shall bear date the day on which it is issued, and shall be signed by the Judge or such officer as the Court may appoint in this behalf, and shall be sealed with the seal of the Court and delivered to the proper officer to be executed.

Order 21 Rule 23 — Note 1

1. ('75) 23 Suth W R 310 (311)

proceeding it was open to the judgment debtor

2. ('16) AIR 1916 Mad 886 (886)
3. ('95) 20 Bom 541 (542)

Note 2

1. ('10) 5 Ind Cas 546 (547) (All)
('67) 8 Suth W R 200 (200)
('70) 14 Suth W R 155 (155).

('95) 22 Cal 558 (561) (Even though the legal representative objects to the power of transferee Court to issue such notice)

2. ('67) 8 Suth W R 200 (200).
3. (86) 8 All 377 (380).
4. ('97) 21 Bom 314 (317) (Or that a judgment-debtor had died after hearing but before judgment)

1. ('11) 9 Ind Cas 760 (760) (Mad)
'88) 11 Mad 130 (132)
('11) 9 Ind Cas 823 (823) (Lah) (But order of a Court that no warrant of attachment should issue before a certain date is not appealable as no order in execution had been made)

O. 21 R. 24 Note 1

(3) In every such process a day shall be specified on or before which it shall be executed

[1877, Ss 250, 251 (1), 343; 1859, Ss 221, 222. *Cf.* R S C, O. 42 Rr 14 and 16 See S 51.]

Local Amendments

ALLAHABAD

After the words at the end of sub rule (3) ' be executed *add* the words ' and a day shall be specified on or before which it shall be returned to Court

BOMBAY

Add the following proviso to sub rule (2)

Provided that a First Class Subordinate Judge may, in his special jurisdiction send a process to another subordinate Court in the same district for execution by the proper officer in that Court

CALCUTTA

Add the following to sub rule (3)

and a day shall also be specified on or before which it shall be returned to the Court

MADRAS

Delete the full stop at the end of sub rule (3) and *add* the following words

and a day shall be specified on or before which it shall be returned to Court

NAGPUR

In sub rule (3) for the word 'executed," *substitute* the words "returned to the Court

OUDH

In sub rule (3) after the words at the end of the sub rule "be executed , *add* the words and a day shall be specified on or before which it shall be returned to Court

RANGOON

In sub rule (3) *add* the following

and a day shall also be specified on or before which it shall be returned to the Court '

SIND

Add the following proviso to sub rule (2)

' Provided that First Class Subordinate Judge may in his special jurisdiction send a process to another Subordinate Court in the same district for execution by the proper officer in that Court

Synopsis

1 "Shall issue process."
2 "Shall be sealed "
3 Delegation of authority to execute, if can be made
4 Arrest or attachment without warrant
5 ' Shall be signed "
6 "A day shall be specified on or before which it shall be executed "
7. Application of the Rule to Revenue Courts.

Other Topics (miscellaneous)

Presumption as to authority to sign and onus See Note 5

' Unless it sees cause to the contrary See Note 1

1. "Shall issue process." — If the preliminary measures prescribed by the previous rules have been taken, the Court is bound to issue process and cannot refuse

O.21 R.24
Notes 1-6

to do so unless ' it sees cause to the contrary such as the judgment debtor being entitled to a right to set off or the applicant asking for simultaneous execution [1]

In the absence of any such cause the Court cannot refuse issue of process [2] The fact that a previous execution application proved infructuous will not justify such a refusal [3]

2 "Shall be sealed" — Every process issued under this rule *shall* be sealed The provision is mandatory and without the seal the process will be invalid and its execution illegal [1] Resistance to the execution of such a process will therefore constitute no offence [2]

3 Delegation of authority to execute, if can be made — The rule only says that the process shall be *delivered* to the proper officer *to be executed* It is not necessary that the proper officer should himself execute the process [1] and there is nothing to prevent his delegating a subordinate of his to execute the process [2] But a process issued to a bailiff cannot be executed by a nazir [3]

4 Arrest or attachment without warrant — An officer effecting an arrest or attachment should have the warrant in his possession otherwise the arrest[1] or attachment[2] will be illegal

5 "Shall be signed"—A process issued under this rule which is not signed by the Judge is illegal [1] If however any other officer of the Court is specially authorized in this behalf it is enough if it is signed by him [2] Such authority should be in writing and kept in the Court [3] If however such process is signed by a sheristadar by order the presumption will be that he was authorized in this behalf [4] and the *onus* of showing that he had no such authority will be on the party who denies the authority [5]

6 "A day shall be specified on or before which it shall be executed" — A warrant which does not specify the date on or before which it is to be executed is invalid and its execution is illegal [1]

If such date is specified the process should be executed on or before that date its execution later is illegal [2]

Order 21 Rule 24 — Note 1

1 (84) 10 Cal 817 (819)
2 (97) 1897 Pun Re No 57 p 252
3 (71) 17 Suth W R 165 (168)

Note 2

1 (19) AIR 1919 Pat 404 (405) 3 Pat L Jour 636
(35) AIR 1935 All 214 (215) 57 All 660
2 (26) AIR 1926 Pat 237 (238 239) 5 Pat 216

Note 3

1 (95) 22 Cal 596 (604 605)
2 (84) 6 All 385 (388)
(3?) AIR 1932 All 227 (227)
(95) 22 Cal 596 (609)
(?5) 22 Cal ?59 (761)
(10) 5 Ind Cas 409 (410) 37 Cal 122 (But a [illegible] can [illegible]
3 [illegible] Jour

Note 4

1 (83) 5 All 318 (321)
2 (05) 27 All 258 (259)

Note 5

1 (85) 7 All 506 (509 510) (PC) (Execution sale was set aside)
(35) AIR 1935 All 214 (215) 57 All 660 (Process signed by amin but not bearing seal of Court—Attachment is illegal — Hence removal of such property is not offence)
2 (02) 6 Cal W N 845 (846 847)
(86) 8 All 293 (294) (The signature may be confined to the initials)
(20) AIR 1920 All 51 (52) (Signature by peshkar who was not authorized)
3 (87) 1887 All W N 42 (42)
4 (23) AIR 19?3 Cal 584 (585)
5 (19) AIR 1919 Pat 404 (405) 3 Pat L Jour 636

Note 6

1 (10) 5 Ind Cas 409 (410) 37 Cal 122
(16) AIR 1916 pat 2?2 (2?3) 1 Pat L Jour 550
(34) AIR 1934 All 1016 (1017) (Resistance to execution of warrant in such case is not an offence)
2 (84) 10 Cal 18 (19)

O. 21 R. 24
Notes 6-7

If the time has been extended, the extended date should be specified, otherwise the execution of the process will be illegal.[3]

Under the rule as amended by the High Court of Allahabad a date has to be fixed also for the return of the process. When it is so fixed the process cannot be executed after that date.[4]

7. Application of the Rule to Revenue Courts. — The provisions of this rule have been held to apply to warrants issued under Section 131 of the Central Provinces Land Revenue Act.[1]

O. 21 R. 25

R. 25. [Ss. 343 and 251, last para.] *(1)* The officer entrusted with the execution of the process shall endorse thereon the day on, and the manner in, which it was executed, and, if the latest day specified in the process for the return thereof has been exceeded, the reason of the delay, or, if it was not executed, the reason why it was not executed, and shall return the process with such endorsement to the Court.

Endorsement on process.

(2) Where the endorsement is to the effect that such officer is unable to execute the process, the Court shall examine him touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability, and shall record the result.

[1877, S. 251, last para.; 1859, S. 222, last para.]

Local Amendments

ALLAHABAD

Substitute the following for paragraph (2):

"(2) Where the endorsement is to the effect that such officer is unable to execute the process, the Court may examine him personally or upon affidavit touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability and shall record the result."

MADRAS

(1) Substitute the following in the place of the present sub rule (2):

"(2) Where in the case of a decree for the payment of money the process is not executed owing to the decree having been satisfied, such officer shall also obtain an endorsement on the process to that effect signed by the decree-holder and attested by two respectable witnesses who can identify the decree holder."

(2). Add the following as sub-rule (3):

"(3) Where the endorsement *of such officer* is to the effect that *he* is unable

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direction to execute it at a date earlier than that fixed by the Court and executed by the peon between the two dates is executed rightly.)

3. ('10) 5 Ind Cas 409 (410): 37 Cal 122.

4. ('33) AIR 1933 All 46 (47): 55 All 110.

Note 7

1. ('24) AIR 1924 Nag 68 (69): 19 Nag L R 183. (Where the date fixed for the return had already expired on the day the process server went to execute it he was not acting in the execution of his duty.)

to execute the process the Court shall examine him or cause him to be examined by any other Court touching his alleged inability and may if it thinks fit summon and examine witnesses as to such inability and shall record the result O 21 R 25 Notes 1-3

Provided that an examination of the officer entrusted with the execution of a process by the Nazir or the Deputy Nazir under the general or special orders of the Court shall be deemed to be sufficient compliance with the requirements of this clause

Where the inability to execute the process is stated to be due to the satisfaction of the decree and such satisfaction has been endorsed on the process as mentioned in sub rule (2) above the Court shall issue notice to the decree holder to show cause on a day to be fixed by the Court why such satisfaction should not be recorded as certified and if after service of such notice the decree holder fails to show cause why the satisfaction should not be recorded as certified the Court shall record the same accordingly

A record of satisfaction under the provisions of this sub rule shall have the same effect as one under the provisions of Order 21 Rule 2 sub rule (2)

OUDH

For the existing sub rule (2) *substitute* the following

(2) Where the endorsement is to the effect that such officer is unable to execute the process the Court may examine him personally or upon affidavit touching his alleged inability and may if it thinks fit summon and examine witnesses as to such inability and shall record the result

Synopsis

1 **Officer entrusted with the execution**
2 **Delegation of process** See Note 3 Rule 24
3 **Proof of execution**

1 **"Officer entrusted with the execution** — The Officer entrusted with execution is the peon who himself executed the process and not the Nazir [1]

2 **Delegation of process** — See Note 3 Rule 24

3 **Proof of execution** — The report of the Nazir regarding execution of process is by itself not evidence It must be proved like any other documentary evidence [1]

STAY OF EXECUTION

R. 26. [Ss 239, 240] *(1)* The Court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment debtor to apply to the Court by which the decree was passed, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution, or for any other order O 21 R 26

When Court may stay execution

Order 21 Rule 25 — Note 1

1 (13) 19 Ind Cas 706 (07) 40 Cal 849

Note 3

1 (81) 7 Cal 34 (38)
(1865) 3 Suth W R Misc 11 (15)
(1864) 1864 Suth W R (Gap) Misc 9 (9)
(1865) 4 Suth W R M sc 4 (5)
(66) 6 Suth W R Act X 99 (93)
(68) 10 Suth W R 3 (4)
(69) 12 Suth W R 365 (366)
(72) 18 Suth W R 197 (197)

O.21 R.26 relating to the decree or execution which might have been made by such Court of first instance or appellate Court if execution had been issued thereby, or if application for execution had been made thereto

(2) Where the property or person of the judgment debtor has been seized under an execution the Court which issued the execution may order the restitution of such property or the discharge of such person pending the result of the application

Power to require security from or impose conditions upon judgment debtor

(3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment debtor, the Court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit

[1877, Ss 239, 240, 1859, Ss 290, 291 *Cf* R S C, O 42 R 17 cl (b) See Ss 42 and 47]

Local Amendments

ALLAHABAD

For the words the Court may *read* the words the Court shall unless good cause to the contrary is shown in sub rule (3)

CALCUTTA

In sub rule (3) *cancel* the words the Court may require such security from or impose such conditions upon the judgment debtor as it thinks fit and *substitute* therefor the following words

the Court shall require security from the judgment debtor unless sufficient cause is shown to the contrary

LAHORE

For the words the Court may *substitute* the words the Court shall unless sufficient cause is shown to the contrary in sub rule (3)

NAGPUR

In sub rule (3) *for* the word may *substitute* the words shall unless good cause to the contrary is shown

N W F P

In sub rule (3) *for* the words the Court may *substitute* the words the Court shall unless good cause to the contrary is shown

OUDH

In sub rule (3) *for* the words the Court may' *read* the words 'the Court shall unless good cause to the contrary is shown

PATNA

In sub rule (3) *substitute* the words shall unless sufficient cause is shown to the contrary *for* the word may

RANGOON

In sub rule (3) *for* the word may the words shall unless sufficient cause is shown to the contrary shall be *substituted*

Synopsis

1. Scope of the Rule.
2. Appeal.

Other Topics (miscellaneous)

Powers of transferee Court See Note 1 Sub rule (3) See Note 1

1. Scope of the Rule. — Under Section 42 *ante* the Court executing a decree sent to it has the same powers in *executing* such a decree as if the decree had been passed by itself But such Court cannot question the legality of the order under which the decree was sent to it for execution, nor can it decide the question whether the decree was barred by limitation on the date of the order See Section 42, Note 1, *ante*

Such question can properly be dealt with only by the Court which passed the decree and, therefore, to enable the judgment debtor to apply to such Court for an order in respect of the decree which is sought to be executed, the Court to which a decree is sent for execution may order stay of execution under this rule [1]

Thus, the executing Court may order stay of execution —

(i) to enable the judgment debtor to get the decree amended ,[2]

(ii) to enable him to show that the decree is satisfied,[3] or is not existing ,[4]

(iii) to enable him to get the decree passed *ex parte* against him set aside ,[5]

(iv) to enable him to get the decree passed against him set aside on the ground that it was obtained by fraud ,[6]

(v) for deciding if the decree is barred [7]

An order for stay of execution under this rule can only be passed on the application of the *judgment debtor* and no stay can be granted on the application of *third* parties or of the *decree holder* [8]

Under sub-rule (3) of this rule the Court may impose conditions or require security, as it thinks fit, before directing stay of execution [9]

A Court to which a decree has been sent for execution has no power to refuse to execute the decree even for a short period except in the circumstances set out in this rule [10]

Under Section 265 (3) of the Chota Nagpur Tenancy Act (VI of 1908), the provisions of the Code relating to stay of execution apply to proceedings referred to in that Section

2. Appeal. — An order directing security under sub rule (3) is not an order determining the *rights of parties* and is not therefore appealable as a decree under Sections 47 and 96 [1] See also Note 44 to Section 47, *ante*

Order 21 Rule 26 — Note 1

1 ('80) 5 Cal 736 (737)
(75) 23 Suth W R 154 (155)

2 [illegible]
([illegible]
judgment contained a provision for payment of the amount due by instalment but the decree was silent)

3 (68) 9 Suth W R 361 (361)

4. (27) AIR 1927 Rang 104 (105) 4 Rang 562

5. (67) 8 Suth W R 202 (203)

6. (82) 4 Mad 324 (325)

7. (86) 13 Cal 257 (261)
(82) 8 Cal 916 (918)
[*See also* (36) AIR 1936 Rang 271 (273) : 14 Rang 550]

8. (31) AIR 1931 Lah 690 (691)
('86) 12 Cal 515 (519)

9 (25) AIR 1925 Lah 552 (554)

10. (36) AIR 1936 Rang 184 (187) (Suit in Court to which execution has been transferred, by judgment debtor for declaration that decree is void as having been obtained by fraud—Such Court cannot stay execution)

Note 2

1. (14) AIR 1914 Cal 149 (149) 20 Ind Cas 72 (72, 73) 41 Cal 160

O. 21 R. 27

R. 27. [S. 241.] No order of restitution or discharge under rule 26 shall prevent the property or person of a judgment-debtor from being retaken in execution of the decree sent for execution.

Liability of judgment-debtor discharged

[1877, S. 241; 1859, S. 293. See S 58, sub-s. (2) and O. 21 R. 40 sub-rule (4)]

1. Scope of the Rule. — Under Section 58, sub section (2) *supra*, a judgment-debtor released from detention under *that Section* is not liable to be re arrested in execution of the same decree[1] But an order of discharge of the judgment debtor consequent on the stay of execution *under Rule 26* above will not prevent the judgment debtor from being re arrested in execution of the decree[2]

O. 21 R. 28

R. 28. [S 242] Any order of the Court by which the decree was passed, or of such Court of appeal as aforesaid, in relation to the execution of such decree, shall be binding upon the Court to which the decree was sent for execution.

Order of Court which passed decree or of appellate Court to be binding upon Court applied to

[1877, S. 242; 1859, S. 292. See S. 42 and O. 21 R. 26.]

1. Scope of the Rule. — This rule states that any order of the Court which passed the decree in relation to execution of such decree shall be binding on the Court executing the decree[1] In the absence of any such order it is the duty of the Court executing the decree to enforce the decree in the same manner and to exercise the same powers as if the decree had been passed by itself[2]

See also Section 42 Notes 1 and 3 and the undermentioned case[3]

O. 21 R. 29

R. 29. [S 243.] Where a suit is pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may, on such

Stay of execution pending suit between decree-holder and judgment debtor.

Order 21 Rule 27 — Note 1

1. ('86) 12 Cal 652 (657)
('93) 20 Cal 874 (878)
2 [*See* ('86) 12 Cal 652 (657)]
[*See also* ('02) 26 Bom 652 (659)]

Order 21 Rule 28 — Note 1

1. ('30) AIR 1930 Oudh 305 (308)
('15) AIR 1915 Oudh 142 (143)
('36) AIR 1936 Pesh 97 (100)
See also S 42, Note 3

2. ('15) AIR 1915 Oudh 142 (143) (Objection against right of decree-holder to proceed against property not charged in decree can be determined by Court executing decree)

3 ('39) AIR 1939 All 97 (101) ILR (1939) All 181 (FB) (Allahabad Court sending decree for execution to Court in Calcutta — Former Court receiving stay order under the U P Encumbered Estates Act should recall decree from Calcutta Court)

terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided. **O.21 R.29 Note 1**

[1877, S. 243; 1859, S. 209.]

Local Amendment

ALLAHABAD

Add "or any person whose interests are affected by the decree, or by any order made in execution thereof" after the words "was passed" and before the words "the Court may"

Synopsis

1. Scope of the Rule. — If a suit by a judgment-debtor is pending in a Court against the holder of a decree of that Court, the execution of the decree may, under this rule, be stayed until the disposal of the suit [1] The object of this rule is twofold —

(i) to enable the judgment-debtor, and the decree-holder to adjust their claims against each other, and

(ii) to prevent a multiplicity of execution proceedings [2]

But the execution Court has no power, under this rule, to stay execution of the decree if at that time, no suit is pending against the holder of the decree[3] or if the suit is against the decree holder, but filed by *third* parties [4]

If the execution of the decree has been carried out and the decree holder has obtained possession of the property, the Court has no power under this rule to order *restitution* of such property [5]

The power to stay execution under this rule is purely a discretionary one [6]

The mere pendency of a suit in which the decree holder is a party is not a ground for stay of execution such stay can be granted only on sufficient grounds being made out [7] Thus, the pendency of a suit for administration of the estate of the mortgagor is no ground for the stay of execution of the mortgage decree [8] It has been held by the High Court of Calcutta that if the suit against the decree holder is for a declaration that the decree is satisfied by an uncertified adjustment out of Court, no stay of execution of the decree can be granted under this rule [9] But, it has been held by the High Court of Madras that this rule embraces every kind of suit which is maintainable Thus, according to the Madras High Court a suit by the judgment debtor for damages for breach of an agreement whereby the defendant had agreed to receive in satisfaction of his decree certain bonds and to get satisfaction entered up, is a suit to which this rule will apply [10]

Order 21 Rule 29 — Note 1

7. (67) 8 Suth W R 392 (392 393)

O. 21 R. 29
Notes 1-3

This rule must be read with O 21 R 92 Hence, after a sale in execution has taken place the Court cannot stay the confirmation of the sale [11]

This rule has no application to the granting of injunctions and no security can be demanded in such applications on principles analogous to this rule [12]

The distinction between a temporary injunction restraining the execution of a decree and a stay order is that the former is not directed to a *Court* but to an *individual* Proceedings taken in contravention of a temporary injunction are not a nullity as being without jurisdiction and the effect of non compliance with a temporary injunction is only to make the offender liable to punishment But proceedings in contravention of a stay order are a nullity [13] See also the undermentioned case [14]

1a. "Holder of a decree." — This term will include an assignee of a decree and a suit by the judgment debtor against such assignee is within this rule [1]

2 "Such Court" — The Court in which the suit is pending has power to stay execution of the decree under this rule only if the decree is a decree of *that* Court [1] Such power can be exercised by it even if the decree has been transferred for execution to another Court But if the judgment debtor s suit is pending before the transferee Court the transferee Court has no power under this rule to stay execution of the decree [3] But the contrary view has been held in the undermentioned decisions [4]

The words decree of such Court include also the decree passed on *appeal* from the decree of that Court [5] See Section 37 *ante*

The words "such Court refer only to the *Court* and not to the *Judge* presiding over the Court Where there are two Judges attached to the Court, and the suit is pending before one Judge and the decree is sought to be executed before the other, the Judge before whom the suit is pending has power under this rule to stay execution of the decree [6]

3 "Until the pending suit has been decided." — The Calcutta High Court has held in the undermentioned case[1] that these words should be interpreted to mean until the *claim* in the pending suit has been *finally* decided after an exhaustion of all rights of appeal and not merely after a decree has been passed by the Court in which the suit is pending The Rangoon High Court has also held a similar view [2] But this view has been dissented from in the undermentioned Calcutta case[3] approving of an earlier view of the Punjab Chief Court [4] wherein it was held that the Court may stay execution, pending appeal under its *inherent powers* though not under this rule

11. ('35) AIR 1935 Rang 151 (152) 13 Rang 351
12 ('33) AIR 1933 Nag 153 (155)
13 ('38) AIR 1938 Lah 220 (221)
14 ('36) AIR 1936 Cal 239 (240) 63 Cal 57 (Temporary injunction restraining execution—Pending suit to set aside decree—Court passing order that attachment is to subsist till decision of suit and that application for execution is to stand dismissed for time being—Order is not warranted by law—It is merely suspensory order keeping execution case pending)

Note 1a

1 ('36) AIR 1936 Mad 102 (103)

Note 2

1. ('67) 8 Suth W R 392 (393)
('30) AIR 1930 Lah 961 (969)
('04) 1904 Pun Re No 41, page 127
2. ('31) AIR 1931 Bom 247 (248, 249)
3 ('30) AIR 1930 All 121 (121)
('36) AIR 1936 Rang 184 (186)
[*See also* ('67) 8 Suth W R 392 (393)]
4 ('88) 10 All 389 (393 394) (Obiter)
('74) 6 N W P H C R 181 (183)
('08) 1908 Pun Re No 130, page 588
('34) AIR 1934 Cal 4 (5) 60 Cal 1119 (On transfer of decree Court passing decree ceases to have jurisdiction to execute it and so transferee Court becomes under Sec 37 Court which passed the decree)
5 ('88) 10 All 389 (393, 394)
6 ('31) AIR 1931 Bom 247 (248 249)

Note 3

1 ('28) AIR 1928 Cal 292 (224) 55 Cal 512
2 ('35) AIR 1935 Rang 389 (390) (Stay can be given even after a suit has been dismissed provided that an appeal is pending)
3 ('32) AIR 1932 Cal 19 (20) 58 Cal 1118
4 ('10) 7 Ind Cas 1017 (1018) 1910 Pun Re No 62

4. Execution of award, if can be stayed under this Rule. — An award filed into Court under Section 11 of the Arbitration Act of 1899 is *enforceable* as a decree of the Court under Section 15 of that Act But Section 15 does not enact that the award, when filed, is to be *deemed* to be a decree of the Court [1] Nor does it give any "power to turn such an award into a judgment "[2] Therefore, it has been held by the High Court of Bombay[3] that the provisions of this rule cannot apply to *stay* execution of an award The Calcutta High Court has held that the words "*enforceable* as a decree" mean that *all* the provisions relating to execution of decrees such as O 21 R 16 (transfer of decrees)[4] and O 21 R 50 (execution by or against firms)[5] are applicable to the execution of awards as well

5. Inherent power to stay execution. — See Note 3 above

6. Appeal. — An order directing security to be given is not appealable as it does not determine conclusively the rights of the parties, but the High Court may, if the discretion is not judicially exercised, interfere in revision [1] See also Note 44 to Section 47, *supra*

Local Amendment

N.-W. F. P.

After Rule 29 the following Rule shall be *added*

"29A When a suit under Rule 63 of this Order is pending, the Court in which such suit is filed, may, if it considers that execution of the former decree should be stayed intimate the fact to the executing Court, which shall thereupon stay execution until the suit is decided **O. 21 R. 29A (N.-W.F.P.)**

MODE OF EXECUTION

O. 21 R. 30

R. 30. [S. 254.] Every decree for the payment of money, including a decree for the payment of money as the alternative to some other relief, may be executed by the detention in the civil prison of the judgment-debtor, or by the attachment and sale of his property, or by both

Decree for payment of money

[1887, S. 254; 1859, Ss. 201, 232.]

Synopsis

1. Scope of the Rule.
2. "Decree for the payment of money "
3. As an alternative to some other relief See Notes to O 20 R 10
4. Option as to mode of execution.
5. Detention of surety in civil prison. See Note 14 to S 145
6. Attachment and sale.
7. Rule not exhaustive of modes of execution
8. Notice to judgment-debtor.

1. Scope of the Rule. — The words "every decree for the payment of money" have been substituted for the words "every decree or *order directing a party* to pay money which occurred in Section 254 of the old Code It was held under the old Code that an order directing a party to refund money wrongly drawn out by him in

Note 4

1 ('22) AIR 1922 PC 374 (377) 49 Ind App 366 50 Cal 1 (PC)

2. [*See* (1907) 1 K B 478 at 482, In re a Bankruptcy Notice (Per F Moulton, L J)]

3. [illegible]

4 [illegible]

5. [illegible]

1. ('29) AIR 1929 Sind 110 (111)

O 21 R 30
Notes 1–6

land acquisition proceedings could be enforced under that Section[1] The same procedure will apply under this Code in view of the provisions of Section 36 *ante*

Under clauses (4) and (5) of Section 36 of the Presidency Towns Insolvency Act (III of 1909) the Insolvency Court is authorized to order payment of money or delivery of property by strangers to the Official Assignee where their liability to the insolvent is established on enquiry Clause (6) of Section 36 of that Act enacts that such orders shall be executed in the same manner as decrees for the payment of money or for the delivery of property under the Civil Procedure Code

2 **"Decree for the payment of money"** — A decree under which maintenance is payable periodically at a certain rate is a decree for the payment of money[1]

See also Note 6 to Section 73

3 **As an alternative to some other relief** — See Notes to O 20 R 10

4 **Option as to mode of execution** — It is for the *decree holder* to decide how he should execute his decree for the payment of money whether by the arrest of the judgment debtor or by attachment and sale of his property While the Court has discretion to refuse execution against the person and property simultaneously under Rule 21 *supra* it cannot compel the decree holder to adopt any particular mode of execution[1] A decree for rent under the Bengal Tenancy Act is a decree for the payment of money and the decree holder has the right to ask for personal execution against the judgment debtor notwithstanding that he has also the right to sell the tenure in arrears[2]

5 **Detention of surety in civil prison** — See Note 14 to Section 145

6 **Attachment and sale** — The words attachment and sale in this rule must be taken together and not distributively Therefore an attachment is a necessary preliminary to a sale[1] As to what property can be attached see Section 60 and as to whether absence of attachment is a material irregularity or not see Notes to Rule 90 *infra*

This rule applies only to cases of decrees for money which do not affect any specific immovable property Thus where a consent decree provided that if a certain

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Order 21 Rule 30 — Note 1

1 ('05) 32 Cal 921 (928)

Note 2

1 ('71) 15 Suth W R 128 (129)
('20) AIR 1920 Pat 636 (639)

Note 4

accept payment in instalments)
('34) AIR 1934 Nag 140 (141)
('39) AIR 1939 Pat 380 (381) 180 Ind Cas 767 (768 769) 18 Pat 966
[*See also* ('35) AIR 1935 All 179 (180) (Application for execution of money decree by attachment and sale—Part of property hypothecated to decree holder as security bond—Objection by judgment debtor that suit on bond should be instituted first is not maintainable)
('33) AIR 1933 Lah 831 (832) (Choice to proceed against two properties given by decree — Decree holder can proceed against any one of them)

stance)

Rule o)]
[**But see** ('82) 4 All 497 (498) (Where execution against hypothecated property was refused on the ground of fraud—Not law under this Code)]
2 ('04) 8 Cal W N 575 (577)
('88) 15 Cal 492 (496)
('89) 17 Cal 301 (303)

Note 6

1 ('67) 8 Suth W R 415 (419)

sum of money is not paid by a certain date some specific immovable property should be sold no attachment is necessary under this rule [2] O 21 R 30 Notes 6-8

The holder of a decree for arrears of rent is not bound to proceed in the first instance against the property in respect of which the arrears are due but may proceed against other property of the judgment debtor [3] See also Note 4 to Section 51

7 **Rule not exhaustive of modes of execution** — The words *may* be executed in this rule show that it does not purport to be exhaustive of the modes of execution of money decrees See also O 21 R 11 Therefore rateable distribution of assets is a mode of execution of a decree for the payment of money [1] Though Section 51 prescribes the appointment of a receiver as one of the modes of execution nothing is mentioned about it in this rule since the subject is dealt with in Order 40 *infra* [2] Execution of a money decree by ejectment of a tenant is a method provided by Section 61 of the Oudh Rent Act in addition to the modes prescribed by this Code [3]

8 **Notice to judgment-debtor** — The Court has ample jurisdiction to issue a warrant of arrest under this Section without previously serving a notice on the judgment debtor [1]

R. 31. [S 259] *(1)* Where the decree is for any specific moveable, or for any share in a specific moveable, it may be executed by the seizure, if practicable, of the moveable or share, and by the delivery thereof to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf, or by the detention in the civil prison of the judgment debtor, or by the attachment of his property, or by both O.21 R.31

Decree for specific moveable property

(2) Where any attachment under sub-rule *(1)* has remained in force for six months, if the judgment debtor has not obeyed the decree and the decree holder has applied to have the attached property sold, such property may be sold, and out of the proceeds

found out by Court and properties directed to be sold — Attachment *held* revived — Order is proper)]

gage decrees d rect on for sale in the decree is the authority to sell and therefore no attach

execution without attachment)
(36) AIR 193[illegible] Lah 573 (573) (Decree directing property to be cons dered as under mortgage

and that judgment debtor will not be entitled to alienate it — Attachment before sale is not necessary)]
3 (35) AIR 1935 Cal 544 (544)

Note 7

1

cree for payment of money by means of appo nt ment of rece ver under O 40 R 1)
3 (13) 19 Ind Cas 38 (39) 15 Oudh Cas 331

Note 8

1 (32) AIR 1932 Cal 847 (849)

O.21 R.31 the Court may award to the decree-holder, in cases where any amount has been fixed by the decree to be paid as an alternative to delivery of moveable property, such amount, and, in other cases, such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(3) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of six months from the date of the attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease.

[1877, Ss. 259, 260; 1859, S. 200.]

Local Amendments

ALLAHABAD

For the words wherever they occur in each sub-rule, "six months", *read* the words "three months or such extended time as the Court may for good cause direct"

CALCUTTA

In sub rules (2) and (3), *substitute* the words "three months" for the words "six months

LAHORE

(1) In sub rule (2) *for* the word "six" *substitute* the word "three"

(2) *Add* the following proviso after sub-rule (2):

"Provided that the Court may, in any special case, according to the special circumstances thereof, extend the period beyond three months, but it shall in no case exceed six months in all"

(3). In sub-rule (3), *for* the words "six months" *substitute* the following words "three months or such other period as may have been prescribed by the Court"

MADRAS

In sub rules (2) and (3), *for* the words "six months", *substitute* the words "three months', and *add* the following as sub-rule (4)

"(4) The Court may on application extend the period of three months mentioned in sub-rules (2) and (3) to such period not exceeding six months on the whole as it may think fit"

NAGPUR

In sub-rules (2) and (3), *for* the words "six months" wherever they occur, *substitute* the words "three months or such further time as the Court may, in any special case, for good cause shown, direct."

N.-W F.P.

In sub rules (2) and (3), *for* the words "six months", *substitute* the words "three months", and *add* the following as sub rule (4)

"(4) The Court may, on application, extend the period of three months mentioned in sub-rules (2) and (3) to such period, not exceeding six months in all as it may think fit"

OUDH

In sub rules (2) and (3), *for* the words "six months" *substitute* the words "three months or such further time as the Court may, in any special case, for good cause shown, direct"

PATNA

In sub rules (2) and (3) *for* the words "six months" *substitute* "three months", and *add* the following as sub-rule (4)

"(4) The Court may, for sufficient cause, extend the period of three months mentioned in sub rules (2) and (3) to such period, not exceeding six months in the whole, as it may think fit '

RANGOON

In sub rules (2) and (3), *for* the words "six months' the words "three months' shall be substituted The following shall be added as sub rule (4) of Rule 31

"(4) The Court may, on application, extend the period of three months mentioned in sub rules (2) and (3) to such period, not exceeding six months in the whole, as it may think fit '

Synopsis

1. Legislative changes. — The words "or for the recovery of a wife' which occurred in Section 259 of the old Code after the words "share in a specific moveable ' have been omitted in this rule The reason is that the wife is not a chattel and cannot, therefore be delivered to her husband See Notes to Rule 33, *infra*

2. Scope of the Rule — This rule *does not apply to a case* where the *property* sought to be seized is not in the possession of the judgment debtor, but in the custody of a third party [1] The words "specific moveable' in this rule do not include money and therefore a decree for money cannot be executed under the provisions of this rule [2]

In order to enable a person to obtain delivery of specific moveable property by suit and to enforce the decree by the stringent methods prescribed in this rule, the plaintiff must allege and prove facts which give him a right to compel the delivery of the specific moveables under Section 11 of the Specific Relief Act (I of 1877) [3]

An order under Section 36, clause (5) of the Presidency Towns Insolvency Act (III of 1909) for delivery of any property can be executed in the manner specified in this rule

3. Decree for specific moveable property. — A decree for possession of three fourths of a person's estate consisting of moveable and immovable property is *a decree that can be executed under this rule so far as the moveable property is* concerned [1]

4. Seizure of property not in the possession of the judgment-debtor.— It has been held in the undermentioned case[1] that Rule 58 *infra* is applicable not only to attachments in execution of money decrees, but also to seizures under this rule

5. Alternative damages — Sub-rule (2). — O 20 R 10 provides that the decree in a suit for moveable property should state a certain amount of money as an

Order 21 Rule 31 — Note 2

1 (97) 1 Cal W N 170 (172)

2. (14) AIR 1914 Mad 572 (573) 14 Ind Cas 254 (255) 37 Mad 381

(38) AIR 1938 Cal 471 (474)

3 (16) AIR 1916 Mad 314 (317) 39 Mad 1 (FB)

(38) AIR 1938 Cal 471 (474)

Note 3

1. (05) 1908 Pun W R No 60

Note 4

1 (94) 7 C P L R 105 (109, 110)

O.21 R.31 the Court may award to the decree-holder, in cases where any amount has been fixed by the decree to be paid as an alternative to delivery of moveable property, such amount, and, in other cases, such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(3) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of six months from the date of the attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease.

[1877, Ss 259, 260; 1859, S. 200.]

Local Amendments

ALLAHABAD

For the words wherever they occur in each sub rule, "six months', *read* the words ' three months or such extended time as the Court may for good cause direct "

CALCUTTA

In sub rules (2) and (3), *substitute* the words "three months" for the words "six months

LAHORE

(1) In sub rule (2) *for* the word "six" *substitute* the word "three"

(2) *Add* the following proviso after sub rule (2).

'Provided that the Court may, in any special case, according to the special circumstances thereof, extend the period beyond three months, but it shall in no case exceed six months in all "

(3) In sub rule (3), *for* the words "six months" *substitute* the following words "three months or such other period as may have been prescribed by the Court "

MADRAS

In sub rules (2) and (3), *for* the words "six months", *substitute* the words "three months , and *add* the following as sub rule (4)

"(4) The Court may on application extend the period of three months mentioned in sub rules (2) and (3) to such period not exceeding six months on the whole as it may think fit "

NAGPUR

In sub rules (2) and (3), *for* the words "six months" wherever they occur, *substitute* the words "three months or such further time as the Court may, in any special case, for good cause shown, direct "

N.-W.F P.

In sub rules (2) and (3), *for* the words "six months", *substitute* the words "three months", and *add* the following as sub rule (4)

"(4) The Court may, on application, extend the period of three months mentioned in sub rules (2) and (3) to such period, not exceeding six months in all as it may think fit "

OUDH

In sub rules (2) and (3), *for* the words "six months" *substitute* the words "three months or such further time as the Court may, in any special case, for good cause shown, direct "

PATNA

In sub rules (2) and (3) *for* the words "six months" *substitute* "three months", and *add* the following as sub rule (4)

"(4) The Court may, for sufficient cause, extend the period of three months mentioned in sub-rules (2) and (3) to such period, not exceeding six months in the whole, as it may think fit '

RANGOON

In sub rules (2) and (3), *for* the words "six months" the words "three months" shall be substituted The following shall be added as sub rule (4) of Rule 31

"(4) The Court may, on application, extend the period of three months mentioned in sub rules (2) and (3) to such period, not exceeding six months in the whole, as it may think fit "

Synopsis

1 Legislative changes
2. Scope of the Rule
3. Decree for specific moveable property.
4 Seizure of property not in the possession of the judgment-debtor
5 Alternative damages—Sub rule (2)
6. "In other cases such compensation as it thinks fit "

1. Legislative changes. — The words "or for the recovery of a wife" which occurred in Section 259 of the old Code after the words "share in a specific moveable ' have been omitted in this rule The reason is that the wife is not a chattel and cannot, therefore, be delivered to her husband See Notes to Rule 33, *infra*

2. Scope of the Rule.— *This rule does not apply to a case where the property* sought to be seized is not in the possession of the judgment debtor, but in the custody of a third party [1] The words "specific moveable in this rule do not include money and therefore a decree for money cannot be executed under the provisions of this rule [2]

In order to enable a person to obtain delivery of specific moveable property by suit and to enforce the decree by the stringent methods prescribed in this rule, the plaintiff must allege and prove facts which give him a right to compel the delivery of the specific moveables under Section 11 of the Specific Relief Act (I of 1877) [3]

An order under Section 36 clause (5) of the Presidency Towns Insolvency Act (III of 1909) for delivery of any property can be executed in the manner specified in this rule

3. Decree for specific moveable property. — A decree for possession of three fourths of a person's estate consisting of moveable and immovable property is a decree that can be executed under this rule so far as the *moveable* property is concerned [1]

4. Seizure of property not in the possession of the judgment-debtor.— It has been held in the undermentioned case[1] that Rule 58 *infra* is applicable not only to attachments in execution of money decrees, but also to seizures under this rule

5. Alternative damages — Sub-rule (2). — O 20 R 10 provides that the decree in a suit for moveable property should state a certain amount of money as an

Order 21 Rule 31 — Note 2

1 (97) 1 Cal W N 170 (172)

2. (14) AIR 1914 Mad 572 (573) 14 Ind Cas 254 (255) 37 Mad 381

(38) AIR 1938 Cal 471 (474)

3 (*16*) *AIR 1916 Mad 314 (317) 39 Mad 1 (FB)*

(38) AIR 1938 Cal 471 (474)

Note 3

1. (08) 1908 Pun W R No 60

Note 4

1. (*91*) *7 C P L R 109 (109 110)*

O 21 R.31
Notes 5-6

alternative if delivery of the chattel in dispute cannot be had This rule provides that if the goods are capable of delivery they must be delivered and that if they are not, then the assessed damages should be paid[1] Where a decree is passed as provided by O 20 R 10 the decree holder cannot execute the money portion of the decree alone without following the procedure prescribed by this rule i e, without applying for delivery of the moveable property[2]

6 **"In other cases, such compensation as it thinks fit"** — A decree for the delivery of a specific moveable need not necessarily in all cases be in the alternative form and an enquiry as to damages in such cases may more profitably be held in execution[1] Such damages need not be assessed only on the footing of wilful neglect or devastavit[2]

O.21 R.32

R. 32. [S. 260] *(1)* Where the party against whom a decree[2] for the specific performance of a contract,[3] or for restitution of conjugal rights,[4] or for an injunction,[6] has been passed, has had an opportunity of obeying the decree[7] and has wilfully failed to obey it, the decree may be enforced [a]*in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract or for an injunction*[1] by his detention in the civil prison, or by the attachment of his property, or by both

Decree for specific performance for restitution of conjugal rights or for an injunction

(2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation or, with the leave of the Court, by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention

(3) Where any attachment under sub-rule *(1)* or sub-rule *(2)* has remained in force for one year, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold,[8] such property may be sold; and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(4) Where the judgment-debtor has obeyed the decree and paid [illegible] ..ay, or

1 (71 [illegible]
(90) 1
[*See also* (73) 19 Suth W R 82 (83)]
2 (27) AIR 1927 Cal 652 (653) 55 Cal 26

1 (35) AIR 1935 Cal 39 (63) 61 Cal 711
2 (35) AIR 1935 Cal 39 (63) 61 Cal 711

where, at the end of one year from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease. O. 21 R. 32

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed,[9] the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.

Illustration

A, a person of little substance erects a building which renders uninhabitable a family mansion belonging to *B* *A*, in spite of his detention in prison and the attachment of his property, declines to obey a decree obtained against him by *B* and directing him to remove the building The Court is of opinion that no sum realizable by the sale of *A's* property would adequately compensate *B* for the depreciation in the value of his mansion *B* may apply to the Court to remove the building and may recover the costs of such removal from *A* in the execution proceedings

a Inserted by the Code of Civil Procedure (Amendment) Act, XXIX of 1923 Section 2

[1877, Ss. 259, 260; 1859, S 200, *Cf.* R. S. C, O 42 Rr 7 and 30.]

Local Amendments

ALLAHABAD

For the words "one year," in sub rule (3), *read* the words "three months," and *after* the words at the end of the sub rule, "on his application, ' *add* the words "the Court may for good cause extend the time '

CALCUTTA

In sub rule (3), *substitute* the words "three months" *for* the words "one year "

LAHORE

(1) In sub rule (3), *for* the words "one year," *substitute* the words "three months "

(2) *Add* the following proviso to sub rule (3)

"Provided that the Court may, for sufficient reasons, on the application of the judgment debtor, extend the period beyond three months, but it shall in no case exceed one year in all "

(3) In sub rule (4), *for* the words "one year", *substitute* the words "three months or such other period as may have been prescribed by the Court "

MADRAS

(1) In sub rule (3)

(i) *for* the words "one year" *substitute* the words "three months",

(ii) after the word "application", *insert* the words "the Court may on application extend the period of three months mentioned herein to such period not exceeding one year on the whole as it may think fit "

(2) In sub rule (4), *for* the words "one year", *substitute* the words "three

O. 21 R. 32 Note 1 months", and after the words "the date of the attachment" *add* "or of such extended period which the Court may order under sub rule (3)"

NAGPUR

(1) In sub rule (3)

(i) for the words "one year" *substitute* the words "three months",

(ii) after the word "application", *insert* the words "and the Court may also, for good cause shown, extend the time for the attachment remaining in force for a period not exceeding one year", and

(2) In sub rule (4), *for* the words "one year", *substitute* the words "three months, or such further time as may have been fixed by the Court under sub rule (3)"

N.-W.F P.

In sub rule (3), *for* the words "for one year," *substitute* the words "for three months or such further period not exceeding one year in the whole as may be fixed by the Court"

OUDH

(1) In sub rule (3), *for* the words "one year," *substitute* the words "three months and at the end of the sub rule, *add* the words "and the Court may also, for good cause shown, extend the time for the attachment remaining in force for a period not exceeding one year'

(2) In sub rule (4) *for* the words "one year," *substitute* the words "three months, or such further time as may have been fixed by the Court under the previous sub-rule

PATNA

In sub rule (3) *for* the words "for one year" *substitute* the words "for three months or for such further period, not exceeding one year in the whole, as may, on sufficient cause shown, be fixed by the Court"

RANGOON

In sub rule (3), *for* the words "for one year," the words "for three months or for such further period, not exceeding one year in the whole, as may be fixed by the Court on the application of the judgment debtor' shall be *substituted*

Synopsis

1. Legislative changes. —

1 The words ' or for an injunction" have been substituted for the words "or for the performance of or abstention from any other particular act"

2 Sub rules (2) and (5) are new

3 In sub rule (3), the word "shall' has been substituted for the word "may"

4 The words "or if made has been refused" are new

Amendment after 1908 —

The words "in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for specific performance of a

contract or for an injunction" have been newly inserted by Act XXIX of 1923 See Note 4 below

2. Scope of the Rule. — A decree which does not contain any direction to the defendant to do or to refrain from doing any act, but is merely a *declaratory* one, cannot be executed under this rule [1]

3. Decree for specific performance. — As to the cases in which specific performance can be decreed, see Sections 12 to 30 of the Specific Relief Act (I of 1877) See also the undermentioned cases [1] A decree for specific performance of a contract for sale of immovable property does not by itself pass title [2] It has been held by the High Court of Patna[3] that the Court executing a decree for specific performance of a contract of sale is competent to grant possession of the property to the decree holder, even though no relief for possession was either asked for in the plaint or awarded by the decree See also Order 2 Rule 2 Note 16, *supra*

A decree for specific performance operates in favour of both parties The defendant is as much entitled to enforce it as the plaintiff A decree that an agreement ought to be specifically performed is a decree against the plaintiff as well as against the defendant, and in favour of the defendant as well as in favour of the plaintiff The defendant is equally a decree holder in such cases [4]

4. Restitution of conjugal rights. — A decree for the restitution of conjugal rights passed under the Parsi Marriage and Divorce Act (XV of 1865) is not executable under this rule, since Section 36 of that Act provides a remedy in substitution of the remedy under this rule [1] But such a decree between Hindus or Mahomedans can be enforced under this rule [2]

A wife is not a chattel and cannot, therefore, be delivered as such in execution under the previous rule or this rule [3] A suit for recovery of a wife must, therefore, be treated as a suit for the restitution of conjugal rights [4] It was held in the under mentioned cases[5] that where a wife disobeyed a decree for the restitution of conjugal rights passed against her, the decree could be enforced by her imprisonment or by the attachment of her property or by both But, since the amendment of this rule by Act XXIX of 1923 referred to in Note 1 above, such a decree can be enforced only by the *attachment* of the defendant's property See also Notes to Rule 33, *infra*

5. Form of decree for restitution of conjugal rights. — In a suit for the restitution of conjugal rights against the wife and other defendants who prevent her

Order 21 Rule 32 — Note 2

1. ('04) 1 All L Jour 541 (542)

Note 3

[illegible]

wife returns)

('33) AIR 1933 Cal 580 (580) (Decree for specific performance conditional on payment of amount in Court within certain time—Court has jurisdiction to extend time for payment of such amount [illegible]

not entitled to possession)

[See however ('81) 5 Bom 554 (560) (Decision [illegible]

3 ('31) AIR 1931 Pat 179 (180, 181)

4 ('32) AIR 1932 Cal 579 (582 583) 59 Cal 501 [*See also* ('33) AIR 1933 Mad 386 (387, 388) 56 Mad 796]

Note 4

1. ('72) 9 Bom H C R 290 (303 304)

2 ('75) 1 Bom 164 (167)

3 [illegible]

O. 21 R. 32
Notes 5-7

from going to her husband, the decree should declare the husband's right and direct that the other defendants do refrain from preventing the plaintiff's wife from returning to him [1] Where they do not obey the decree, execution can proceed against them under this rule [2]

Where, in a decree for the restitution of conjugal rights, the plaintiff's mother-in-law who was impleaded as a defendant in the suit, was directed to refrain from preventing the plaintiff's wife from returning to him, it was held that her action in merely permitting her daughter, who was of age, to reside in her home after decree, did not justify the attachment of her property under this rule [3]

6. Decree for injunction. — This rule applies to cases where a party is directed to do some act, as well as to cases where he is directed to abstain from doing an act [1] The High Court of Madras has expressed an *obiter dictum* in the undermentioned case[2] that an interim injunction may be enforced under this rule read with Section 36, *ante*

As to whether a decree for injunction can be executed against vendees from the defendant and against the legal representatives of a deceased defendant, see Note 18 to Section 50 *ante*

Under the old Code it was held that disobedience to an order directing the defendant to render accounts within a particular time was disobedience to an order "requiring the performance of a particular act" within the meaning of Section 260 and consequently was punishable under that Section [3] But under the present rule those words have been omitted and an order requiring the defendant to furnish accounts is not an injunction within the meaning of this rule and therefore the disobedience of that order cannot be dealt with under this rule [4]

7. "Opportunity of obeying the decree." — Before allowing execution under this rule against a judgment debtor, the Court should see if he has had an opportunity of obeying the decree and whether he has wilfully failed to obey it [1] If he has had such an opportunity, then execution may issue against him without giving him a further opportunity to obey the decree and the Court is not bound to issue notice calling upon him to obey the decree [2]

Where an application for enforcing a decree under this rule has been dismissed on the ground that the judgment debtor had no opportunity of obeying the decree,

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('67) 8 Suth W R 3 (13) (PC) *(Quære)*
('76) 1876 Pun Re No 15 page 20
('71) 1871 Pun Re No 2
[**But see** ('75) 23 Suth W R 179 (180)]

Note 5

1 ('20) AIR 1920 Pat 798 (799)
('67) 2 Agra 111 (112)
('70) 2 N W P H C R 314 (314)
('73) 20 Suth W R 92 (92)
[*See* ('73) 20 Suth W R 50 (50)
('67) 8 Suth W R 467 (467)]
2. ('14) AIR 1914 Mad 219 (221)

improper]]
3. ('78) 1 All 501 (503)

Note 6

1. ('19) AIR 1919 Cal 674 (675) 46 Cal 103 (Per Richardson, J)
('30) 1930 Mad W N 809 (810)
('13) 21 Ind Cas 789 (802) (Mad) (Mandatory injunction directing a guardian to hand over custody of a minor)
('10) 6 Ind Cas 289 (289) (Mad)

...t L Jour
...and 7 Cal

Note 7

ask Court to issue notice or order embodying

a second application after such opportunity has been given is not barred[3]

8. Sale of property — Sub-rule (3). — This rule is a highly penal one and must be construed strictly When a sale is ordered under sub rule (3), the following three conditions must exist —

(a) a valid original attachment,

(b) application, *within* one year of the attachment, by the decree holder, and

(c) lapse of one year from date of attachment[1]

Thus, where an order of attachment was made on 27-6 1908 and was carried out on 20-7-1908 and no application for sale was made before 20-7-1909, it was held that the attachment ceased to exist and the order for sale was therefore, set aside[2] A sale held under sub rule (3) cannot be set aside under O 21 R 89, sub rule (1) even where the execution of the decree under which the sale took place is restrained by an injunction granted subsequent to the sale in a separate suit[3]

Where a *decree* is attached under this rule, the fact that this rule prohibits the sale of the attached property before the expiry of one year from the date of the attachment is no bar to the attached decree being executed by the holder thereof under O 21 R 53, sub rule (2) before the expiry of one year[4]

In the undermentioned case,[5] a decree for injunction was passed against a defendant prohibiting him from holding a certain fair He disobeyed the injunction by holding the fair Thereupon, his property was attached and after the prescribed period it was sought to be sold The judgment-debtor objected on the ground that the property could be sold under sub rule (3) only if *after* the attachment he has disobeyed the injunction again It was held that where the injunction requires the defendant to *do* a certain act, and upon his failure to do the act his property is attached but subsequently within the period specified in the rule he carried out the directions in the decree his property cannot be sold But, where the injunction is one restraining the defendant from doing a certain act and he has disobeyed the decree by doing the act, he has, by his own act made it impossible for himself to obey the decree (so that there can be no question of a second disobedience), and in such a case, the judgment-debtor cannot escape the liability to have the attached property sold after the lapse of the prescribed period and have compensation paid to the decree holder out of the sale proceeds

9. Disobedience of order for injunction or specific performance. — Where a defendant has wilfully failed to obey a decree for injunction or for specific performance passed against him, the decree may be enforced by his detention in the civil prison or by the attachment of his property or by both[1] But the Court has no

injunction and have it served on defendants — O 21 R 32 does not provide for such notice or order)]

3. ('94) 21 Cal 784 (788) 21 Ind App 89 (P C)

Note 8

1 [illegible]

2 [illegible]

3 [illegible]

4 [illegible]

[illegible] satisfaction of decree against her)

5. ('35) AIR 1935 All 480 (480, 481) 57 All 858

Note 9

1. (1900) 24 Bom 45 (49)
('94) 21 Cal 784 (788, 789) 21 Ind App 89 (P C).
('81) 6 Cal 445 (446) (He cannot be prosecuted under S 188 I P C for disobedience of injunction of Civil Court)
('81) 8 Cal L Rep 487 (488)
('73) 18 Suth W R 282 (283)

O.21 R.32
Note 9

power to order the defendant to execute a security bond for obeying the decree[2]

Where a decree requires the plaintiff to do certain acts necessary for the enjoyment of his property and restrains the defendant from interfering with it, the defendant is bound to give the plaintiff reasonable facilities for doing it and the refusal to do so can be punished under this rule[3]

Under the old Code, a Court, in executing a decree which directed a defendant to do a particular act, had no power to have the thing done by an officer of the Court when the defendant failed to obey the decree, inasmuch as it was not one of the modes of execution prescribed by Section 260[4] But now under sub rule (5) of this rule the Court has got the power to direct the act to be done so far as practicable by the decree holder or by some other person appointed by the Court at the expense of the judgment debtor[5] The Court is, however, not justified in ordering the police to interfere in the matter, or in appointing a commissioner to see that the decree holder performs without obstruction the acts required to be done[6] Where, after a decree for injunction has been passed, the defendant does not obey it, the plaintiff's remedy is by execution under this rule and not by a separate *suit*[7] The reason is that a separate suit would be barred by Section 47.

The words 'the act required to be done" in sub rule (5) mean the act that has to be done to enforce the injunction granted by the decree[8] Thus, where a decree directs a wall to be demolished as being an obstruction to a right of way and is so demolished in execution of the decree, but the judgment debtor erects another wall at a different place obstructing the right of way, the remedy of the decree holder is a fresh *suit* for injunction[9] The words 'act required to be done" in this sub rule show that this clause applies only to *mandatory* injunctions and not to *prohibitory* injunctions, though the other sub rules apply to all injunctions generally[10]

Where a decree for injunction has been passed against several persons *jointly*, restraining them from holding a fair on the plaintiff s land and all of them have been jointly and severally responsible for the disobedience of the decree as well as for the profit which they have made out of the plaintiff s land by holding the fair on such

('82) 8 Cal 174 (176)
(72) 18 Suth W R 282 (283)

land, the mere fact that one of them is dead will not justify a reduction of the amount which the plaintiff is entitled to get as compensation out of the sale proceeds of the property of the defendants that has been attached and sold under sub rule (3)[11]

9a. Disobedience of decree for restitution of conjugal rights. — The only remedy where the judgment debtor in a decree for the restitution of conjugal rights wilfully refuses to obey the decree is to proceed to attach the property of the judgment debtor[1] The Court cannot compel the wife against whom such a decree has been passed, to go and live with her husband[2] It would also be wrong in such cases to pass an order under Section 25 of the Guardians and Wards Act directing that the custody of a minor wife should be given to the husband[3] See also Note 4, *ante*

10. Effect of procedure under this Rule. — The provisions of this rule are intended to punish the defendant for disobedience of the decree and are not intended to be a satisfaction of the decree so as to prevent the decree holder from taking further steps Thus, where a decree for possession of a certain plot of land and for the demolition of a house situate thereon was passed, and the decree holder had received some compensation under this rule by the attachment and sale of the house on the land, it was held that he could still enforce his right to the possession of the property[1]

11. Limitation. — It has been held by the High Court of Allahabad[1] that disobedience to an injunction is a contempt of Court and can therefore be punished at any time and that the provisions of Article 182 of the Limitation Act do not apply to an application to enforce the order under this rule But the High Court of Madras[2] has held that Article 182 cannot apply from the very nature of the provisions therein but that the decree holder may enforce his decree by an application made within three years of each successive breach of the injunction and that the application is governed by Article 181 of the Limitation Act The decree holder, however, is not obliged to take action in regard to every petty infringement on pain of allowing the decree to become inoperative after three years and depriving him of the fruits of his decree, if a serious infringement of it were afterwards made[3] The Chief Court of Lower Burma[4] has, on the other hand, held that the application to enforce the decree under this rule is governed by Article 182 of the Limitation Act The High Court of Lahore has, in the undermentioned case[5] followed the Madras view

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R. 33. [New.] *(1)* Notwithstanding anything in rule 32, the Court, either at the time of passing a decree *[a]against a husband* for the restitution of conjugal rights or at any time afterwards, may order that the decree *[b]shall be executed in the manner provided in this rule.* **O. 21 R. 33**

Discretion of Court in executing decrees for restitution of conjugal rights

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decree and raising the building — Decree-holder

('35) AIR 1935 All 480 (481) 57 All 858

11. ('35) AIR 1935 All 480 (481) 57 All 858

Note 9a

1. ('36) AIR 1936 All 657 (658) I L R (1937) All 82
2. ('34) 150 Ind Cas 307 (308) (Lah)
3. ('36) AIR 1936 All 657 (658) I L R (1937) All 82 (Reversing AIR 1936 All 267)

Note 10

1 ('04) 1 All L Jour 431 (432)

Note 11

1. ('01) 23 All 465 (466)

O. 21 R. 33
Notes 1-2

(2) Where the Court has made an order under sub-rule *(1)* c ..., it may order that, in the event of the decree not being obeyed within such period as may be fixed in this behalf, the judgment-debtor shall make to the decree-holder such periodical payments as may be just, and, if it thinks fit, require that the judgment-debtor shall, to its satisfaction, secure to the decree-holder such periodical payments.

(3) The Court may from time to time vary or modify any order made under sub-rule *(2)* for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again revive the same, either wholly or in part as it may think just.

(4) Any money ordered to be paid under this rule may be recovered as though it were payable under a decree for the payment of money

a Inserted by the Code of Civil Procedure (Amendment) Act, XXIX of 1923, Section 3
b Substituted by Section 3, *ibid* for shall not be executed by detention in prison "
c The words ' and the decree holder is the wife" repealed by Section 3, *ibid*

Synopsis

1. Amendments after 1908. | 2. Scope of the Rule.

1. Amendments after 1908. — (1) The words "against a husband' in sub rule (1) after the words "passing a decree" have been newly inserted by Act XXIX of 1923

(2) By the same Amending Act the words "shall be executed in the manner provided in this rule" have been substituted for the words "shall not be executed by detention in prison '

(3) The words "and the decree holder is the wife" after the words "under sub rule (1)' occurring in sub rule (2) have been omitted by Act XXIX of 1923, because the rule as *amended applies only to cases of decrees against husbands*

2. Scope of the Rule. — Before the amendment of this rule by Act XXIX of 1923 it was held that the tendency of modern legislation is against sending women to jail in civil matters and therefore, ordinarily, a Court passing a decree for the restitution of conjugal rights against a wife should direct, in the exercise of its discretion under this rule, that the decree shall not be executed by the detention of the wife in civil prison[1] In view of the amendment of Rule 32 *ante* by Act XXIX of 1923, a

Order 21 Rule 33 — Note 2

1. ('24) AIR 1924 All 836 (837) (Condition in decree of trial Court disallowing imprisonment will not be interfered with by High Court in appeal)

('20) AIR 1920 Bom 203 (204) 44 Bom 972 (The fact that wife had been in criminal jail is immaterial)

('24) AIR 1924 Lah 244 (245) (Where wife ... nt ... en unhappy)

[*See* ('23) AIR 1923 Lah 595 (596) (But if wife persists in immorality she may be detained in jail in execution if she disobeys)]

decree for the restitution of conjugal rights can no longer be executed by imprisonment whether the decree be against the husband or the wife See Note 1 to Rule 32 *ante* O 21 R. 33 Note 2

R. 34. [Ss 261, 262] *(1)* Where a decree is for the execution of a document or for the endorsement of a negotiable instrument and the judgment-debtor neglects or refuses to obey the decree, the decree-holder may prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the Court O 21 R. 34

Decree for execution of document or endorsement of negotiable instrument

(2) The Court shall thereupon cause the draft to be served on the judgment debtor together with a notice requiring his objections (if any) to be made within such time as the Court fixes in this behalf.

(3) Where the judgment debtor objects to the draft, his objections shall be stated in writing within such time, and the Court shall make such order approving or altering the draft, as it thinks fit.

(4) The decree holder shall deliver to the Court a copy of the draft with such alterations (if any) as the Court may have directed upon the proper stamp-paper if a stamp is required by the law for the time being in force, and the Judge or such officer as may be appointed in this behalf shall execute the document so delivered

(5) The execution of a document or the endorsement of a negotiable instrument under this rule may be in the following form, namely —

"C D., Judge of the Court of
(or as the case may be), for A B, in a suit by E. F against A B,"
and shall have the same effect as the execution of the document or the endorsement of the negotiable instrument by the party ordered to execute or endorse the same

(6) The Court, or such officer as it may appoint in this behalf, shall cause the document to be registered if its registration is required by the law for the time being in force or the decree-holder desires to have it registered, and may make such order as it thinks fit as to the payment of the expenses of the registration

[1877, Ss 261, 262, 1859, S 202]

O. 21 R. 34
Notes 1-3

Synopsis

1. Legislative changes. —

1 The word "document" has been used in this rule instead of the word "conveyance" in the old Code

2 Sub rule (6) is new See Note 5 below

2. Decree for execution of document. — A decree directing a defendant to execute a document in favour of the plaintiff is executable in the manner provided by this rule, on the failure of the defendant to obey the directions given in the decree [1] The decree for the execution of a document need not have been passed in a suit for specific performance of a contract [2] Thus, where a decree absolute for divorce directs the judgment debtor to secure to his wife a certain amount and to execute a proper instrument securing that payment and the judgment debtor fails to comply with that direction the Court can under this rule, execute a special power of attorney in favour of the wife authorizing her on behalf of the judgment debtor to withdraw the amount decreed out of the provident fund of the judgment debtor in a railway company in which he was employed [3] Where the judgment-debtor makes any alteration in the draft submitted to the Court, he could not be compelled to execute the document, but the proper procedure is to act under this rule [4]

The Registrar of a High Court can, if directed by the Court, execute a document, but he cannot enter into any covenant on behalf of the judgment debtor [5] The title of the decree holder is complete only after the execution of the document, till then there is only an inchoate right capable of being completed.[6]

A British Indian Court cannot, under this rule, direct a party to convey by a document, property which is outside its jurisdiction [7]

Where a decree directed a defendant to endorse certain promissory notes to the plaintiff and the defendant failed to do so and in the meantime the promissory notes were barred by limitation, it was held that a suit for compensation for failure to carry out the terms of the decree was not maintainable and that the proper remedy of the plaintiff was by way of execution under this rule [8]

See also the undermentioned case [9]

3. Compromise decree for execution of document. — Where a compromise decree directs the plaintiff to execute a document in favour of the defendant in respect

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Order 21 Rule 34 — Note 2

1. ('18) AIR 1918 Cal 817 (818)
(84) 10 Cal 710 (712)
[*See* ('23) AIR 1923 Bom 26 (27) 46 Bom 990 (Defendant also may execute a decree for specific performance)]
[*See also* (33) AIR 1933 Cal 496 (498)]

2 ('38) AIR 1938 Cal 767 (767, 768)

3 (38) AIR 1938 Oudh 48 (49) 13 Luck 466 (Execution of such a special power of attorney does not contravene the provisions of S 3 (1) of the Provident Funds Act)

4. (02) 5 Oudh Cas 370 (371, 372).
[*See also* (09) 10 Cal W N 345 (346)]

5 (89) 16 Cal 330 (344 345)

6 (98) 3 Cal W N 30 (32)

7 ('16) AIR 1916 Mad 1133 (1136 1137)

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of properties which are the subject matter of the suit, the defendant can enforce the decree under this rule [1]

4. Execution by Court on behalf of Hindu father is binding on son. — A document executed by the Court under this rule on behalf of a Hindu father, in execution of a decree, is binding on his son [1] The reason is that sub rule (5) provides that such a document shall have the same effect as if it had been executed by the party himself

5. Registration.— Even under the old Code the High Court of Allahabad held that where a document required to be registered under the provisions of the Registration Act, it must be registered even though executed by a Court acting under this rule [1] Sub-rule (6) gives legislative recognition to the abovementioned decision

6. Lis pendens. — Action taken by the Court in executing a decree under this rule is a proceeding in the suit and, therefore, a transfer of the property in dispute made by the judgment debtor after the date of the decree but before the proceeding under this rule will be affected by the doctrine of *lis pendens* [1]

7. Limitation. — An application under this rule is an application for execution of the decree and is, therefore, governed by Article 182 of the Limitation Act, 1908 [1]

8. Appeal. — Under O 43 R 1 clause (i) an appeal lies against an order passed under this rule, *on an objection to the draft of a document or of an endorsement*, but a second appeal is prohibited by Section 104 [1]

R. 35. [S. 263.] *(1)* Where a decree is for the delivery of any immoveable property, possession thereof shall be delivered[3] to the party to whom it has been adjudged, or to such person as he may appoint[7] to receive delivery on his behalf, and, if necessary, by removing[9] any person bound by the decree who refuses[11] to vacate the property.

Decree for immoveable property.

(2) Where a decree is for the joint possession[6] of immoveable property, such possession shall be delivered by affixing[8] a copy of the warrant in *some conspicuous place on the property and proclaiming* by beat of drum, or other customary mode, at some convenient place, the substance of the decree.

(3) Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the Court, through its officers, may,

Note 3

1. ('21) AIR 1921 Cal 227 (229)
('26) AIR 1926 Cal 975 (975, 976)

Note 4

1. ('19) AIR 1919 Oudh 335 (337, 338) 22 Oudh Cas 84

Note 5

1. ('80) 2 All 392 (393, 394)

Note 6

1. ('16) AIR 1916 Nag 221 (223, 224) 14 Nag L R 176

Note 7

1. ('86) 10 Bom 91 (93)

Note 8

1. ('26) AIR 1926 Cal 975 (976)

O 21 R 35
Notes 1-2

after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open[13] any door or do any other act[10] necessary for putting the decree-holder in possession

[1877, S 263, 1859, Ss 199, 223 *Cf* R S C, O 42 R 5 and O 88 R 1 See Rr 36 and 95 to 103 See also S 51, cl (a)]

Synopsis

1 Legislative changes — Sub rules (2) and (3) are new

2 Scope of the Rule — This rule and Rule 36 point out the mode of executing decrees *for possession* of immovable property Rules 95 and 96 of this Order provide for the mode of delivery of possession to the auction purchaser of the properties purchased by him in a court sale This rule corresponds with Rule 95 and Rule 36 corresponds with Rule 96 The procedure for delivery of possession is the same in both sets of rules[1]

Where property is delivered to the decree holder in execution of his decree for possession the decree is satisfied and therefore a second application for possession on the ground that he was *dispossessed* by the judgment debtor is not maintainable[2] But a subsequent application will lie when the first application has been *ineffectual*[3] Thus where the decree holder asks for delivery of the immovable property with standing crops but is given delivery of the land only and not of the crops he can apply again for effective possession of the land and of the crops[4] Similarly where

Order 21 Rule 35 — Note 2

1 ('24) AIR 1924 Lah 301 (302)

2 ('82) 4 All 164 (165) (Delivery of possession was formal)
('16) AIR 1916 All 261 (262 264)
('12) 16 Ind Cas 708 (709) (Cal) (Delivery of possession not effectual in law — Decree holder can again apply for delivery of possession)
('23) AIR 1923 Mad 25 (26 27)
('16) AIR 1916 Mad 930 (930)
('17) AIR 1917 Mad 202 (203)
('02) 12 Mad L Jour 96 (97)
('27) AIR 1927 Nag 36 (36)
('23) AIR 1923 Nag 237 (239)

('28) AIR 1928 Nag 100 (101 102) (A case of [illegible] 0) [illegible] e to apply for removal of obstruction within 30 days does not debar application to obtain fresh [illegible] er [illegible] ed

the decree holder obtained possession against the judgment debtor but it was ineffectual against a transferee *pendente lite* from the judgment debtor, it was held that a fresh application for delivery of possession was maintainable against such transferee [5] Where, however, a decree holder allows his decree to get time barred without executing it, and the defendant continues in possession, a second suit for possession is not maintainable [6]

A delivery of possession in execution of a decree has not the effect of dispossessing a *third* person (not a party to the suit), who was previously in possession and was *not present* when the delivery took place [7] But it will be operative as an ouster or dispossession of the third person if it takes place in his presence and adversely to his claim [8]

Where delivery of possession is made under this rule the delivery must be deemed to have been made, not of the land alone, but of all things attached to it [9]

An order for delivery of possession should not, ordinarily be made *ex parte* [10]

This rule applies to proceedings under the undermentioned Acts [11] but not to the proceedings noted below [12]

3 Delivery of possession — Symbolical and actual. — This rule provides that where the property is in the occupation of the judgment debtor or some one on his behalf, possession shall be given, if necessary, by removing the judgment debtor or any person bound by the decree and placing the decree holder (or the auction purchaser in cases coming under Rule 95, *infra*) in occupation of the same But if the property is of such a nature that the judgment debtor cannot be in actual possession of it, as for instance where the property is in the possession of a tenant then delivery should be effected by the officer of the Court by going through the process prescribed in Rule 36, *infra* and proclaiming to the occupant of the property that possession has been given to the decree holder (or auction purchaser in cases coming under Rule 96) [1] The former kind of delivery is called *khas* or *actual* possession while the latter is called *symbolical* or *formal* delivery of possession Where the property is capable of immediate actual possession, possession must be delivered under sub rule (1) and there

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5 (33) AIR 1933 All 901 ... 55 All 925

7. (96) 20 Bom 351 (353) (FB)
(04) 27 Mad 262 (270)

8 (04) 27 Mad 262 (270)

9 (05) 3 Low Bur Rul 129 (130) (It was held in this case that growing crops would also be deemed to be delivered — This was a decision under the old Code where growing crops ' was

10 (23) AIR 1923 Pat 597 (599)

11 ...

of 1888) Section 25 cl (b) Central Provinces Tenancy Act (Act I of 1920) S 36 cl (6) Presidency Towns Insolvency Act (India Act III of 1909)

12 Proceedings of the Provincial Small Cause Court—See O 50 R 1 cl (a) sub clause (2) Proceedings of the Presidency Small Cause Courts in the towns of Calcutta Madras and Bombay

Note 3

1. (32) AIR 1932 Pat 145 (147, 148) 11 Pat 165
(96) 18 All 440 (449 450)
(80) 5 Cal 584 (588) (FB)
(37) AIR 1937 Oudh 275 (276) 13 Luck 96 (Symbolical possession — Sub rule (1) contemplates actual possession while sub-rule (2) contemplates symbolical possession — No specification of land with reference to khasra numbers — Symbolical delivery can be given under sub-rule (2))

O. 21 R. 35
Notes 3-4

can be no symbolical possession in such a case as between the parties to the decree[2] The term 'symbolical possession' is applied where delivery is made under sub rule (2) of this rule and Rules 36 and 96 *infra*[3]

If the property is zamindari or a tank or mineral rights in direct possession of the judgment debtor, though the delivery of possession will be by ousting the judgment debtor from it the judgment debtor cannot be *physically* removed from it and the decree holder cannot be put in *physical occupation* of the property What the bailiff who is entrusted with giving possession can do is to go to the property and proclaim in the name of the Court that so and so has been dispossessed and so and so has been put in possession of it This delivery of possession is not symbolical but actual and is as effective against the judgment debtor as his physical removal from a house[4]

A decree holder who has been given symbolical possession is entitled to apply again under this rule to be put in actual possession if he is entitled to it,[5] unless he deliberately accepts such symbolical possession and does not repudiate it[6] In the latter case his remedy is to file a separate suit

Where the decree holder is put in possession of land, such possession includes the standing crops The judgment debtor cannot re enter in order to reap and dispose of the crops which he had cultivated on the land[7]

4. Effect of symbolical possession — The distinction between the effect of the delivery of symbolical possession as between parties to the suit and as against third persons is important with reference to the question of limitation applicable to suits for actual possession by decree holders or auction purchasers who have obtained only symbolical possession

The effect of delivery of symbolical possession in execution in cases where such possession alone can be delivered is the same as the actual transfer of possession from the judgment debtor to the decree holder,[1] that being the only means by which, *as between the parties* the Court can effectuate and carry out its own decree Where, therefore subsequent to this delivery the judgment debtor dispossesses the decree-holder and remains in possession such possession would be adverse to the decree holder only from the date of the dispossession[2]

2 (23) AIR 1923 Nag 237 (238)
(33) AIR 1933 Lah 22 (22)
(69) 11 Suth W R 63 (64)
3 (23) AIR 1923 Nag 237 (238)
4 (39) AIR 1939 Pat 151 (153)

(17) AIR 1917 P C 197 (201) (PC) (5 Cal 584, Approved)
(24) AIR 1924 All 844 (845)

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Note 4

1 (39) AIR 1939 Pat 151 (153)
(35) AIR 1935 Lah 612 (613)
2. (80) 5 Cal 584 (588) (FB) (Overruling 21 Suth W R 418)

years from date of symbolical possession suit will be barred)
(13) 21 Ind Cas 972 (974) (Lah)
(10) 8 Ind Cas 236 (239) (Lah)

Illustrations

1 *J* obtained a foreclosure decree for possession on 16th May 1864 against the mortgagor and took symbolical possession in execution on 30th January 1873 When attempting to take actual possession *J* was prevented by one *R* who had purchased the property from the mortgagor in 1865 *J* filed a suit for actual possession against *R* within 12 years of the date of formal possession It was held that the delivery of symbolical possession had the effect of interrupting *R s* adverse possession inasmuch as he was a person bound by the decree and that his possession after such delivery was a fresh act of trespass giving rise to a new cause of action *Juggobandhu v Ram Chunder* I L R 5 Calcutta 584 (F B)

2 *M* purchased immovable property belonging to *D* the defendant in court auction in execution of a decree against him on 21st August 1880 Symbolical possession was delivered to *M* on 14th July 1884 *M* filed a suit for possession on 29th May 1895 against *D* who remained in actual possession since the date of the auction purchase *D* contended that the suit was barred by limitation inasmuch as he was in possession for more than 12 years prior to suit It was held that a fresh period of limitation must be computed from the *date of delivery* of symbolical possession and that therefore the suit was in time *Mangli Prasad* v *Debi Din* I L R 19 Allahabad 499

But where symbolical possession was not delivered in the manner required by law, it will not furnish a fresh starting point of limitation [3] Again the delivery of symbolical possession has no such operation as against *third* persons who are not parties to the decree [4]

A suit might be brought and a decree obtained, by a person who has neither title nor possession against another person who has neither title nor possession and if the delivery of symbolical possession in such a suit were to constitute actual possession as against the true owner who had been in actual possession for many years and who was no party to the suit it would operate most unjustly [5]

Illustration

S mortgaged his property to *L* who obtained a decree on his mortgage in 1883 and in execution of that decree purchased *S s* rights on 20th August 1884 and obtained formal possession on 4th May 1885 V purchased the same property on 21st April 1884 in execution

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(26) AIR 1926 Mad 42 (44)
(15) AIR 1915 Mad 145 (149 150)
(28) AIR 1928 Oudh 8 (8 9) 3 Luck 180
(28) AIR 1928 Oudh 251 (254 256) 3 Luck 506 (F B) (Auction purchaser of undivided share being put in constructive possession by beat of drum)
(21) AIR 1921 Pat 344 (349)
(29) AIR 1929 Nag 298 (301) (Possession of judgment-debtor after symbolical delivery deemed fresh act of trespass)
(73) 19 Suth W R 101 (102) (PC) (Symbolical possession puts an end to limitation in respect of parties under Order 21 Rule 96)
(36) AIR 1936 All 85 (85)
(33) AIR 1933 Cal 494 (495)
(36) AIR 1936 Pesh 7 (8)
[*See* (13) 18 Ind Cas 751 (752) (Cal)]
[*See also* (95) 18 Mad 405 (407) (Formal possession amounts to dispossession of judgment debtor)]
[**But see** (16) AIR 1916 Mad 640 (640) 39 Mad 543 (Symbolical possession (without prejudice) not actual possession for purposes of S 145 Criminal Procedure Code)]

3 (33) AIR 1933 Lah 427 (428)
(36) AIR 1936 Lah 749 (750)

4 (12) 15 Ind Cas 10 (12) (All)
(99) 21 All 269 (271)
(95) 19 Bom 670 (675)
(88) 10 Cal 993 (995)
(07) 6 Cal L Jour 472 (483 484)
(18) AIR 1918 Cal 253 (255)
(18) AIR 1918 Cal 983 (984)
(18) AIR 1918 Cal 659 (659)
(17) AIR 1917 Cal 199 (201)
(91) 18 Cal 520 (525)
(87) 11 Cal L Rep 395 (398)
(16) AIR 1916 Cal 745 (746)
(14) AIR 1914 Cal 527 (529)
(14) AIR 1914 Cal 630 (631)
(16) AIR 1916 Cal 408 (409)
(13) 21 Ind Cas 76[illegible] (767) (Mad)
(11) 9 Ind Cas 271 (272) (Mad)
(17) AIR 1917 Oudh 135 (135)
(97) 1 Cal W N 343 (344)
(3) AIR 1923 Cal 82 (91)

O 21 R 35
Notes 4-6

of a money decree held by him against *S* and obtained actual possession in January 188 and was in possession since then *I* brought a suit on 27th April 1897 for possession against *N* a week before the expiry of twelve years from the date of delivery to him It was held that the suit was barred by limitation *Naram Das v Lalta Prasad* I L R 21 Allahabad 269

Now suppose that symbolical possession is given in circumstances in which *actual possession* ought to have been delivered What is its effect upon limitation? There is a conflict of opinion on this question On the one hand it has been held by the High Courts of Calcutta[6] Lahore[7] Madras[8] and Patna[9] the Chief Court of Lower Burma[10] and the Judicial Commissioner s Court of Nagpur[11] that the delivery of such possession amounts to delivery of actual possession so far as the judgment debtor and his representatives are concerned and that if after that date the judgment debtor continues in possession his possession becomes that of a trespasser giving rise to a fresh cause of action They proceed on the view that though actual possession might have been taken still as it was obtained through Court and by process of law and as the judgment debtor must be deemed to have been present at the proceedings relating to the taking of possession it is not open to him to say that the whole proceeding should be taken as a nullity and that the plaintiff should be treated as one who never obtained possession at all The High Courts of Allahabad[12] and Bombay[13] have on the other hand held that where the judgment debtor is in possession and the decree holder or the auction purchaser is entitled to actual possession he cannot get anything less than that and if he does not get actual possession he cannot rely upon symbolical possession for the law does not allow a person who is entitled to actual possession to get only symbolical possession

5 Symbolical possession and limitation — See Note 4 above

6 Joint possession — Undivided share — Sub rule (2) does not confer on Courts a new power of granting decrees for joint possession Such decrees were given before this Code was enacted and sub rule (2) merely defines the manner in which such decrees are to be executed[1] A person who is entitled to possession of immovable property jointly with others is not merely entitled to a decree declaring his rights in the land but also to a decree for *joint possession* and it is immaterial whether he was originally in possession and was subsequently dispossessed or whether he had never been in possession at all[2] But the Court has a discretion in granting such a decree

6 ('97) 24 Cal 715 (719)
('23) AIR 1923 Cal 139 (140 141)
('81) 7 Cal 418 (419 420)
('04) 8 Cal W N 49 (51)
('84) 11 Cal 93 (98 102)
('79) 4 Cal 870 (876)
[**But see** ('80) 5 Cal 331 (333)]

7 ('26) AIR 1926 Lah 35 (37) (General principles of estoppel similar to *res judicata* will apply)

[illegible]

9 ('23) AIR 1923 Pat 76 (82)
10 ('10) 8 Ind Cas 463 (464) (Low Bur)
11 ('14) AIR 1914 Nag 14 (14) 10 Nag L R 60

12 ('21) AIR 1921 All 9 (10 11) 43 All 520 (FB)
[**But see** ('06) 28 All 722 (723) (No longer law in view of AIR 1921 All 9 (FB))]

13 ('22) AIR 1922 Bom 2 (3) 46 Bom 932
('19) AIR 1919 Bom 44 (44 45) 43 Bom 559
('12) 14 Ind Cas 447 (449) 36 Bom 373 (FB) (Overruling 25 Bom 275 and 1 [illegible] Bom 3 8 and following 16 Bom 722)
('92) 16 Bom 722 (728)
('94) 18 Bom 37 (40)

[illegible]

Note 6

1 ('28) AIR 1928 All 472 (474) 51 All 303 (FB)
('11) 11 Ind Cas 87 (88) (All)

2 [illegible]

and the discretion must be exercised in accordance with the principles of justice, equity and good conscience [3]

Under the old Code it was held that a decree for joint possession may be executed by putting the plaintiff in actual possession of a portion of the property [4] The difficulty which arose in giving such delivery of joint possession has now been removed by the enactment of sub rule (2), prescribing the mode in which such delivery should be made [5] The delivery of joint possession under this rule is merely a symbolical transaction [6]

Whenever it is a question of giving effective possession of an undivided share in immovable property to an auction purchaser under a decree the provisions of Rule 95, *infra*, may be read with sub rule (2) of this rule [7]

7. Delivery of possession to agent. — Delivery of possession can be made to a person who is orally authorized by the decree holder [1]

8. Affixture of copy of warrant. — The provisions of this rule and of Rules 36 and 96 *infra*, imperatively require that a copy of the warrant for delivery of possession should be affixed in some conspicuous place on the property, the object of the provision being that co sharers and tenants may know that possession has been transferred to the decree holder or the auction purchaser as the case may be Therefore the failure to comply with the procedure laid down in those rules is fatal to the delivery which is no delivery at all in the eye of the law, and cannot be the basis for a fresh suit for possession [1] But where the parties concerned had actually come to know of the proceedings taken to give symbolical possession it must be presumed that there had been a substantial compliance with the requirements of the rules [2]

It must also be assumed that a process recorded as served through Court was served with all the formalities required by law and the burden of proof lies on the

(83) 10 Cal 244 (246)
[*See also* (96) 20 Bom 467 (468)]
3 (28) AIR 1928 All 472 (474) 51 All 303 (FB)
See the undermentioned cases in which joint possession was refused
(90) 18 Cal 10 (21 22) 17 Ind App 110 (P C)
(15) AIR 1915 Mad 50(51) (Per Napier J —Must

adverse possession)

('12) 14 Ind Cas 447 (449) 36 Bom 373 (F B)
(39) 1939 All L Jour 375 (376) (Decree for joint possession does not entitle decree holder to actual possession by ousting person in possession — His remedy for getting actual possession is by bringing suit for partition)
7 (14) AIR 1914 All 511 (511) 36 All 181
(28) AIR 1928 Oudh 251 (256) 3 Luck 506 (Per Misra J)

Note 7

1 (17) AIR 1917 Nag 231 (232) 13 Nag L R 87. (Even without a power of attorney)

Note 8

1. (23) AIR 1923 Lah 693 (693)
(20) AIR 1920 Lah 473 (474)
(17) AIR 1917 Lah 336 (337)
(17) AIR 1917 Lah 364(365) 1917 Pun Re No 20
(29) AIR 1929 Lah 545 (545 546)
(71) 15 Suth W R 99 (99)
[*See also* (25) AIR 1925 Lah 264 (265)
(36) AIR 1936 Lah 749 (750)]

subsequently — Possession is effective and valid against him)

O. 21 R. 35 Notes 8-12

person asserting the contrary to prove that the formalities, such as the fixing of copy of the warrant, had not been complied with[3]

9. Removal of person bound by decree. — The words "any person bound by the decree" in this rule include the judgment debtor as well as any person who may be held under law as bound by the decree[1] Therefore, if the property for which a decree for possession has been made is in the occupancy of a person claiming under a title created by the defendant subsequent to the institution of the suit, actual possession under sub rule (1) must be given to the decree-holder[2] by removing, if necessary, the person bound by the decree and refusing to vacate the property[3] As to cases in which a party is bound by the decree according to principles of *lis pendens*, see Section 52, Transfer of Property Act, and the undermentioned cases[4]

10. Use of force in giving possession. — Where a person bound by a decree for possession of immovable property refuses to vacate or deliver possession of the property a reasonable degree of force may be used in removing such person[1] But the removal by force of a person other than the one bound by the decree is an offence punishable under Section 323 of the Penal Code[2]

11. Resistance to delivery of possession. — Resistance to a warrant for delivery of actual possession by a person in possession who is not a party to the decree and who is not bound by it is not an offence under Section 186 of the Penal Code[1]

See also Notes to Order 21 Rule 98

11a. Consent of judgment-debtor. — The consent of the judgment debtor is not essential for the execution of a warrant for the delivery of possession under sub rule (1), and it is not obligatory upon the decree holder or the executing official to apprise the judgment debtor of the fact that the possession had been delivered to the decree holder, all that is necessary is to deliver possession to the decree holder, and if any resistance by a person bound by the decree is offered, to remove him from the possession thereof[1]

12. Identification of land. — If in the course of the proceedings in execution of a decree for possession of land, it appears that the boundaries described in the plaint are no longer in existence, the Court can make an enquiry to ascertain the land decreed[1] Where the plaintiff, who has obtained a decree for possession of land, describes the land as having a particular area and as lying within certain boundaries,

3. ('30) 132 Ind Cas 181 (182) (Lah)
('28) AIR 1928 Lah 910 (910 911)

Note 9

1 ('32) AIR 1932 Cal 241 (241, 242) 59 Cal 739 (Decree for landlord for possession against lessee can be executed against sub lessee)
[*See* ('37) AIR 1937 Cal 301 (303) (The person sought to be removed must be bound by the decree for possession — Mortgage decree for sale against executors under will in representative capacity — Property sold — Proceedings for delivery of property — Beneficiaries under will are not persons bound by the decree for possession but by the decree for sale)]
2. ('25) AIR 1925 Cal 1243 (1244)
('87) 15 Cal 94 (99)
('73) 20 Suth W R 201 (201 205, 206)
('69) 11 Suth W R 444 (444)
('74) 11 Bom H C R 24 (31)
3. ('72) 18 Suth W R 526 (528) (Delivery of land not involving delivery of buildings thereon)
4 ('98) 20 All 349 (351)
('95) 1 Cal W N 62 (64)
('13) 18 Ind Cas 177 (179, 181) (Cal)
('74) 21 Suth W R 349 (351)
('67) 7 Suth W R 225 (226)
(1862) 1 Hyde 160 (167, 168)
('30) AIR 1930 Cal 15 (16) 56 Cal 1130

Note 10

1 ('15) AIR 1915 Cal 558 (560) 42 Cal 313
2 ('30) AIR 1930 Cal 720 (720)

Note 11

1. ('25) AIR 1925 Mad 613 (614)

Note 11a

1 ('33) AIR 1933 Lah 22 (23)
('35) AIR 1935 All 938 (939)

Note 12

1 ('72) 17 Suth W R 379 (380)
('71) 16 Suth W R 171 (172)
[But see ('69) 12 Suth W R 99 (99, 100)]

the boundaries must prevail even if the land exceeds the area stated in the plaint[2]

See also Note 3 to Order 7 Rule 3 and Order 21 Rule 94

13. Break open — Sub-rule (3) — Though in the old Code there was no provision corresponding to this sub rule it was held that where the building or enclosure to be given possession of was locked by the judgment debtor or some person claiming under him and bound by the decree the officer of the Court had the power to break open the lock, and place the decree holder in possession[1]

R. 36. [S 264] Where a decree is for the delivery of any immoveable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property

Decree for delivery of immoveable property when in occupancy of tenant

[1877, S 264; 1859, S 224 *Cf* O. 21 R 96]

Synopsis

1 Scope and applicability of the Rule
2 Formal or symbolical possession See Notes to Rule 35
3 Possession without the intervention of the Court
4 Effect of delivery on criminal proceedings

Other Topics (miscellaneous)

Other persons See Note 1 Tenant See Note 1

1. Scope and applicability of the Rule. — This rule applies only to a case where the property is in the exclusive possession of a person who is not bound by the decree and who is entitled to remain in possession it does not apply to a case of joint holding which is covered by Rule 35 *ante*[1] Where the property which is the subject matter of a suit for possession is in the possession of a tenant[2] or of a usufructuary mortgagee whose term has not expired[3] or in the possession of a person having a right of residence,[4] delivery of the property in execution should be made under this rule provided, of course such person is not bound by the decree But where a third person claims to enter on the land under certain contractual rights and has not derived title

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2 (72) 18 Suth W R 25 (25)

Note 13

1 (74) 22 Suth W R 283 (284)

Order 21 Rule 36 — Note 1

Mad 394 (Revenue sale against jenmi in Malabar — Sale binds only jenmi and kanomdar and not tenants under kanomdar — Purchaser at revenue sale can therefore get only symbolical possession)]

[*See also* (72) 17 Suth W R 236 (236) (In executing a decree under this rule Court should

O. 21 R. 36 Notes 1–4

from the defendant in the suit, he cannot be regarded as a tenant against whom an order under this rule can be made [5]

Delivery of symbolical possession under this rule does not pass the right to the crops on the land, where a third person not bound by the decree is in possession [6]

2. Formal or symbolical possession. — See Notes to Rule 35, *ante*

3. Possession without the intervention of the Court. — A person who has obtained a decree for possession of immovable property may take possession of such property otherwise than in execution and may rely, for the support of his possession, on the title vested in him under the decree [1] Where, after having obtained possession without the aid of the Court, he is subsequently dispossessed, he can maintain an action against the persons who have dispossessed him, although he has not taken out execution of his decree [2]

4. Effect of delivery on criminal proceedings. — Where a short time before the institution of proceedings under Section 145 of the Criminal Procedure Code, a party has been put in possession of the disputed land by the Civil Court in execution of a decree, it is the duty of the Magistrate to find possession with that party in accordance with the Civil Court's order, even though he might have got only symbolical possession [1]

ARREST AND DETENTION IN THE CIVIL PRISON

O. 21 R. 37

Discretionary power to permit judgment-debtor to show cause against detention in prison

R. 37. [S. 245B.] *(1)* Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the Court [a]*shall*, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the civil prison:

[b]*Provided that such notice shall not be necessary if the Court is satisfied, by affidavit, or otherwise, that, with the object or effect of delaying the execution of the decree, the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the Court.*

(2) Where appearance is not made in obedience to the notice,

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5. ('23) AIR 1923 Mad 25 (27)
6 ('03) 3 Low Bur Rul 129 (130)

Note 3

1. ('91) 15 Bom 238 (241)
('67) 2 Agra 235 (236)
('74) 22 Suth W R 406 (406)
('81) 5 Bom 387 (391, 392) (If in taking such possession he uses violence he can be prosecuted)
2. ('16) AIR 1916 All 163 (163, 164) 38 All 509 (Twelve years after such dispossession suit will be barred)
('74) 6 N W P H C R 137 (139)
('16) AIR 1916 Mad 1089 (1090) (Execution is not the remedy)
('22) AIR 1922 Lah 459 (460)

Note 4

. .. . Mad 543 (Symbolical possession without prejudice to persons in actual possession — Not actual possession for purposes of S 145, Cr P C)]

the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor. **O. 21 R. 37 Notes 1-2**

a Substituted by the Code of Civil Procedure (Amendment) Act XXI of 1936, S 3, for "may"
b Inserted by *ibid*, Section 3

Synopsis

1. **Notice to show cause.** | 2. **Privilege from arrest.** See Section 135

Other Topics (miscellaneous)

"For the payment of money" See Note 1
Judgment debtor residing outside jurisdiction — Whether notice could be issued See Note 1

1. Notice to show cause. — Under Rules 16 and 22 of this Order, a Court is bound to issue notice to the judgment debtor, preliminary to ordering the execution of the decree, in three classes of applications for execution, *viz* —

(1) those made by transferees of decrees
(2) those made more than one year after the decree, and
(3) those made against the legal representatives of a party to a decree

Where, after such preliminary notice the party does not show cause against execution, the Court is bound, under Rule 24, to issue *process* for the execution of the decree But, where an application is made for the execution of a money decree by the imprisonment of the judgment debtor, the Court is bound under this rule to issue, in the first instance a notice to the judgment debtor to appear and show cause why he should not be committed to the civil prison in execution of the decree The Court cannot issue a notice and a warrant of arrest at the same time with directions for arrest in case the judgment debtor intimates he does not propose to appear [1]

Under the rule as it stood before it was amended by Act XXI of 1936 the Court had a discretionary power to issue a notice to the judgment debtor to show cause against his detention in prison This discretionary power was provided only in respect of the execution of *money decrees* by the *arrest and imprisonment* of the judgment debtor The classes of cases in which the discretion to issue notice could be exercised were indicated in the provisions of Rule 40, *infra* It was held that it would be a proper exercise of discretion to order notice where the Court had reason to believe that the judgment debtor was too ill for imprisonment [2]

Though a judgment debtor cannot be *arrested* because he is outside the jurisdiction of the Court at the time of the arrest, a notice under this rule may nevertheless be issued [3]

See also Note 1a to Rule 40 *infra*

2. Privilege from arrest. — See Section 135, *ante*

R. 38. [S. 337.] Every warrant for the arrest of a judgment-debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the **O. 21 R. 38**

Warrant for arrest to direct judgment debtor to be brought up

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Order 21 Rule 37 — Note 1
1. ('32) AIR 1932 Pat 315 (316) 11 Pat 743
('32) AIR 1932 All 602 (603) 55 All 109 (The warrant is illegal)
2. ('11) 9 Ind Cas 746 (747) 14 Oudh Cas 36
3 ('26) AIR 1926 Sind 51 (53)
[*See also* ('18) AIR 1918 Pat 427 (428) 3 Pat L Jour 95]

O.21 R.38 Note 1 amount which he has been ordered to pay, together with the interest thereon and the costs (if any) to which he is liable, be sooner paid.

[1877, Ss. 251, 343; 1859, S. 222.]

Local Amendment

MADRAS

Substitute a comma for the full stop after the word "paid" and *add* the following

"or unless satisfaction of the decree be endorsed by the decree holder on the warrant in the manner provided in Rule 25 (2) above"

1. **"With all convenient speed."** — Detention, without authority, beyond such time as is reasonably necessary to bring the judgment debtor to Court after arrest, is illegal [1]

The date for the return of the warrant should also be specified in the warrant [2]

Local Amendment

RANGOON

Add the following as Rule 38A

O. 21 R. 38A (Rangoon) Costs of conveyance of civil prisoners to be borne by Court

"38A The actual cost of conveyance of a civil prisoner shall be borne by the Court ordering his arrest or requiring his attendance at Court, as the case may be and shall not be charged to the judgment creditor"

O.21 R.39 Subsistence-allowance.

R. 39. [Ss. 339, 340.] *(1)* No judgment-debtor shall be arrested in execution of a decree unless and until the decree-holder pays into Court such sum as the Judge thinks sufficient for the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the Court

(2) Where a judgment-debtor is committed to the civil prison in execution of a decree, the Court shall fix for his subsistence such monthly allowance as he may be entitled to according to the scales fixed under section 57, or, where no such scales have been fixed, as it considers sufficient with reference to the class to which he belongs.

(3) The monthly allowance fixed by the Court shall be supplied by the party on whose application the judgment-debtor has been arrested by monthly payments in advance before the first day of each month.

Order 21 Rule 38 — Note 1

1. ('59) 1859 Bourke 59
2. ('19) AIR 1919 Pat 427 (428) 3 Pat L Jour 95

(4) The first payment shall be made to the proper officer of the Court for such portion of the current month as remains unexpired before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) shall be made to the officer in charge of the civil prison. O.21 R.39

(5) Sums disbursed by the decree-holder for the subsistence of the judgment-debtor in the civil prison shall be deemed to be costs in the suit:

Provided that the judgment-debtor shall not be detained in the civil prison or arrested on account of any sum so disbursed.

[1877, Ss. 339, 340; 1859, Ss. 276, 279.]

Local Amendments

ALLAHABAD

Delete the words "in the civil prison" in sub-rule (5)

CALCUTTA

Omit the words "in the civil prison" in sub rule (5)

LAHORE

Delete the words "in the civil prison" in sub-rule (5)

MADRAS

Delete the present sub-rules (4) and (5) and *substitute* the following

"(4) Such sum (if any) as the Judge thinks sufficient for the subsistence and costs of conveyance of the judgment debtor for his journey from the Court-house to the Civil Prison and from the Civil Prison, on his release, to his usual place of residence together with the first of the payments in advance under sub rule (3) for such portion of the current month as remains unexpired, shall be paid to the proper officer of the Court before the judgment debtor is committed to the Civil Prison, and the subsequent payments (if any) shall be paid to the officer-in-charge of the Civil Prison

(5) Sums disbursed under this rule by the decree holder for the subsistence and costs of conveyance (if any) of the judgment debtor shall be deemed to be costs in the suit."

NAGPUR

(a) To sub-rule (1) the following words shall be added, namely :

"and for the cost of conveyance of the judgment-debtor from the place of his arrest to the Court house "

(b) For sub rules (4) and (5), the following sub-rules shall be substituted, namely

"(4) Such sum (if any) as the Judge thinks sufficient for the subsistence and cost of conveyance of the judgment-debtor for his journey from the Court house to the Civil Prison and from the Civil Prison, on his release, to his usual place of residence together with the first of the payments in advance under sub-rule (3) for such portion of the current month as remains unexpired, shall be paid to the proper officer of the Court before the judgment-debtor is committed to the Civil Prison, and the subsequent payments (if any) shall be paid to the officer-in charge of the Civil Prison.

O. 21 R. 39
Notes 1–2

(5) Sums disbursed under this rule by the decree holder for the subsistence and the cost of the conveyance (if any) of the judgment-debtor shall be deemed to be costs in the suit "

N.-W. F. P.

(1) For sub-rule (4), *substitute* the following

"(4) All payments shall be made to the officer-in charge of the Civil Prison "

(2) In sub rule (5), *omit* the words "in the Civil Prison,"

OUDH

In sub-rule (5), *delete* the words "in the Civil Prison "

PATNA

In sub rule (5) *delete* the words "in the Civil Prison" in the first place where they occur

RANGOON

The following shall be *inserted* as sub-rule (2A) .

"(2A) When a civil prisoner is kept in confinement at the instance of more than one decree holder, he shall only receive the same allowance for his subsistence as if he were detained in confinement upon the application of one decree holder Each decree holder shall, however pay the full allowance for subsistence, and when the debtor is released, the balance shall be divided rateably among the decree holders, and paid to them

In sub rule (5) the words "in the Civil Prison" shall be deleted

Synopsis

1. Subsistence money.
2. Arrest before judgment
3. Payment of subsistence money and limitation

1. Subsistence money. — This rule is to be strictly followed The subsistence allowance payable to the officer in charge of the civil prison must always be paid for a whole month in advance [1] Thus, the payment for the month of January must be actually made to the officer in-charge of the civil prison *before the 1st* of January [2] Otherwise, the judgment debtor will be released from imprisonment See Section 58, Note 3 and the undermentioned cases [3] The decree holder is bound to pay, however, only the amount due as *subsistence allowance* according to the prescribed scales[4] and not the costs of bedding, clothing, etc , for the prisoner which are governed by the Prison Rules [5]

In case the judgment debtor is not committed to prison, the decree holder is entitled to a refund of any money unspent between the dates of arrest and release from custody [6]

2. Arrest before judgment. — The same rules apply equally to cases of arrest *before* judgment [1]

Order 21 Rule 39 — Note 1

1. ('70) 5 Beng L R App 79 (79 80)
('70) 5 Beng L R App 80 (81) (Unspent amount of previous month may be taken into account)

2. ('14) AIR 1914 Mad 24 (24) (Remittance by postal money order, must actually reach officer before the first day of the month)

3. Bourke O C 59
Bourke O C 109
Bourke O C 421
('68) 4 Mad H C R 76 (77)

4 Bourke O C 52 (The corresponding Section of the Code of 1859 contained no reference to any scales)
Bourke O C 59 (Do)

5. ('93) 1893 Pun Re 43, page 202
See also Note 2 to Section 58

6 ('68) 5 Bom H C R 84 (85)
('79) 4 Bom 65 (69, 70) (Time for payment of process fee for arrest under the Code of 1859 was different)

Note 2

1. Bourke O C 423

3 Payment of subsistence money and limitation — A payment or remittance of subsistence money by post to the Superintendent of Jail under sub rule (4) is a step in aid of execution within the meaning of Article 182 of the Limitation Act[1] O 21 R 39 Note 3

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[a]**R 40.** O 21 R 40

Proceedings on appearance of judgment debtor in obedience to notice or after arrest

(1) When a judgment debtor appears before the Court in obedience to a notice issued under rule 37, or is brought before the Court after being arrested in execution of a decree for the payment of money, the Court shall proceed to hear the decree holder and take all such evidence as may be produced by him in support of his application for execution, and shall then give the judgment-debtor an opportunity of showing cause why he should not be committed to the civil prison

(2) Pending the conclusion of the inquiry under sub rule (1) the Court may, in its discretion, order the judgment debtor to be detained in the custody of an officer of the Court or release him on his furnishing security to the satisfaction of the Court for his appearance when required

(3) Upon the conclusion of the inquiry under sub rule (1) the Court may, subject to the provisions of section 51 and to the other provisions of this Code make an order for the detention of the judgment debtor in the civil prison and shall in that event cause him to be arrested if he is not already under arrest

Provided that in order to give the judgment-debtor an opportunity of satisfying the decree, the Court may, before making the order of detention, leave the judgment debtor in the custody of an officer of the Court for a specified period not exceeding fifteen days or release him on his furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period if the decree be not sooner satisfied

(4) A judgment debtor released under this rule may be re arrested

(5) When the Court does not make an order of detention under sub rule (3), it shall disallow the application and, if the judgment debtor is under arrest, direct his release

a Substituted by Section 4 of the Code of Civil Procedure (Amendment) Act XXI of 1936

Note 3
1 (33) AIR 1933 Mad 83 (84 85) 56 Mad 320

O.21 R 40
Note 1a

Local Amendments

NAGPUR

insert the following as sub rules (6) (7) and (8)

(6) When a judgment debtor is ordered to be detained in the custody of an officer of the Court under sub rule (2) or the proviso to sub rule (3) above the Court may direct the decree holder to deposit such amount as having regard to the specified or probable length of detention will provide

(a) for the subsistence of the judgment debtor at the rate to which he is entitled under the scales fixed under Section 57

(b) for the payment to the officer of the Court in whose custody the judgment debtor is placed of such fees (including lodging charges) in respect thereof as the Court may by order fix

Provided (i) that the subsistence allowance and the fees payable to the officer of the Court shall not be recovered for more than one month at a time and

(ii) that the Court may from time to time require the decree holder to deposit such further sums as it deems necessary

(7) If a decree holder fails to deposit any sum as required under sub rule (6) above the Court may disallow the application and direct the release of the judgment debtor

(8) Sums disbursed by the decree holder under sub rule (6) shall be deemed to be costs in the suit

Provided that the judgment debtor shall not be detained in the civil prison or arrested on account of any sum so disbursed

[Notification No 7719 dated 29 11 1938]

ALLAHABAD MADRAS and OUDH

Under Section 4 of Act XXI of 1936 the amendments to Rule 40 made by the above High Courts have been repealed

Synopsis

Other Topics (miscellaneous)

1a Legislative changes — The rule in its present form was substituted for the old Rule 40 by Section 4 of Act XXI of 1936 The old Rule 40 ran as follows —

Proceedings on appearance of judgment debtor in obedience to notice or after arrest

R 40 [S 337A] *(1)* Where a judgment debtor appears before the Court in obedience to a notice issued under Rule 37 or is brought [illegible] a decree

cause to pay the amount of the decree or if that amount is [illegible]

the amount of any instalment thereof the Court may upon such terms (if any) as it thinks fit make an order disallowing the application for his arrest and detention or

nder sub rule (1) the Court may take into ecree holder touching any of the following matters namely —

(a) the decree being for a sum for which the judgment debtor was bound in any fiduciary capacity to account

(b) the transfer concealment or removal by the judgment debtor of any part of his property after the date of the institution of the suit in which the decree was passed or the commission by him after that date of any other act of bad faith in relation to his property with the object or effect of obstructing or delaying the decree holder in the execution of the decree

(c) any undue preference given by the judgment debtor to any of his other creditors

(d) refusal or neglect on the part of the judgment debtor to pay the amount of the decree or some part thereof when he has or since the date of the

holder in the execution of the decree

(3) While any of the matters mentioned in sub rule (2) are being considered the Court may in its discretion order the judgment debtor to be detained in the civil prison or leave him in the custody of an officer of the Court or release him on his furnishing security to the satisfaction of the Court for his appearance when required by the Court

(4) A judgment debtor released under this rule may be re arrested

(5) Where the Court does not make an order under sub rule (1) it shall cause the judgment debtor to be arrested if he has not already been arrested and subject to the other provisions of this Code commit him to the civil prison

The above Act also amended Section 51 and O 21 R 37 of the Code (See Section 51 and O 21 R 37) The effect of all these amendments taken together is as follows —

1 It is now obligatory in every case on the Court to give an opportunity to the judgment debtor to show cause why he should not be imprisoned before ordering his imprisonment in execution of a money decree But before the passing of the above Act the Court had a *discretion* in the matter (See O 21 R 37)

2 Execution of a money decree by the imprisonment of the judgment debtor cannot now be ordered except in certain special circumstances specified in the proviso to Section 51 But before the passing of the above Act the Court was ordinarily bound to order the imprisonment of the judgment debtor on the application of the decree holder though the Court had a *discretion* to refuse to order such imprisonment in certain circumstances (old R 40 of O 21) In other words the burden is now thrown on the decree holder to prove the circumstances justifying the imprisonment of the judgment debtor whereas formerly the burden was on the judgment debtor to establish the circumstances justifying the Court in refusing to order his imprisonment [1]

3 The provision in Rule 40 for giving a further opportunity to the judgment debtor to satisfy the decree even after his imprisonment has been ordered by directing

Order 21 Rule 40 — Note 1a

1 (3) AIR 1938 Lah 515 (519) (Provision is retrospective)

O. 21 R. 40 Notes 1a-2 that he should be left in the custody of an officer of the Court for a certain period or should be released on his furnishing security is new

See also Note 5A to Section 51 *ante*

1. Scope of the Rule — As seen in Note 1a the one great distinction between the law as it was before the amendments made by Act XXI of 1936 and the law as it is now is that previously the Court was ordinarily *bound* to order the imprisonment of the judgment debtor in execution of a money decree on the application of the decree holder, though the Court had a discretion in certain exceptional circumstances to refuse to order the imprisonment of the judgment debtor [1] whereas now the Court has *no power* to order the imprisonment of the judgment debtor in execution of a money decree except in certain specified circumstances Inability to pay the amount of the decree was recognized under the old rule as a ground for disallowing an application for arrest But the inability must be a *bona fide* one as implied in sub rule (2) An order releasing the judgment debtor without considering the allegations of the decree holder touching any of the matters referred to in sub rule (2) of the old rule was not proper [2] The object of the rule was to prevent creditors from unduly harassing indigent debtors[3] but if no sufficient cause as required by the rule existed the Court could not refuse the decree holder the right of arrest and detention [4] The finding as to inability to pay must be based on evidence [5] and the burden of proof of such inability rested on the judgment debtor [6] The executing Court had no power to excuse the judgment debtor from liability to arrest until he actually came before the Court [7]

A judgment debtor committed to the civil prison will be deemed to be in unlawful detention if he is delivered to an officer other than the officer named in the warrant of committal issued under the rule and will be entitled to be released from such custody [8] Though in the case of a judgment debtor against whom a warrant had been issued sub rule (1) of the old rule in terms was applicable *on his being brought under arrest* he was not precluded from *surrendering* to the Court before arrest and claiming the protection of the rule [9]

2 "Poverty or other sufficient cause" (old Rule) — The Court had a *discretion* under the old rule to disallow the application for arrest on any one of the grounds specified in the rule [1] Inability to pay may arise from poverty or other sufficient cause Where the object of the decree holder was to harass a judgment debtor whose properties had all been sold in execution of decrees and the amount

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[*See also* (38) AIR 1938 Rang 477 (478) (As the normal limit under which a man cannot reasonably be expected to support himself and a family is held at Rs 40 unless there is any thing on the record from which it can be said to have been proved that a judgment debtor earns more than Rs 40 a month and fails to pay the excess to the decree holder the Court should not order arrest of a judgment debtor)]

Note 1

1 [*See* (36) AIR 1936 Rang 280 (281)]

2 (29) AIR 1929 Pat 728 (729) (Fraudulent concealment of property since date of suit)

3 (13) 21 Ind Cas 993 (997) (Mad)

4 (97) 2 Cal W N 588 (589) (Court is bound to cause the arrest at once)

(26) 94 Ind Cas 279 (279) (Lah)

[*See also* (33) AIR 1933 Pat 248 (248) (Judgment debtor evading arrest—Court refusing to make further effort to apprehend and dismissing execution case—Order is not proper)]

5 (28) AIR 1928 Cal 62 (63) 54 Cal 782 (And *not on a statement at the bar*)

6 (14) AIR 1914 Low Bur 51 (52) 7 Low Bur Rul 339

(97 01) 2 Upp Bur Rul 279

7 (33) AIR 1933 Pat 248 (249)

8 (85) 11 Cal 527 (530)

9 (29) AIR 1929 Sind 110 (111)

Note 2

1 (35) AIR 1935 Oudh 57 (58) 10 Luck 509

could be realized from solvent co judgment debtors,[2] or where the assets of a judgment-debtor could not be readily called in, for no fault of his,[3] the Court might, in its discretion, refuse arrest or detention and, in the latter instance, grant him a reasonable time to pay the amount

Lunacy of the judgment-debtor was held to be a sufficient cause under the old rule for refusing arrest or detention [4]

3. Insolvency. — In the absence of a *protection order* from the Insolvency Court, the insolvency of a judgment debtor was not necessarily a ground for release under the old rule [1] The Court was, however, bound to consider, under that rule, the question of his inability to pay, if pleaded, notwithstanding the want of a protection order [2]

Prior to any enquiry under this rule the Court must, under Section 55, sub section (3), inform the judgment debtor that he may apply to be declared an insolvent[3] and the judgment debtor must express his intention to do so also before the proceedings under this rule are terminated [4]

4. Transfer, concealment, removal or any other act of bad faith — Sub-rule (2), clauses (b) and (c) (old Rule). — The acts of bad faith contemplated by clauses (b) and (c) of sub rule (2), of the old rule were akin to those dealt with in Section 53 of the Transfer of Property Act, Sections 55 to 57 of the Presidency Towns Insolvency Act, and Sections 53 and 54 of the Provincial Insolvency Act of 1920 Under clause (b) however, the alleged act must be subsequent to the suit in question and intended to defeat or delay the decree holder in particular [1]

One test of good faith is whether the transaction complained of is genuine or colourable [2]

5. Undue preference — Sub-rule (2), clause (c) (old Rule). — It was held that the Court might be guided by the relevant provisions of the Insolvency Acts in dealing with the question of undue preference under clause (c) of sub rule (2) of the old rule [1] See also the undermentioned cases [2]

6. Refusal or neglect to pay the amount of the decree — Sub-rule (2), clause (d) (old Rule). — The word "thereof' in clause (d) of sub rule (2) referred to the

2. (22) AIR 1922 Lah 259 (260)
3 (11) 11 Ind Cas 848 (849) (Lah) (Decree debt

Note 3

1 See Note 10 to Section 55 *ante*
(07) 9 Bom L R 898 (900)
(30) AIR 1930 Lah 1070 (1071, 1072) (Protection order produced—Judgment debtor immune from arrest)
2 (31) AIR 1931 Lah 121 (122) (Insolvency application — Property in the hands of *ad interim* receiver—Sufficient cause)
[*See also* (35) AIR 1935 Rang 415 (418) 13 Rang 623 (It does not follow, because the Insolvency
3
4

Note 4

1 [*See* (85) 7 All 445 (446)
(95) 17 All 218 (221)]
2. [*See* (05) 29 Bom 428 (434)]

Note 5

1 (85) 11 Cal 451 (461)
2. (93) 16 Mad 499 (503, 505) (Preference must be voluntary and devoid of consideration)
(81) 3 All 530 (532, 533) (Do)

O. 21 R. 40
Notes 6-10

decree amount generally, whether payable in instalments or otherwise [1]

7. Likelihood of the judgment-debtor absconding—Sub-rule (2) clause (e) (old Rule). — See the undermentioned case [1]

8. Sub-rule (3) (old Rule). — This sub rule was intended to give facility for the enquiry contemplated in the preceding sub rule [1] The security to be furnished under the sub rule must be a substantial one and not a personal security of the judgment debtor himself [2] A security bond given under the sub-rule would be in force until the execution proceedings were terminated by a final order [3] Where a judgment debtor had not been arrested, but had been given notice to show cause why he should not be arrested, the Court had no jurisdiction to order, under sub rule (3), the release of the judgment debtor and take a bond for his appearance [4]

9. Appeal. — By the operation of Sections 2 (2) and 47 of this Code, an appeal lies from an order disallowing an application for the arrest and imprisonment of the judgment debtor[1] as well as from an order refusing him exemption from arrest [2]

10. Madras Amendment. — Act XXI of 1936 repealed the amendments to the old R 40 made under Section 122 of the Civil Procedure Code Before the above Act under the rule as amended by the Madras High Court, it was provided that a judgment-debtor who had been ordered to be detained in the civil prison might be ordered to be left in the custody of an officer of the Court for a specified period not exceeding ten days in order to enable the judgment debtor to satisfy the debt It was held that the order for leaving the judgment debtor in the custody of an officer of the Court under this proviso need not be in writing [1]

ATTACHMENT OF PROPERTY

O. 21 R. 41

R. 41. [S. 267.] Where a decree is for the payment of money the decree-holder may apply to the Court for an order that —

Examination of judgment-debtor as to his property.

(*a*) the judgment-debtor, or

(*b*) in the case of a corporation, any officer thereof, or

(*c*) any other person,

be orally examined as to whether any or what debts are owing

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(88) 12 Bom 425 (426)

Note 6

1. (14) AIR 1914 Low Bur 51 (53) 7 Low Bur Rul 339

Note 7

1. (93) 20 Cal 771 (787)

Note 8

1. (14) AIR 1914 Low Bur 51 (53) 7 Low Bur Rul 339
2. .
3. .

continues)

4. (34) AIR 1934 Lah 217 (218) (The security bond cannot be enforced)

Note 9

1 (19) AIR 1919 Lah 15 (16) 1 Lah 77
(33) AIR 1933 Pat 248 (249)
(22) AIR 1922 Lah 259 (259)
(98) 21 Mad 29 (30)
(95) 1895 Pun Re No 69 page 338
('17) AIR 1917 Mad 187 (187)
2 (29) AIR 1929 Lah 141 (141)
('37) AIR 1937 Lah 706 (707)

Note 10

1. (33) AIR 1933 Mad 278 (279) (Escaping from such custody is an offence under S 225 B of the Penal Code)

to the judgment-debtor and whether the judgment-debtor has any and what other property or means of satisfying the decree; and the Court may make an order for the attendance and examination of such judgment-debtor, or officer or other person, and for the production of any books or documents

[1877, S. 267; 1859, S 219.]

Synopsis

1. Legislative changes	3 "Any other person"
2. Scope and object of the Rule.	4 "Any and what other property"
2a "Decree for payment of money"	5 Production of books of account.

1. Legislative changes. — "Order 21 R 41 is an amplification of Section 219 of Act VIII of 1859, modified by Section 267 of Act X of 1877"[1] Under the former Codes the Court was also expressly empowered to act *suo motu*

2. Scope and object of the Rule. — The object of the rule is to obtain discovery for purposes of execution in cases where there is any difficulty or cause for delay in obtaining particulars of the judgment debtor s property[1] An application under this rule can be made at any stage, though it should not be allowed, if it is calculated to harass any person by personal examination when an order for examination or production is made *ex parte* It is open to the Court to hear the objections of the respondent without an application by him[2] The provisions of this rule come into effect only after a decree has been passed and cannot be invoked in the suit stage[3] The power of the Court under this rule is discretionary[4]

2a. "Decree for payment of money." — A decree directing an enquiry as to damages is a decree for payment of money and a person who has obtained such a decree is entitled to invoke the aid of this rule in order to enable him to effect an attachment in pursuance of the right given to him under O 21 R 42, before the amount due from the judgment debtor has been ascertained[1]

3. "Any other person." — The Court may order the examination of any person who is alleged to be a mortgagee in possession of the property of the judgment-debtor and if it finds such person not to be in possession, it may order the attachment of the property[1]

It has been held by the Judicial Commissioner's Court of Sind[2] that permission should not be granted to a judgment debtor to examine a garnishee on the affidavit filed by him denying his liability to the judgment debtor It has also been held by the Madras High Court[3] that the discretionary power under this rule to examine a garnishee must ordinarily be limited to cases where the garnishee *admits* the debt In such cases, the executing Court may find out the exact extent of the debt before ordering execution

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Order 21 Rule 41 — Note 1

1 (16) AIR 1916 Cal 228 (229) 43 Cal 285

Note 2

[illegible]

Note 2a

1. (39) AIR 1939 Mad 699 (699, 701)

Note 3

1 [illegible]
2 [illegible]
3 [illegible]

O. 21 R. 40
Notes 6-10

decree amount generally, whether payable in instalments or otherwise[1]

7. Likelihood of the judgment-debtor absconding—Sub-rule (2) clause (e) (old Rule). — See the undermentioned case[1]

8. Sub-rule (3) (old Rule). — This sub rule was intended to give facility for the enquiry contemplated in the preceding sub rule[1] The security to be furnished under the sub rule must be a substantial one and not a personal security of the judgment debtor himself[2] A security bond given under the sub rule would be in force until the execution proceedings were terminated by a final order[3] Where a judgment debtor had not been arrested, but had been given notice to show cause why he should not be arrested, the Court had no jurisdiction to order, under sub rule (3), the release of the judgment debtor and take a bond for his appearance[4]

9 Appeal — By the operation of Sections 2 (2) and 47 of this Code an appeal lies from an order disallowing an application for the arrest and imprisonment of the judgment debtor[1] as well as from an order refusing him exemption from arrest[2]

10 Madras Amendment. — Act XXI of 1936 repealed the amendments to the old R 40 made under Section 122 of the Civil Procedure Code Before the above Act under the rule as amended by the Madras High Court it was provided that a judgment debtor who had been ordered to be detained in the civil prison might be ordered to be left in the custody of an officer of the Court for a specified period not exceeding ten days in order to enable the judgment debtor to satisfy the debt It was held that the order for leaving the judgment debtor in the custody of an officer of the Court under this proviso need not be in writing[1]

ATTACHMENT OF PROPERTY

O 21 R 41

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Examination of judgment-debtor as to his property

(*a*) the judgment-debtor, or

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(88) 12 Bom 495 (426)

Note 6

1 (14) AIR 1914 Low Bur 51 (53) 7 Low Bur Rul 339

Note 7

1. (93) 20 Cal 771 (787)

Note 8

1 (14) AIR 1914 Low Bur 51 (53) 7 Low Bur Rul 339

2 (28) AIR 1928 Cal 62 (63) 54 Cal 789

3 (29) AIR 1929 Lah 776 (777) (Surety bond—Execution proceedings consigned to record room on judgment-debtor applying for being declared insolvent — Fresh execution application on dismissal of insolvency petition—Surety's liability continues)

4 (34) AIR 1934 Lah 217 (218) (The security bond cannot be enforced)

Note 9

1 (19) AIR 1919 Lah 15 (16) 1 Lah 77
(33) AIR 1933 Pat 248 (249)
(22) AIR 1922 Lah 259 (259)
(98) 21 Mad 29 (30)
(95) 1895 Pun Re No 69 page 338
(17) AIR 1917 Mad 187 (187)

2 (29) AIR 1929 Lah 141 (141)
(37) AIR 1937 Lah 706 (707)

Note 10

1 (33) AIR 1933 Mad 278 (279) (Escaping from such custody is an offence under S 225 B of the Penal Code)

to the judgment-debtor and whether the judgment-debtor has any and what other property or means of satisfying the decree; and the Court may make an order for the attendance and examination of such judgment-debtor, or officer or other person, and for the production of any books or documents **O. 21 R. 41 Notes 1-3**

[1877, S. 267; 1859, S 219.]

Synopsis

1 Legislative changes
2 Scope and object of the Rule
2a "Decree for payment of money"
3 "Any other person"
4 "Any and what other property"
5 Production of books of account

1. Legislative changes — Order 21 R 41 is an amplification of Section 219 of Act VIII of 1859 modified by Section 267 of Act X of 1877 '[1] Under the former Codes the Court was also expressly empowered to act *suo motu*

2. Scope and object of the Rule. — The object of the rule is to obtain discovery for purposes of execution in cases where there is any difficulty or cause for delay in obtaining particulars of the judgment debtor s property [1] An application under this rule can be made at any stage, though it should not be allowed, if it is calculated to harass any person by personal examination when an order for examination or production is made *ex parte* It is open to the Court to hear the objections of the respondent without an application by him [2] The provisions of this rule come into effect only after a decree has been passed and cannot be invoked in the suit stage [3] The power of the Court under this rule is discretionary [4]

2a. "Decree for payment of money." — A decree directing an enquiry as to damages is a decree for payment of money and a person who has obtained such a decree is entitled to invoke the aid of this rule in order to enable him to effect an attachment in pursuance of the right given to him under O 21 R 42, before the amount due from the judgment debtor has been ascertained [1]

3. "Any other person." — The Court may order the examination of any person who is alleged to be a mortgagee in possession of the property of the judgment-debtor and if it finds such person not to be in possession it may order the attachment of the property [1]

It has been held by the Judicial Commissioner s Court of Sind[2] that permission should not be granted to a judgment debtor to examine a garnishee on the affidavit filed by him denying his liability to the judgment debtor It has also been held by the Madras High Court[3] that the discretionary power under this rule to examine a garnishee must ordinarily be limited to cases where the garnishee *admits* the debt In such cases the executing Court may find out the exact extent of the debt before ordering execution

Order 21 Rule 41 — Note 1

1 (16) AIR 1916 Cal 228 (229) 43 Cal 285

Note 2

1 [illegible]

Note 2a

1 (39) AIR 1939 Mad 699 (699, 701)

Note 3

1 (93) 17 Bom 514 (518 519)
2 (39) AIR 1939 Sind 350 (351)
3 (39) AIR 1938 Mad 771 (773 774) (But examination may be allowed to prevent fraud or collusion — Object is to find out if debt is pro

O.21 R.41
Notes 4-5

4. "Any and what other property." — The rule applies to every description of property of the judgment debtor legally liable to be proceeded against in satisfaction of the decree [1]

5. Production of books of account. — To prevent the judgment debtor from defeating the decree holder's rights the Court may require the former to produce his books of account and leave them in court custody [1] A garnishee may also be directed to produce his books of account or other documents for finding out whether there are any dealings between him and the judgment debtor making the existence of a debt probable [2]

O.21 R.42

R. 42. [S. 255.] Where a decree directs an inquiry as to rent or mesne profits or any other matter, the property of the judgment-debtor may, before the amount due from him has been ascertained, be attached, as in the case of an ordinary decree for the payment of money.

Attachment in case of decree for rent or mesne profits or other matter, amount of which to be subsequently determined

[1877, S 255 See O 21 Rr. 12, 15 and 16.]

Synopsis

1 Scope of the Rule
2 Attachment under a preliminary decree.
3 Enquiry into state of account in suits under Section 92 of this Code.

1. Scope of the Rule. — This rule is analogous to the provision in the Code relating to attachment before judgment and its object is to secure to the decree holder the fruits of his decree Although, unlike O 38 R 5, this rule makes no specific provision for avoiding attachment by furnishing security, it has been held that the Court will be justified in requiring security before acting under this rule [1] This rule treats the attachment as a proceeding in execution and the application for attachment may, therefore be treated as one for execution And as soon as the amount is ascertained, the application for attachment becomes one for the execution of the decree for the realization of the ascertained sum of money and the applicant will also be entitled to share in a rateable distribution of assets under Section 73 *ante* [2]

2. Attachment under a preliminary decree. — An attachment of the property of a *judgment debtor* under a preliminary decree fixing his *liability* can be validly made under this rule pending enquiry as to the amount due [1] But where the preliminary decree does not fix the liability but directs enquiry in order to *ascertain*

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ings for the attachment of such debt)

Note 4

1. [*See* ('93) 17 Bom 514 (518, 519) (E g, Equity of redemption)]

Note 5

1. ('71) 3 N W P H C R 334 (335)
2. ('38) AIR 1938 Mad 771 (774) (But garnishee ought not to be subjected to any examination or cross examination for the purpose of determining whether the liability subsists or not)

Order 21 Rule 42 — Note 1

1 ('12) 16 Ind Cas 708 (710) (Cal) ('17) AIR 1917 All 153 (154)
2. ('34) AIR 1934 Mad 604 (605) 58 Mad 233

Note 2

1 ('67) 8 Suth W R 9 (10) (E g, A preliminary decree for mesne profits directing enquiry into the account)
('17) AIR 1917 All 153 (154)

the liability, this rule does not apply [2] "An operative decree obtained after the death of a defendant, by which the extent and quality of his liability, already declared in general terms, are for the first time ascertained, cannot bind the representatives of the deceased, unless they were made parties to the suit in which it was pronounced ' [3] To such a case the present rule can have no application **O. 21 R. 42 Notes 2-3**

3. Enquiry into state of account in suits under Section 92 of this Code. — This rule applies also to the case of trustee against whom a decree has been passed in a suit under Section 92 of this Code, with a direction to take accounts of the trust moneys [1]

R. 43. [S. 269.] Where the property to be attached is moveable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof: **O. 21 R. 43**

Attachment of moveable property other than agricultural produce, in possession of judgment-debtor.

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once

[1877, S 269; 1859, S. 233 See Ss 2, 13 and 145.]

Local Amendments

CALCUTTA

Read Rule 43 as follows

' Where the property to be attached is moveable property, other than agricultural produce, in the possession of the judgment debtor, the attachment shall be made by actual seizure, and, save as otherwise prescribed, the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof

Provided that, when the property seized does not, in the opinion of the attaching officer, exceed twenty rupees in value, or is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once "

LAHORE

Re number the rule as sub rule (1) and *add* the following further proviso and sub rules (2) and (3)

"and provided also that, when the property attached consists of live stock, agricultural implements or other articles which cannot conveniently be removed and

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2 [illegible] of accounts)
(29) AIR 1929 Mad 641 (648) 52 Mad 563 (Do —Per Thiruvenkatachariar, J)
(37) AIR 1937 Cal 4 (7) (Words ' any other matter " in O 21 R 42 cannot include a preliminary decree directing the taking of accounts in a partnership suit)
3 ('91) 13 All 53 (65) 17 Ind App 150 (P C)

Note 3

1 (17) AIR 1917 All 153 (154)

O.21 R.43 the attaching officer does not act under the first proviso to this rule, he may at the instance of the judgment debtor or of the decree holder or of any person claiming to be interested in such property leave it in the village or place where it has been attached—

(a) in the charge of the person at whose instance the property is retained in such village or place, if such person enters into a bond in Form No 15A of Appendix E to this Schedule with one or more sufficient sureties for its production when called for, or

(b) in the charge of an officer of the Court, if a suitable place for its safe custody be provided and the remuneration of the officer for a period of 15 days at such rate as may from time to time be fixed by the High Court be paid in advance, or

(c) in the charge of a village *lambardar* or such other respectable person as will undertake to keep such property, subject to the orders of the Court, if such person enters into a bond in Form No 15B of Appendix E with one or more sureties for its production

(2) Whenever an attachment made under the provisions of this rule ceases for any of the reasons specified in Rules 55, 57 or 60 of this Order, the Court may order the restitution of the attached property to the person in whose possession it was before attachment

(3) When property is made over to a custodian under sub clauses (a) or (c), of clause (1), the schedule of property annexed to the bond shall be drawn up by the attaching officer in triplicate, and dated and signed by —

(a) the custodian and his sureties,
(b) the officer of the Court who made the attachment,
(c) the person whose property is attached and made over,
(d) two respectable witnesses

One copy will be transmitted to the Court by the attaching officer and placed on the record of the proceedings under which the attachment has been ordered one copy will be made over to the person whose property is attached and one copy will be made over to the custodian '

MADRAS

Substitute the following Rule for Rule 43

"43 (1) Where the property to be attached is moveable property, other than agricultural produce, in the possession of the judgment debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once, and

Provided also that, when the property attached consists of live stock, agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the first proviso to this rule, he may at the instance of the judgment debtor or of the decree holder or of any person claiming to be interested in such property leave it in the village or place where it has been attached—

(a) in the charge of the person at whose instance the property is retained in such village or place, if such person enters into a bond in Form No 15A of Appendix E to this Schedule with one or more sufficient sureties for its production when called for, or

(b) in the charge of an officer of the Court if a suitable place for its safe custody be provided and the remuneration of the officer for a period of 15 days at such rate as may from time to time be fixed by the High Court be paid in advance **O 21 R 43**

(2) Whenever an attachment made under the provisions of this rule ceases for any of the reasons specified in Rule 55 or Rule 57 or Rule 60 of this Order the Court may order the restitution of the attached property to the person in whose possession it was before attachment

NAGPUR

Substitute the following for Rule 43

43 (1) Where the property to be attached is moveable property other than agricultural produce in the possession of the judgment debtor the attachment shall be made by actual seizure and the attaching officer shall keep the property in his own custody or in the custody of any of his subordinates and shall be responsible for the due custody thereof

Provided that when the property seized is subject to speedy and natural decay or when the expense of keeping it in custody is likely to exceed its value the attaching officer may sell it at once and

Provided also that when the property attached consists of live stock agricultural implements or other articles which cannot be conveniently removed and the attaching officer does not act under the first proviso to this rule he may at the instance of the judgment debtor or of the decree holder or any person claiming to be interested in such property leave it in the village or at the place where it has been attached —

(a) in the charge of the judgment debtor or of the station pound keeper if any or

(b) in the charge of the decree holder or of the person claiming to be interested in such property or of such respectable person as will undertake to keep such property on his entering into a bond with one or more sureties in an amount not less than the value of the property that he will take proper care of such property and produce it when called for

(2) The attaching officer shall make a list of the property attached and shall obtain thereto the acknowledgment of the person in whose custody the property is left and if possible of the parties to the suit and of at least one respectable person in attestation of the correctness of the list If the property attached includes both live stock and other articles a separate list of the live stock shall similarly be prepared and attested

N W F P

Add the following further proviso

Provided further that when the attached property consists of live stock or articles which cannot conveniently be removed and the attaching officer does not act under the first proviso to this rule he may leave it in the village or place where it has been attached in the charge of a village lambardar or such other respectable person as will undertake to keep the property subject to the orders of the Court if such person enters into a written bond for its production

Any person who has so undertaken to keep attached property may be proceeded against as a surety under Section 145 of the Code and shall be liable to pay in execution proceedings the value of any such property wilfully lost by him

PATNA

Substitute the following for Rule 43

43 Where the property to be attached is moveable property other than

O.21 R.43
Notes 1-5

agricultural produce, in the possession of the judgment debtor, the attachment shall be made by actual seizure, and the attaching officer shall be responsible for the due custody thereof

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once"

Synopsis

1. Scope of the Rule. — This rule deals with the mode of attachment of all moveable property except *(a)* agricultural produce and *(b)* property not in the possession of the judgment-debtor, for both of which provision is made in Rules 44 to 46, *infra*

The attachment is legally effected only by actual seizure[1] As to the procedure for the custody and maintenance of such property as live stock, see the rules framed under this Code by the various High Courts and the undermentioned cases[2]

2. "Moveable property." — See Notes under Section 2 (13) and (16)

3. "Actual seizure." — Unlike a prohibit [illegible]
by actual seizure involves a change of possessio[illegible]
Court[1] But *actual seizure* does not always imply [illegible]
bring the property into physical contact with the person attaching[2] Any overt act short of direct physical apprehension, sufficient to pass possession to the Court, amounts to actual seizure, as for example, the affixing of the Court seal to the outer door of a warehouse containing the property to be attached,[3] or in the case of an attachment of cattle already tied and secured, the announcement on the spot by the attaching officer of his intention to attach[4] The seizure by a peon of the attaching officer is valid if done in the presence and under the instructions of such officer[5] Continuance of attachment necessarily involves continuance of court custody If such custody is once lost, there can be no further attachment without a fresh seizure[6]

4. Effect of wrongful attachment. — See Note 23 to Section 60, *ante*

5. "Shall be responsible for the due custody thereof." — The attaching officer is primarily responsible for the safe custody of moveable property attached by him[1] This rule deals only with the liability of the attaching officer so far as the Court

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Order 21 Rule 43 — Note 1

1. ('39) AIR 1939 Cal 316 (319) (The goods have to be actually seized by the officer of the Court [illegible]

2 [illegible]

Note 3

1. ('14) AIR 1914 Mad 126 (127) 38 Mad 972 (FB)

2. ('30) AIR 1930 Mad 670 (671)
('87) 11 Bom 448 (454)
3. ('04) 27 Mad 346 (347)
4. ('30) AIR 1930 Mad 670 (671)
5. ('29) AIR 1929 Mad 188 (189)
6 ('30) AIR 1930 R[illegible] 8 Rang 491.
[illegible]
revived)

Note 5

1. ('34) AIR 1934 All 357 (358)
('39) AIR 1939 Cal 316 (319)
[*See also* ('36) AIR 1936 Rang 12 (14)]

is concerned It does not affect in any way the liability of a surety who expressly takes charge of the attached property either to the Court or to the decree holder [2]

Attaching officers have been authorized by rules to leave the attached property in the custody of the judgment debtor or other person See rules by the various High Courts Rule 93 of the Calcutta High Court General Rules and Circular Orders (Civil) and also Rule 122 of this Order passed by the Allahabad High Court

See also Note 4 to Section 145

6 Security bond to produce attached property — On the question whether liability under such a security bond is enforceable in execution or by a separate suit see Note 4 to Section 145 *ante*

Local Amendments

LAHORE

Insert the following as Rules 43A 43B 43C and 43D

O 21 R 43A (Lahore)

43A (1) Whenever attached property is kept in the village or place where it is attached the attaching officer shall forthwith report the fact to the Court and shall with his report forward a list of the property seized

(2) If attached property is not sold under the first proviso to Rule 43 or retained in the village or place where it is attached under the second proviso to that rule it shall be brought to the court house and delivered to the proper officer of the Court

(3) A custodian appointed under the second proviso to Rule 43 may at any time terminate his responsibilities by giving notice to the Court of his desire to be relieved of his trust and delivering to the proper officer of the Court the property made over to him

(4) When any property is taken back from a custodian he shall be granted a receipt for the same

O 21 R 43B (Lahore)

43B (1) Whenever attached property kept in the village or place where it is attached is live stock the person at whose instance it is retained shall provide for its maintenance and if he fails to do so and if it is in charge of an officer of the Court it shall be removed to the court house

Nothing in this rule shall prevent the judgment debtor or any person claiming to be interested in such stock from making such arrangements for feeding the same as may not be inconsistent with its safe custody

(2) The Court may direct that any sums which have been expended by the attaching officer or are payable to him if not duly deposited or paid be recovered from the proceeds of property if sold or be paid by the person declared entitled to delivery before he receives the same The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings

O 21 R 43C (Lahore)

43C When an application is made for the attachment of live stock or other moveable property the decree holder shall pay into Court in cash such sum as will cover the costs of the maintenance and custody of the property for fifteen days If within three clear days before the expiry of any such period of fifteen days the amount of such costs for such further period as the Court may direct be not paid into Court the Court on receiving a report thereof from the proper officer may issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid

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2 (21) AIR 19 1 All 220 (220 221)
(26) AIR 1926 All 406 (407) 48 All 510 (Attaching officer entrusting the attached property to a third person without the permission of Court — Loss of the property—Court can order the attaching officer to make good the loss)

O.21 R.43D (Lahore) 43D (1) Any person who has undertaken to keep attached property under Rule 43 (1) (c) shall be liable to be proceeded against as a surety under Section 145 of the Code and shall be liable to pay in execution proceedings the value of any such property wilfully lost by him'

MADRAS

Insert the following as Rules 43A and 43B

O 21 R 43A (Madras) '43A (1) Whenever attached property is kept in the village or place where it is attached, the attaching officer shall forthwith report the fact to the Court and shall with his report forward a list of the property seized

(2) If attached property is not sold under the first proviso to Rule 43 or retained in the village or place where it is attached under the second proviso to that rule it shall be brought to the court house and delivered to the proper officer of the Court

O 21 R 43B (Madras) 43B (1) Whenever attached property kept in the village or place where it is attached is live stock the person at whose instance it is so retained shall provide for its maintenance and if he fails to do so and if it is in charge of an officer of the Court, it shall be removed to the court house

Nothing in this rule shall prevent the judgment debtor or any person claiming to be interested in such stock from making such arrangements for feeding the same as may not be inconsistent with its safe custody

(2) The Court may direct that any sums which have been expended by the attaching officer or are payable to him if not duly deposited or paid, be recovered from the proceeds of property, if sold, or be paid by the person declared entitled to delivery before he receives the same The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings

NAGPUR

Insert the following as Rule 43A

O 21 R 43A (Nagpur) '43A (1) When an application is made for the attachment of live stock the Court may demand an advance in cash at rates to be fixed half yearly or oftener, if necessary by the Courts with the sanction of the District Court the amount requisite for the maintenance of the live stock from the probable time of attachment to the probable time of sale or may at its discretion, make successive demands for portions of such period The rates shall include costs of feeding, tending and conveyance and all other charges requisite for the maintenance and custody of the live stock

(2) If the live stock be entrusted to any person other than the judgment debtor the amount paid by the decree holder for the maintenance of the cattle or the part thereof may, at the discretion of the Court be paid to the custodian of the live stock for their maintenance The produce such as milk eggs etc, if any may either be sold, as promptly as possible for the benefit of the judgment debtor, or may at the discretion of the Court be set off against the cost of maintenance of the live stock

PATNA

Insert the following as Rule 43A

O 21 R 43A (Patna) "43A (1) The attaching officer shall in suitable cases, keep the attached property in the village or locality either —

(a) in his own custody in any suitable place provided by the judgment debtor, or in his absence by any adult member of his family who is present, on his own premises or elsewhere,

(b) in the case of live stock and provided the decree holder furnishes the

necessary funds, in the local pound, if a pound has been established in or near the village, in which case the pound keeper will be responsible for the property to the attaching officer, and shall receive the same rates for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description, or such less rate as may be agreed upon,

(c) in the custody of a respectable surety, provided the decree holder furnishes the cost of maintenance and other costs, if any

(2) If in the opinion of the attaching officer the attached property cannot be kept in the village or locality, through lack of a suitable place, or satisfactory surety, or through failure of the decree holder to provide necessary funds, or for any other reason, the attaching officer shall remove the property to the Court at the decree holder's expenses In the event of the decree holder failing to provide the necessary funds, the attachment shall be withdrawn

(3) Whenever attached property is kept in the village or locality as aforesaid the officer shall forthwith report the fact to the Court, and shall with his report forward an accurate list of property seized, such that the Court may thereon at once issue the proclamation of sale prescribed by Rule 66

(4) If the debtor shall give his consent in writing to the sale of the property without awaiting the expiry of the term prescribed in Rule 68, the officer shall receive the same and forward it without delay to the Court for its orders

(5) When property is removed to the Court it shall be kept by the nazir on his own sole responsibility in such place as may be approved by the Court If the property cannot, from its nature or bulk be conveniently kept on the court premises, or in the personal custody of the nazir, he may, subject to approval by the Court, make such arrangements for its safe custody under his own supervision as may be most convenient and economical, and the Court may fix the remuneration to be allowed to the persons, not being officers of the Court, in whose custody the property is kept

(6) When property remains in the village or locality where it is attached and any person other than the judgment debtor shall claim the same, or any part of it, the attaching officer shall nevertheless, unless the decree holder desires to withdraw the attachment of the property so claimed, maintain the attachment, and shall direct the claimant to prefer his claim to the Court

(7) *(a)* If the decree holder shall withdraw an attachment or it shall be withdrawn under sub rule (2) or sub rule (9) the attaching officer shall inform the debtor, or in his absence, any adult member of his family, that the property is at his disposal

(b) In the absence of any person to take charge of it, or in case the officer shall have had notice of claim by a person other than the judgment debtor, the officer shall, if the property has been moved from the premises in which it was seized, replace it where it was found at the time of seizure

(8) Whenever live stock is kept in the village or locality where it has been attached, the judgment debtor shall be at liberty to undertake the due feeding and tending of it under the supervision of the attaching officer, but the latter shall, if required by the decree holder, and on his paying for the same at the rate to be fixed by the District Judge, and subject to the orders of the Court under whose orders the attachment is made, engage the services of as many persons as may be necessary, for the safe custody of it

(9) In the event of the judgment debtor failing to feed the attached live stock

O. 21 R. 43A (Patna)

in accordance with sub rule (8), the officer shall call upon the decree holder to pay forthwith, for feeding the same In the event of his failure to do so, the officer shall proceed as provided in sub rule (2) and shall report the matter to the Court without delay

(10) When attached live stock is brought to Court, the nazir shall be responsible for the safe custody and proper feeding of it so long as the attachment continues

(11) If a pound has been established in or near the place where the Court is held, the nazir shall be at liberty to place in it such attached live stock as can be properly kept there, in which case the pound keeper will be responsible for the property to the nazir and shall receive the same rates for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description, or such less rate as may be agreed upon

(12) If there be no pound available, or if, in the opinion of the Court, it be inconvenient to lodge the attached live stock in the pound, the nazir may keep it in his own premises, or he may entrust it to any person selected by himself and approved by the Court The nazir will in all cases remain responsible for the custody of the property

(13) Each Court shall from time to time fix the rates to be allowed for the custody and maintenance of the various descriptions of live stock with reference to seasons and local circumstances The District Judge may make any alteration he deems fit in the rates prescribed by Courts subordinate to him Where there are two or more Courts in the same place, the rates shall be the same for each Court '

O. 21 R. 44

Attachment of agricultural produce

R. 44. [New.] Where the property to be attached is agricultural produce, the attachment shall be made by affixing a copy of the warrant of attachment, —

(a) where such produce is a growing crop, on the land on which such crop has grown, or

(b) where such produce has been cut or gathered, on the threshing-floor or place for treading out grain or the like or fodder-stack on or in which it is deposited,

and another copy on the outer door or on some other conspicuous part of the house in which the judgment-debtor ordinarily resides or, with the leave of the Court, on the outer door or on some other conspicuous part of the house in which he carries on business or personally works for gain or in which he is known to have last resided or carried on business or personally worked for gain; and the produce shall thereupon be deemed to have passed into the possession of the Court.

[See S. 2 (13).]

1. Attachment of agricultural produce. — Agricultural produce, whether standing crop[1] or severed from the soil, is moveable property Unlike other moveable property agricultural produce of either description cannot be attached by *actual seizure* as provided in Rule 43 *The custodia legis* in the case of agricultural produce on attachment is only symbolical and is not validly created unless the rules of affixture herein provided are strictly complied with[2] The reason is that no property can be declared to be attached unless first, the order for attachment has been issued, and secondly, in execution of that order the other things prescribed by the rules in the Code have been done[3] But, when it is proved that an attachment has been made it must be presumed, until the contrary is shown, that all the necessary formalities were duly observed[4] **O.21 R.44 Note 1**

This rule like the preceding one, applies only when the property is in the *possession* of the judgment debtor and not of a *third* party[5]

As regards the mode of attachment of growing crops, standing timber or other products of the earth, under the Madras Estates Land Act V of 1908, see Section 192 (1) thereof

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Local Amendment

BOMBAY

The following shall be *inserted*, namely

"44A Where the property to be attached is agricultural produce a copy of the warrant or order of attachment shall be sent by post to the office of the Collector of the district in which the land is situate" **O.21 R.44A (Bombay)**

R. 45. [New.] *(1)* Where agricultural produce is attached, the Court shall make such arrangements for the custody thereof as it may deem sufficient and, for the purpose of enabling the Court to make such arrangements, every application for the attachment of a growing crop shall specify the time at which it is likely to be fit to be cut or gathered. ***O.21 R.45***

Provisions as to agricultural produce under attachment

(2) Subject to such conditions as may be imposed by the Court in this behalf either in the order of attachment or in any subsequent order, the judgment-debtor may tend, cut, gather and

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Order 21 Rule 44 — Note 1

1 Section 2 (13) — Decisions *contra* under old Code no longer law
(92) 14 All 30 (34)
(82) 6 Bom 592 (593)
(70) 13 Suth W R 275 (275, 276)
(88) 11 Mad 193 (196)

O.21 R.45 store the produce and do any other act necessary for maturing or preserving it; and if the judgment-debtor fails to do all or any of such acts, the decree-holder may, with the permission of the Court and subject to the like conditions, do all or any of them either by himself or by any person appointed by him in this behalf, and the costs incurred by the decree-holder shall be recoverable from the judgment-debtor as if they were included in, or formed part of, the decree.

(3) Agricultural produce attached as a growing crop shall not be deemed to have ceased to be under attachment or to require re-attachment merely because it has been severed from the soil.

(4) Where an order for the attachment of a growing crop has been made at a considerable time before the crop is likely to be fit to be cut or gathered, the Court may suspend the execution of the order for such time as it thinks fit, and may, in its discretion, make a further order prohibiting the removal of the crop pending the execution of the order of attachment

(5) A growing crop which from its nature does not admit of being stored shall not be attached under this rule at any time less than twenty days before the time at which it is likely to be fit to be cut or gathered.

Local Amendments

BOMBAY

The following words shall be *added* to sub rule (1), after *substituting* a semicolon *for* the full stop

"and the applicant shall deposit in Court at the time of the application such sum as the Court shall deem sufficient to defray the cost of watching and tending the crop till such time"

CALCUTTA

Add the following to sub rule (1)

"and the applicant shall deposit in Court such sum as the Court shall require in order to defray the cost of watching or tending the crop till such time'

LAHORE

Add the following to sub rule (1) of Rule 45

"and with every such application such charges as may be necessary for the custody of the crop up to the time at which it is likely to be fit to be cut or gathered shall be paid to the Court"

MADRAS

Substitute a semi-colon *for* the full stop at the end of sub rule (1), and *add* the following words

"and the applicant shall deposit in Court within a date to be fixed by Court, such sum as the Court may deem sufficient to defray the cost of watching and tending the crop till such time"

PATNA O 21 R 45 Note 1

Add to sub rule (1) after deleting the full stop at the end of the sub rule

and the applicant shall pay into Court such sums as he may from time to time be required by the Court to pay in order to defray the cost of such arrangements

1. "Shall specify the time at which it is likely to be fit to be cut and gathered" — The attachment of agricultural produce does not prevent the judgment debtor from doing or continuing all necessary acts of husbandry with respect to the crop or produce In fact the Court is bound under this rule to make proper arrangements for the custody tending cutting gathering storing maturing and preservation of the produce either at the instance of the judgment debtor or if he neglects to perform the acts of preservation at the instance of the decree holder or otherwise The attached property continues to be in the possession of the Court during the process of husbandry

To enable the Court to make the necessary arrangements an application for attachment must state the time at which the crop is likely to be ready for harvest If the application is made a considerable time before the harvest the Court may postpone attachment and prohibit the present removal of the produce

Local Amendments

RANGOON

Add Rules 45A and 45B

O 21 R 45A (Rangoon)

Deposit disbursement and refund of watching fees for attached moveable property

45A (1) Before issuing a warrant for the attachment of moveable property which it will be necessary to place in charge of one or more peons permanent or temporary the Court shall satisfy itself that the attaching decree holder has produced a receipt in Form 15A, Appendix E from the Bailiff that he has paid in cash as process fees under Rule 17 (1) (*e*) (*ii*) (2) of the Process Fees Rules not less than Rs 10 for each person whom the Bailiff considers should be employed

(2) In sending the warrant for execution to the Bailiff the Court Clerk shall certify at the foot of the warrant that the receipt granted by the Bailiff for the necessary fees has been filed in the record The Bailiff shall then endorse on the warrant the name of the process server to whom it is issued for execution If a temporary peon is employed for the custody of the attached property the process server shall state in his report of the attachment the name of the temporary peon employed and the date from which his duties commenced

(3) At the time of granting the receipt in Form 15A for payments made by the decree holder as required by such sub rule (1) the Bailiff shall state in the lower portion of the form the date on which the fees paid will be exhausted warning the decree holder that the property will not be kept under attachment after that date unless further fees are paid before that date If the further fees required are not paid the attachment shall cease as soon as the period for which fees have already been paid expires In such a case the amount paid prior to the cessation of the attachment shall not be allowed to the attaching decree holder as costs

(4) The payment of fees under sub rule (1) shall be made in cash to the Bailiff and the amount shall be at once entered in Bailiff s Register No II The Court Clerk shall on receipt of the Bailiff s acknowledgment (Form 15A) file it in the record and make an entry to that effect in the diary

(5) Temporary peons employed for the custody of attached property shall be remunerated at the rate provided for in Rule 15 of the rules regarding process serving

O. 21 R. 45A (Rangoon) establishments, provided that the total remuneration disbursed shall in no case exceed the amount of the process fees actually paid under the foregoing sub rules Permanent peons shall be presumed to be remunerated at the same rate as temporary peons but if the services of the former are utilized, the fees paid shall be credited direct into the Treasury to "Process servers' Fees," XVI A, Law and Justice" — "Courts of Law' — "Court fees realized in cash "

(6) The remuneration of temporary peons employed to take charge of attached property shall be paid direct by the Bailiff to them on the order of the Judge Before passing such order, the Judge must verify the name of the payee from the report of the attachment and must satisfy himself that the amount proposed to be paid does not exceed the amount of the fees deposited with the Bailiff, or, if any payments have already been made in the case of the unexpended balance of such deposits and that all amounts previously drawn have been disbursed to the proper persons

(7) When the order has been signed by the Judge, the money shall be disbursed by the Bailiff at once to the peon or peons concerned, whose acknowledgment of receipt shall be taken in Bailiff s Register II If, however, the amount has been transferred to Bailiff s Register I the Bailiff shall draw the amount necessary for payment from the Treasury as if it were a re payment of deposit and shall then disburse the amount due to the peon or peons concerned, whose acknowledgment of receipt shall be taken in Bailiff s Register I

(8) When the attachment is brought to a close or has not been effected, if the Judge finds, at the time of calculating the amount paid in and properly chargeable for peons, that the total amount of the fees actually paid under sub rules (1) and (3) exceeds the total amount that is chargeable for peons including the amount of the last payment, he shall direct that the excess be refunded to the payer.

(9) The Judge shall in all cases in which a refund is to be made, issue to the Bailiff an order, a copy of which shall be placed on the record, to make such refund If a sufficient portion of the amount paid by the decree holder to pay such refund is in the hands of the Bailiff, that officer shall make the refund in the ordinary way prescribed in his Register II for re payments If the amount has been credited into the Treasury, he shall prepare a bill for the amount to be refunded in the prescribed Treasury F[illegible] and shall lay it before the Judge for signature with the record of the case in the [illegible] way as a bill for the remuneration of temporary peons Before signing the refur[illegible] the Judge must satisfy himself that the amount is available for refund by ex[illegible] Bailiff's Register I and the record The bill when signed by the Judge will be [illegible] the payee, with instructions to present it for payment at the Treasury or sub tre[illegible]

O. 21 R 45B (Rangoon) 45B (1) In addition to the fees payable before a warrant issues for the attachment of moveable property under Rule 45A, the Bailiff shall require the attaching decree holder to deposit a sum of money sufficient to cover the cost of attachment other than the pay of peons employed to take charge of it, for such period as the Bailiff may think fit

Charges incurred in connexion with custody and conveyance of attached moveable property and feeding and tending of live stock.

Explanation — The costs in question might be, for example

(a) rent of building in which to store attached furniture,

(b) cost of conveying the attached property from the place of attachment to Court or to a secure place of custody,

(c) costs of feeding and tending live stock,

(d) cost of proceeding to the place of attachment to sell perishable property.

(2) If the attaching decree holder fails to comply with the Bailiff's requisition the warrant shall not be issued **O.21 R.45B (Rangoon)**

(3) Sums thus deposited shall be entered in the Bailiff s Registers I and II and any re payments thereof shall be made according to existing orders A receipt for such sums shall be granted by the Bailiff in Form 15A, Appendix E

(4) In the receipt given for the sums deposited, the Bailiff shall state the period for which such sums will last, and if the attaching decree holder does not deposit a further sum before the expiry of such period, the attachment shall cease when the sum deposited is exhausted

(5) The officer actually attaching the property shall, unless the Court otherwise directs, give the debtor or in his absence, any adult member of his family who may be present the option of having the attached property kept on his premises or elsewhere, on condition that a suitable place for its safe custody is duly provided The option so given may be subsequently withdrawn by order of the Court Where the attached property consists of cattle these may be employed, so far as is consistent with Rule 43 in agricultural operations

(6) If no such suitable place be provided or if the Court directs that the property shall be removed, the officer shall remove the property to the Court, unless the property attached is a growing crop, when Rule 45 applies Whenever live stock is placed at the place where it has been attached, the judgment debtor shall be at liberty to undertake the due feeding and tending of it under the supervision of the attaching officer

(7) Whenever property is attached, the officer shall forthwith report to the Court and shall with his report forward an accurate list of the property seized

(8) If the judgment debtor shall give his consent in writing to the sale of property without awaiting the expiry of the terms prescribed in Rule 68, the officer shall receive the written consent and forward it without delay to the Court for its orders

(9) When property is removed to the Court it shall be kept by the Bailiff, on his own sole responsibility, in such place as may be approved by the Court If the property cannot, from its nature or bulk, be conveniently kept on the court premises or in the personal custody of the Bailiff he may, subject to the approval of the Court, make such arrangement for its safe custody under his own supervision as may be most convenient and economical

(10) If there be a cattle pound maintained by Government or any local authority in or near the place where the Court is held, the Bailiff shall be at liberty to place in it such attached live stock as can be properly kept there in which case the pound-keeper will be responsible for the property to the Bailiff and shall receive the same rates for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description

(11) Whenever property is attached, and any person other than the judgment-debtor shall claim the same, or any part of it, the officer shall nevertheless, unless the decree holder desires to withdraw the attachment of the property so claimed, remain in possession and shall direct the claimant to prefer his claim to the Court

(12) If the decree holder shall withdraw an attachment or if it shall cease under sub rule (2) or sub rule (4), the Bailiff s officer shall inform the debtor or, in his absence, an adult member of his family that the property is at his disposal

(13) If any portion of the deposit made under sub rule (1) or sub rule (4)

O.21 R.45B (Rangoon) remains unexpended it shall be refunded to the decree holder in the manner prescribed for such refunds in sub rule (9) of Rule 45A Any difference between the cost of attachment of moveable property (other than the costs referred to in Rule 45A) and the sums deposited by the attaching decree holder shall unless the difference is due to the fault of the Bailiff, be recovered from the sale proceeds of the attached property, if any, and if there are no sale proceeds from the attaching decree holder on the application of the Bailiff If there is still a deficiency the amount shall be paid by Government

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O.21 R.46 **Attachment of debt, share and other property not in possession of judgment debtor**

R. 46. [S 268] *(1)* In the case of —

(a) a debt[2] not secured by a negotiable instrument,

(b) a share[11] in the capital of a corporation,

(c) other moveable property[12] not in the possession of the judgment-debtor, except property deposited in, or in the custody of, any Court,

the attachment shall be made by a written order prohibiting,—

(i) in the case of the debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of the Court;

(ii) in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon;

(iii) in the case of the other moveable property except as aforesaid, the person in possession of the same from giving it over to the judgment-debtor

(2) A copy of such order shall be affixed on some conspicuous part of the court-house and another copy shall be sent in the case of the debt, to the debtor, in the case of the share, to the proper officer of the corporation, and, in the case of the other moveable property (except as aforesaid), to the person in possession of the same [13]

(3) A debtor prohibited under clause *(i)* of sub-rule *(1)* may pay the amount of his debt into Court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same

[1877, Ss 268, 301; 1859, Ss 236, 239]

Local Amendment

RANGOON

Delete sub rule (3)

Synopsis

Other Topics (miscellaneous)

1. Attachment of debt, share, or other moveable property — General — There is a broad distinction between the attachment of moveable property *in the possession* of the judgment debtor and the attachment of debts (other than negotiable instruments) shares in a corporation or other moveable property *not in the possession* of the judgment debtor in the former case the attachment is effected by *actual seizure* while in the latter case it is done by a *prohibitory order*[1]

A debt in order to be attachable under this rule must be due *solely* to the judgment debtor and should be described with reasonable certainty in the application for *attachment*[3] *The Court cannot on an application under this rule* direct the *garnishee* (judgment debtor s debtor) to *pay* the amount into Court it can only pass a prohibitory order as mentioned in the rule[4] It is however *open* to the *garnishee* to deposit the amount of the debt in Court and thereby obtain a valid discharge[5] But in the case of dispute as to the title to the amount in deposit the Court must decide the question before ordering payment to the decree holder[6] Rules 58 and 63 of this Order are applicable to attachments hereunder[7]

Order 21 Rule 46—Note 1

1 (14) AIR 1914 Mad 106(127) 38 Mad 972 (FB)
(32) AIR 193 Pat 279 (280 281) 11 Pat 493 (Property not in possession of judgment debtor ^

tral family money lending business cannot be attached)
(37) I L R (1937) 2 Cal 440 (443)
[*See also* (37) AIR 1937 Cal 199 (200) I L R (193) 2 Cal 48]
3 (18) AIR 1918 Mad 541 (549)
(91) 16 All 286 (91)
(11) 9 Ind Cas 240 (241) (Oudh)
4 (10) 5 Ind Cas 145 (145) 33 Mad 261
[*See* (29) AIR 1929 Mad 347 (348) (Order for payment by garnishee of amount under life policy before proof of death according to rules of company not valid)]
[*See also* (10) 5 Ind Cas 820 (820) (Mad) (Order absolute for injunction to the disburser to pay the judgment debtor s salary into Court is not an order effecting attachment)]
5 See sub-rule (3)
(21) AIR 1921 All 81 (85) 43 All 272 (Motive of depositor not material)
See also Note 7 *infra*

Court)
7 (01) 27 Mad 67 (71)
(10) 8 Ind Cas 603 (603) (Low Bur)
(12) 15 Ind Cas 193 (194) (Mad)

O 21 R. 46
Notes 1-4

Under Section 50 of the Code where a decree is executed against a legal representative he is liable only to the extent of the property of the deceased which has come to his hands Hence a debt due to the legal representative or moveable property of the deceased which has not yet come into the possession of the legal representative cannot be attached under this rule[8]

2 **"Debt," meaning of** — See Notes 7 14 and 22 to Section 60 and also the undermentioned cases[1]

3 **Salary, whether a debt** — A pay or pension in private service *becomes due* on the last day of the month even though it is not paid till the first of the next month and can be attached on the last day of the month[1] So also it has been held that the salary of a member of a Provincial Legislative Assembly is not the salary of a public officer and is not attachable before it becomes payable at the end of the month[2] See also Notes 15 to 17 to Section 60

4 **Attachment of mortgage debt** — A mortgage debt due under a *simple* mortgage is a debt within the meaning of this rule and can be attached by a prohibitory order[1] Such attachment carries with it the security of the immovable property without any further attachment of the *property* itself the purchaser of the mortgage interest in execution is entitled therefore to sue for the *sale* of the mortgaged property for the debt[2]

A *usufructuary* mortgage in which there is a covenant to pay is also a debt which can be attached under this rule[3] But a purely usufructuary mortgage without any liability to pay the mortgage amount is not a debt at all and cannot be attached under this rule[4] Such a mortgage should be attached under Rule 54 as *immovable*

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8 (37) AIR 1937 Rang 274 (274) (Security deposit of deceased judgment debtor in deposit with his employer cannot be attached under this rule)

Note 2

1 (29) AIR 1929 Mad 347 (347 348) (Life policy requiring proof of death before payment—Money payable by company becomes debt only on proof of death)
(34) AIR 1934 All 448 (453) (Unpaid portion of loan by mortgagee is not debt)
(34) AIR 1934 All 954 (956) (Money left with mortgagee is not debt)
(39) AIR 1939 Bom 90 (91) I L R (1939) Bom 109 (Deposit made by member of association which is subject to forfeiture and lien and is within absolute control of association is not liable to attachment as it does not constitute debt nor moveable property not in possession of the judgment debtor)
(39) AIR 1939 Mad 811 (813) (A dividend payable to a creditor in insolvency is not debt liable to be attached under O 21 R 46—When no dividend has at all been declared there is nothing to attach)

Note 3

1 (30) AIR 1930 Rang 101 (101)
2 (39) AIR 1939 Cal 423 (429) I L R (1939) 1 Cal 523

Note 4

1 (93) 15 All 184 (185)
(86) 12 Cal 546 (550)
(15) AIR 1915 Mad 209 (209) 13 Ind Cas 91 (92) 37 Mad 51
(15) AIR 1915 Mad 551 (552)
(01) 14 C P L R 5 (8)
(87) 10 Mad 169 (172)
(19) AIR 1919 Oudh 132 (132) 21 Oudh Cas 400
(24) AIR 1924 All 796 (798) 46 All 917 (It is moveable property under this rule)
(02) 26 Bom 305 (312) (Do)
(12) 16 Ind Cas 816 (816) (Mad) (Do)
(30) AIR 1930 Oudh 473 (474) (Do)
(09) 1 Ind Cas 450 (451) 1909 Pun Re No 18 (Do)
2 (95) 19 Bom 121 (123)
(02) 26 Bom 305 (310 312)
(24) AIR 1924 All 796 (798) 46 All 91
(01) 14 C P L R 5 (8)
(12) 16 Ind Cas 438 (438) (Mad) (Attachment though under wrong Section passes the mortgagee's rights)
(93) 20 Cal 805 (809 810) (Do)
(87) 10 Mad 169 (1 9) (Do)
(95) 18 Mad 437 (439) (Do)
(96) 18 All 469 (471) (Do)
(12) 18 Ind Cas 318 (318) (Lah)
(34) AIR 1934 Mad 498 (499)
[*See also* (86) 9 Mad 5 (8)

3 [illegible]
[illegible] this rule is the only appropriate and effective procedure)
(31) AIR 1931 Mad 38 (39)
(32) AIR 1932 Mad 283 (284) (Other mortgagee)
(31) AIR 1931 Pat 63 (64)
4 (28) AIR 1928 Mad 648 (651)
(11) 10 Ind Cas 812 (812) 35 Bom 238

property[5] See also Note 4 to Section 16, *ante.*

The locality of a mortgage debt is where the mortgage-bond is found and the Court within whose jurisdiction it is found can attach it even though the mortgagor or the property comprised in the mortgage is outside the jurisdiction of such Court.[6]

For the purposes of execution, a mortgage debt is "moveable property" within the meaning of this rule[7]

5. Attachment of decree. — See Rule 53, *infra*

6. Attachment of debt already paid by cheque. — Payment of a debt by *delivery* of a cheque extinguishes the debt There is, therefore, no debt that can be attached in the hands of the garnishee where the latter has delivered a cheque for the debt to the judgment debtor, even though the latter had not cashed the cheque[1] The same principle will apply where money due to a judgment debtor from a bank has been debited by the bank to the judgment-debtor and credited to a third person.[2]

7. Procedure where garnishee denies debt. — Under sub-rule (3) a garnishee may, *at his option*, pay the amount of the debt into Court But the Court has no jurisdiction to *compel* the garnishee to do so,[1] nor can the Court proceed against him or his property for the recovery of the amount,[2] though the Court, in practice, calls on him to pay[3] In case the garnishee denies that debt, it is not the duty of the Court to enquire and decide if the debt is due[4] The only course in such cases is either to have a receiver appointed for the collection of the debt or to sell the debt notifying the fact of denial[5] An order so appointing a receiver or for sale does not, however, debar the garnishee, in a suit on the debt, from setting up the defence that no debt is due[6] It has been held by the High Court of Rangoon that a decree-holder who has

5. ('31) AIR 1931 Pat 63 (64)
('11) 10 Ind Cas 812 (812) 35 Bom 288
6. ('33) AIR 1933 Cal 379 (380) 60 Cal 782
7. ('33) AIR 1933 Rang 61 (62)
('33) AIR 1933 Cal 379 (381) 60 Cal 782

Note 6

... (Cheque ... nt debtor ... (After a ... annot be ...
[See also ('78) 3 Bom 49 (52) (Do)]
2. ('33) AIR 1933 PC 150 (154) 60 Ind App 211 57 Bom 474 (PC) (On appeal from A I R 1932 Bom 206)

Note 7

... examine and cross examine garnishee on his affidavit denying liability)
('26) AIR 1926 Rang 175 (176) : 4 Rang 100.

('31) AIR 1931 Mad 570 (571)
('32) AIR 1932 Mad 283 (284)
('16) AIR 1916 Mad 504 (504)
('24) AIR 1924 Nag 98 (101) 20 Nag L R 11.
('36) AIR 1936 Mad 152 (152) : 59 Mad 966.
('36) AIR 1936 Nag 218 (219)
[See ('31) AIR 1931 Bom 288 (290) (*Quære*)

[See however ('80) 4 Bom 323 (326) (In case of order for sale Court must be satisfied of the existence of debt)
('85) 10 Mad 194 (196) (Do)]
6. ('26) AIR 1926 Mad 1011 (1011)
('74) 22 Suth W R 36 (37) (Although the garnishee's objection to the attachment on the same ...
[*See also* ('36) AIR 1936 Nag 218 (219, 220)

O. 21 R. 46 Notes 7–12 attached future rents is not thereby entitled to sue the tenants for the amount of the rent due without his being duly appointed a receiver for the purpose [7]

8. Set-off by garnishee of cross-debt. — The garnishee is entitled to a set off in respect of any cross debt due to him from the judgment debtor, at the date of the attachment[1] or of the sale [2]

9. Procedure where garnishee resides outside jurisdiction. — The executing Court has no jurisdiction to pass any prohibitory order under this rule unless either the debt to be attached is payable or the garnishee is within its jurisdiction [1] "In its essential elements a garnishment proceeding is a proceeding by the defendant in the suit against the garnishee, in the name and for the benefit of the plaintiff . Wherever the garnishee could be sued by the defendant for the payment, he may be charged as garnishee on account of it "[2] If, therefore, the garnishee resides outside the jurisdiction of a Court and the debt is also payable outside its jurisdiction, no prohibitory order can be made against the garnishee[3] unless specifically provided for by the Code [4]

A *garnishee* submitting in the first instance, to a prohibitory order in ignorance of the want of jurisdiction may however, refuse to abide by it subsequently [5]

As to attachment of property outside jurisdiction, see Note 7 to Section 39

10. Procedure where garnishee admits liability but does not pay. — See Note 7 above See also the undermentioned case[1] as regards the procedure to be followed in Rangoon

11. Attachment of shares. — An attachment of shares in a corporation is made in the form required by clause (ii) of sub rule (1) and by sub rule (2) of this rule [1]

See also Rules 79 and 80, *infra* as to sale of such shares

12. Attachment of other moveable property. — A judgment creditor does not by virtue of his judgment, get a right to the property of the judgment debtor in

7 [illegible]

(80) 1850 Pun Re No 11 p 23 (Do B)

Note 8

1 ('14) AIR 1914 Bom 299 (299) 38 Bom 631
(1875) 10 Q B 591 (593) Tapp v Jenes (36 Cal 936 AIR 1914 Bom 299 Referred)
(37) AIR 1937 Mad 848 (849)

2 (23) AIR 1923 Lah 261 (262) 3 Lah 414

Note 9

1 (34) AIR 1934 Nag 167 (168) 30 Nag L R 92
(34) AIR 1934 Sind 185 (185)
[*See also* (33) AIR 1933 P C 150 (153) 60 Ind App 211 57 Bom 474 (PC)]

2. (11) 11 Ind Cas 417 (421) 39 Cal 101 (116) (Proper course is by transfer or under S 46 C P C)
[*See also* ('18) AIR 1918 Pat 126 (128) 4 Pat L Jour 141
(32) AIR 1932 Pat 148 (149) 11 Pat 473
('15) *AIR 1915* Lah 273 (273)]

3 ('11) 11 Ind Cas 417 (419) 39 Cal 101
(81) 5 Bom 249 (252) (So also an attachment of claim over which no Court in British India has jurisdiction is invalid)
(39) AIR 1939 Cal 428 (429) I L R (1939) 1 Cal 523
('18) AIR 1918 Cal 911 (912) (It is not competent to a Court in execution of a *decree for* money, to attach at the instance of the decree

Note 10

1. ('16) AIR 1916 Low Bur 33 (33) (All that can be done is to warn him that if he fails to pay into Court he may be subjected to a suit)

Note 11

1. ('23) AIR 1923 Mad 241 (242) 45 Mad 537

his hands or in the hands of a third party, and his remedy is not by way of suit but by attachment and sale in execution[1] But, where a property in the possession of another is *declared to belong to the plaintiff*, the proper remedy for its recovery is by a suit and not in execution[2] **O. 21 R. 46 Notes 12-16**

Attachment of agricultural produce not in the possession of the judgment debtor is covered by this rule[3] Unpaid purchase money due to the judgment debtor is moveable property attachable under this rule[4] Where money is deposited by a judgment debtor with a railway company as security for the due performance of his duties as a servant of the company, an attachment of such deposit is subject to all the rights of the company on the deposit, though the interest, if any, payable to the judgment debtor on the deposit amount may be made available to the decree holder by virtue of the attachment[5] The attachment of rights under a patent cannot be effected by serving a prohibitory order on the Controller of Patents under this rule, because such rights cannot be said to be in the possession of the Controller[6]

13. Service of prohibitory order. — A prohibitory order under this rule must be duly served on the garnishee[1]

14. Effect of non-compliance with sub-rule (2). — Want of affixture of the order as required by sub rule (2) is fatal to the validity of the attachment and a *bona fide* assignee from the judgment-debtor after such attachment acquires good title[1]

The mere *order* to make an attachment does not amount to actual attachment unless it has been effected in the manner prescribed by this rule, i e, served on the debtor by sending a copy of the order to him[2]

15. Notice to debtor. — Under sub rule (2) a copy of the prohibitory order shall be sent to the debtor When it is not so sent, the attachment is ineffectual and the garnishee remains liable to pay the debt to the judgment debtor[1] A notice to the *judgment-debtor* is, however, not a condition precedent to the validity of the attachment[2]

16. Effect of attachment. — An attachment under this rule prohibits the creditor from *collecting* the debt, but does not prevent him from *suing* on the debt,[1]

Note 12

1. ('76) 3 Ind App 241 (248 251, 252) (PC)

in the possession of some person other than the judgment debtor)]

6 ('39) AIR 1939 Cal 283 (284, 285) I L R (1938) 2 Cal 618

Note 13

Note 14

1. ('05) 9 Cal W N 693 (695)
('11) 12 Ind Cas 869 (870) (Low Bur)
[*See* ('28) AIR 1928 Rang 285 (285) (Removal of property after such attachment—No offence)]
2. ('34) AIR 1934 Pat 619 (622)
('39) AIR 1939 Mad 811 (813)

Note 15

1. ('67) 7 Suth W R 10 (11)
[*See* ('16) AIR 1916 Mad 434 (436) 39 Mad 389]
2. ('12) 17 Ind Cas 420 (420) 15 Oudh Cas 289.
('77) 1877 Pun Re No 67, p 173
[But see ('06) 1906 Pun Re No 118, p 453]

Note 16

1. ('91) 13 All 76 (78)
('95) 17 All 198 (210, 211) 22 Ind App 31 (PC)
(In fact a suit is proper if to save limitation)
('11) 10 Ind Cas 569 (569) (Cal)
('94) 1894 Pun Re No 142 p 537
('19) AIR 1919 Oudh 373 (374)

O. 21 R. 46 Notes 16-17

nor is the attachment a bar to a contest of non liability by the garnishee[2]

The attaching decree holder gets no higher rights in the debt than what the judgment debtor could give him at the date of the attachment and any disposition of the debt by the judgment debtor prior to attachment binds the decree holder,[3] nor can a decree holder compel the judgment debtor to create larger rights for him[4] If, on the day of attachment, there was no debt and the attachment was raised, a subsequent accrual of a debt does not by itself revive the attachment[5] But where a debt existed at the time of attachment, the attaching decree holder is not precluded from realising the debt by the fact of the debt having been subsequently paid to judgment debtor by the garnishee[6]

A prohibitory order under this rule is a process in execution and money deposited in Court under sub rule (3) is "assets" within the meaning of Section 73 of the Code[7] When there are attachments of more Courts than one of varying grades, the garnishee acting under sub rule (3) is bound to deposit the money in the Court of the superior grade on the analogy of Section 63[8]

As against an Official Assignee in bankruptcy, the attaching decree holder obtains rights in the property attached only on complete realization by him before vesting[9]

16a Payment into Court — Sub-rule (3) — The payment contemplated by sub rule (3) is payment into the attaching Court so as to be available to the attaching decree holder Thus where the rent due by a tenant is attached and the tenant pays such rent to the credit of some other suit against the judgment debtor than the one in which it has been attached, the payment will not discharge the tenant from his liability for the rent[1]

17. Inherent power of Court to pass prohibitory orders in proper cases. — Even in cases not strictly governed by O 21 R 46 a prohibitory order can be passed under the inherent powers of the Court where the ends of justice require it to be done[1]

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2 (15) AIR 1915 Lah 137 (138) (Payment to attaching decree holder by garnishee without contest—Liability of garnishee to rightful creditor not absolved)

3 (24) AIR 1924 Cal 1068 (1068 1069)
(71) 8 Bom H C R (O C) 169 (178)
(1888) 38 Ch D 238 (263) Badeley v Consolidated Bank

4 (27) AIR 1927 Bom 365 (366) (Attachment of deposit with association — Article of Association providing for return of deposit only on termination of membership—Decree holder can not compel debtor to resign membership for making deposit payable)

5. ('22) AIR 1922 All 384 (385)

6 (26) AIR 1926 Mad 371 (371 372 376) (Debt ... ment of the decree obtained thereon is also necessary the two Judges in the case take opposite views)

Note 16a

1 (36) AIR 1936 Mad 251 (252)

Note 17

1 (39) AIR 1932 Lah 295 (296)
(37) AIR 1937 Cal 199 (201) ILR (1937) 2 Cal 45

Local Amendments

O. 21 R. 46A (Calcutta)

CALCUTTA

Add the following Rules

"46A The Court may in case of a debt, other than a debt secured by a mortgage or a charge or by a negotiable instrument, which has been attached under Rule 46 or Rule 51 of this Order, upon the application of the attaching creditor, issue notice to the garnishee liable to pay such debt calling upon him either to pay into Court the debt due from him to the judgment debtor or so much thereof as may be sufficient to satisfy the decree and costs of execution, or to appear and show cause why he should not do so

Provided that if the debt in respect of which the application aforesaid is made is in respect of a sum of money beyond the pecuniary jurisdiction of the Court the Court shall send the execution case to the Court of the District Judge to which the said Court is subordinate and thereupon the Court of the District Judge or any other competent Court to which it may be transferred by the District Judge will deal with it in the same manner as if the case had been originally instituted in that Court

Such application shall be made on affidavit verifying the facts alleged and stating that in the belief of the deponent the garnishee is indebted to the judgment debtor

46B Where the garnishee does not forthwith pay into Court the amount due from him to the judgment debtor or so much thereof as is sufficient to satisfy the decree and the costs of execution or does not appear and show cause in answer to the notice the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue as though such order were a decree against him — O 21 R. 46B (Calcutta)

46C Where the garnishee disputes liability, the Court may order that any issue or question necessary for the determination of liability shall be tried as if it were an issue in a suit and upon the determination of such issue shall make such order or orders upon the parties as may seem just — O 21 R. 46C (Calcutta)

46D Where it is suggested or appears to be probable that the debt belongs to some third person or that any third person has a lien or charge on, or other interest in such debt, the Court may order such third person to appear and state the nature and particulars of his claim (if any) to such debt and prove the same — O. 21 R. 46D (Calcutta)

46E After hearing such third person and any other person or persons who may subsequently be ordered to appear, or where such third or other person or persons do not appear when so ordered, the Court may make such order as is hereinbefore provided, or such other order or orders upon such terms, if any, with respect to the lien charge or interest if any of such third or other person as may seem fit and proper — O. 21 R. 46E (Calcutta)

46F Payment made by the garnishee on a notice under Rule 46A or under any such order as aforesaid shall be valid discharge to him as against the judgment debtor and any other person ordered to appear as aforesaid, for the amount paid or levied although such judgment may be set aside or reversed — O. 21 R. 46F (Calcutta)

46G The cost of any application made under Rule 46A and of any proceeding arising therefrom or incidental thereto, shall be in the discretion of the Court — O 21 R. 46G (Calcutta)

46H An order made under Rule 46B, 46C or Rule 46E shall be appealable as a decree " — O. 21 R. 46H (Calcutta)

(Section 51 of the Code contemplates sale without attachment and so even if a share of debt be not attachable under O 21 R 46 or under any other rule prescribed, a Court can pass prohibitory orders similar to one under O 21 R 46 under its inherent powers for the ends of justice)

O.21 R.46A (Sind)

SIND. *Add* the following as Rules 46A to 46I

Procedure when debt or any moveable property not in possession of judgment debtor attached

"46A The Court may in the case of a debt (other than a debt secured by a mortgage or a charge or by a negotiable instrument) and any moveable property not in the possession of the judgment-debtor which has been *attached under Rule 46 or Rule 51 of* this Order, upon the application of the attaching creditor, issue notice to any person liable to pay such debt or deliver or account for such moveable property (such person to be hereinafter called "the garnishee"), calling upon him either to pay or deliver into Court the debt due from or the property deliverable by him to such judgment debtor, or so much thereof as may be sufficient to satisfy the decree and costs of execution, or to appear and show cause why he should not do so

Provided that if the debt or property in respect of which the application aforesaid is made is of value beyond the pecuniary jurisdiction of the Court the execution case shall be sent, if the attaching Court is the Karachi Small Cause Court, to the High Court, if it is any other Court, to the District Court to which the said Court is subordinate *and thereupon the High Court or, as the case may be, the* District Court or any other competent Court to which such case may be transferred shall deal with it in the same manner as if the case had been originally instituted in that Court

Such application shall be supported by an affidavit verifying the facts alleged and stating that in the belief of the deponent *the garnishee* is indebted to the judgment debtor.

O.21 R 46B (Sind)

Procedure when garnishee does not forthwith pay amount etc

46B Where the garnishee does not forthwith pay or deliver into Court the amount due from or the property deliverable by him to the judgment debtor or so much thereof as is sufficient to satisfy the decree and the cost of execution, or does not appear and show cause in answer to the notice, the Court may order the garnishee to comply with the terms of such notice, and on such order being made execution may issue as though such order were a decree against him

O.21 R.46C (Sind)

Procedure when garnishee disputes his liability

46C Where the garnishee disputes his liability, the Court may order that any issue or question necessary for the determination of the liability shall be tried as if it were an issue in a suit and upon the determination of such issue shall make such order as may seem just

O.21 R.46D (Sind)

Procedure when debt or property belongs to a third person

46D Where it is suggested or appears to be probable that the debt or the property attached belongs to some third person or that any third person has a lien or a charge on or an interest in it the Court may order such third person to appear and state the nature and particulars of his claim, if any, to such debt or property and prove the same

O.21 R.46E (Sind)

Order to be made on hearing such person

46E After hearing such third person and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing when ordered, the Court may pass such order as is hereinbefore provided, or make such other order upon such terms, if any, with respect to the lien, charge or interest (if any) of such third or other person as may seem fit and proper

O.21 R.46F (Sind)

Payment or delivery under order to be a valid discharge

46F Payment or delivery made by the garnishee on a notice under Rule 46A or under any such order as aforesaid shall be a valid discharge to him as against the judgment-

debtor and any other person ordered to appear as aforesaid, for the amount paid or levied or, as the case may be, property delivered, although such order may be set aside or reversed O. 21 R. 46F (Sind)

46G Debts owing from a firm carrying on business within the jurisdiction may be proceeded against under Rules 46A to 46E of this Order, although one or more members of such firm may be resident outside the jurisdiction Provided that any person having control or management of the partnership business or any member of the firm within the jurisdiction is served with the garnishee notice An appearance by any member pursuant to such notice shall be a sufficient appearance by the firm O. 21 R. 46G (Sind)

Procedure re debts owing from a firm

46H The costs of any application made under Rule 46A and of any proceeding arising therefrom or incidental thereto shall be in the discretion of the Court O. 21 R. 46H (Sind)

Costs to be in discretion of Court

46I An order made under Rules 46B, 46C or 46E, shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree" O. 21 R. 46I (Sind)

Orders appealable

R. 47. [New.] Where the property to be attached consists of the share or interest of the judgment-debtor in moveable property belonging to him and another as co-owners, the attachment shall be made by a notice to the judgment-debtor prohibiting him from transferring the share or interest or charging it in any way. O. 21 R. 47

Attachment of share in moveables

1. Attachment of share in moveable property. — A share or interest in moveable property is incapable of actual seizure,[1] and attachment by a prohibitory order is the only proper course where such share or interest is to be proceeded against [2]

R. 48. [S. 268.] *(1)* Where the property to be attached is the salary or allowances of a public officer or of a servant of a railway company or local authority, the Court, whether the judgment-debtor or the disbursing officer is or is not within the local limits of the Court's jurisdiction, may order that the amount shall, subject to the provisions of section 60, be withheld from such salary or allowances either in one payment or by monthly instalments as the Court may direct; and, upon notice of O. 21 R. 48

Attachment of salary or allowances of public officer or servant of railway company or local authority.

Order 21 Rule 47 — Note 1

ops by actual seizure for recovery of fine from member of Hindu coparcenary as the share of offender in crops is unascertained)

2 ('32) AIR 1932 Cal 408 (408) 59 Cal 808
('37) AIR 1937 Lah 813 (313) (Attachment of

O. 21 R. 48 the order to such officer as [a]*the Central Government or the Provincial Government may by notification in their Official Gazette* appoint [b]*in this behalf*,—

(a) *where such salary or allowances are to be disbursed within the local limits to which this Code for the time being extends the officer or other person whose duty it is to disburse the same shall withhold and remit to the Court the amount due under the order, or the monthly instalments, as the case may be*,

(b) *where such salary or allowances are to be disbursed beyond the said limits, the officer or other person within those limits whose duty it is to instruct the disbursing authority regarding the amount of the salary or allowances to be disbursed shall remit to the Court the amount due under the order, or the monthly instalments, as the case may be, and shall direct the disbursing authority to reduce the aggregate of the amounts from time to time to be disbursed by the aggregate of the amounts from time to time remitted to the Court*

(2) Where the attachable proportion of such salary or allowances is already being withheld and remitted to a Court in pursuance of a previous and unsatisfied order of attachment, the officer appointed by [c]*the Central Government or the Provincial Government, as the case may be*, in this behalf shall forthwith return the subsequent order to the Court issuing it with a full statement of all the particulars of the existing attachment

(3) Every order made under this rule, unless it is returned in accordance with the provisions of sub-rule *(2)*, shall, without further notice or other process, bind [d]*the Central Government or the Provincial Government* or the railway company or local authority, as the case may be, while the judgment debtor is within the local limits to which this Code for the time being extends and while he is beyond those limits if he is in receipt of any salary or allowances payable out of His Majesty's Indian revenues or the funds of a railway company carrying on business in any part of British India or local authority in British India; and [e]*the Central Government or the Provincial Government* or the railway

company or local authority, as the case may be, shall be liable for any sum paid in contravention of this rule. **O. 21 R. 48 Note 1**

a Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "the Government may, by notification in the Gazette of India or in the Local Official Gazette, as the case may be"

b Substituted by Section 2 of the Code of Civil Procedure (Amendment) Act, XXVI of 1939, for "in this behalf, the officer or other person whose duty it is to disburse such salary or allowances shall withhold and remit to the Court the amount due under the order, or the monthly instalments, as the case may be"

c Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for 'the Government'

d *ibid*

e *ibid*

Local Amendment

MADRAS

Substitute a comma for the period at the end of the last sentence of sub-rule (1) and *add* the following clause "such amount or instalment being calculated to the nearest anna by fractions of an anna of six pies and over being considered as one anna and omitting amounts less than six pies"

Synopsis

1. Attachment of salary of public officer, etc. — Under the old Code the salary of a public officer or of a railway servant or of a servant of a local authority could not be attached unless the disbursing officer was within the local limits of the jurisdiction of the Court executing the decree [1] As this led to considerable inconvenience and needless expense, this rule has been newly enacted to provide for such cases, the salary of this class of judgment-debtors can now be attached under this rule whether they or the disbursing officers reside within such local limits, or not [2] The distinction between this rule and Rule 52, *infra* is that the latter refers specifically to property *actually* in the hands of public officers, while the former provides for the *anticipatory* attachment of salaries [3]

This rule has no application to the attachment of salaries of judgment debtors in *private service* Such salaries are attachable only as *debts* after they fall due [4] The *wages of domestic servants*[5] *or moneys due to railway contractors*[6] *are not* salary or allowances, within the meaning of this rule This rule does not apply to the attachment of the salary of a member of a Provincial Legislative Assembly as such member is not a "public officer"[7] The attachment of salaries or allowances at the disposal of the

Order 21 Rule 48 — Note 1

1. ('84) 6 All 248 (247, 248)
('88) 12 Bom 44 (45)

2. ('12) 39 Cal 104 (110, 112, 113)
('29) AIR 1929 Lah 645 (646) *(Obiter)*.

3. *See* ('98) 22 Bom 89 (41)

4. ('29) AIR 1929 Nag 333 (334) (Pay of a servant which falls due on the 1st of each month cannot be attached as a debt on an earlier date, as the right to receive pay for a period shorter

6. ('28) AIR 1928 Nag 210 (210)

7. ('39) AIR 1939 Cal 428 (429) · ILR (1939) 1 Cal 523.

O.21 R.48 Notes 1-4

disbursing officer is not invalid by reason merely of the fact that the sanction of the superior authority is necessary before the money is actually disbursed [8]

Attachment under this rule can be made also by the Court to which a decree is transferred for execution [9]

Sub rule (1) of this rule has been amended by Act XXVI of 1939 so as to make it legal for the High Commissioner for India to comply with attachment orders issued by Courts in India in respect of the leave salaries payable in England to officers of the Indian Services [10]

2. Sub-rule (2) and Section 64, Explanation. — Salary attached under this rule is "assets" within the meaning of Section 73 of the Code, and successive attaching decree-holders are entitled to rateable distribution thereof There is no inconsistency between the Explanation to Section 64 and sub-rule (2) of this rule The latter provision only lays down what the officer concerned should do [1] See also Note 13 to Section 64

3. Sub-rule (3). — The effect of this sub rule is that any sum paid by a disbursing officer in contravention of this rule can[1] and should be[2] recovered directly from the Government or the railway company or the local authority, as the case may be But no order for recovery thereof can be made without bringing the Government[3] or the railway company or the local authority on the record as a party

4. Appeal. — Where a decree holder wants to execute his decree by attachment of the pay of the judgment debtor under this rule, the question whether it is possible to execute the decree in the manner which has been adopted by the executing Court is a question under Section 47 *ante* and the decision of the question is, therefore, appealable as a decree [1] Where an order directing an attachment under this rule is not appealed against, it becomes final as against the parties to it and a subsequent application contesting the validity of the order of attachment is barred by the general principles of *res judicata* [2]

O.21 R.49

R. 49. [New.] *(1)* Save as otherwise provided by this rule, property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such.

Attachment of partnership property.

(2) The Court may, on the application of the holder of a decree against a partner, make an order charging the interest of such partner in the partnership property and profits with payment

8. ('14) AIR 1914 Low Bur 215 (216) 8 Low Bur Rul 62
9. ('27) AIR 1927 Oudh 112 (112) 1 Luck 46
10. See Statement of Objects and Reasons, Gazette of India Sept 2 1939, Part V, Page 149

Note 2

1 ('12) 16 Ind Cas 640 (640) (Bom)
('39) AIR 1939 Cal 485 (495, 496) ILR (1939) 1 Cal 40

Note 3

1. ('14) AIR 1914 Low Bur 215 (216) 8 Low Bur Rul 62
2. ('10) 5 Ind Cas 602 (603) 1910 Pun Re No 10 (The Government should settle with the disbursing officer)
3. ('12) 14 Ind Cas 737 (737) 1912 Pun Re No 93

Note 4

1 ('33) AIR 1933 Bom 165 (166) (No revision therefore lies)
('36) AIR 1936 Lah 761 (762)
2. ('39) AIR 1939 Rang 381 (385)

of the amount due under the decree, and may, by the same or a subsequent order, appoint a receiver of the share of such partner in the profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership, and direct accounts and inquiries and make an order for the sale of such interest or other orders as might have been directed or made if a charge had been made in favour of the decree holder by such partner, or as the circumstances of the case may require

(3) The other partner or partners shall be at liberty at any time to redeem the interest charged or, in the case of a sale being directed, to purchase the same

(4) Every application for an order under sub-rule *(2)* shall be served on the judgment-debtor and on his partners or such of them as are within British India

(5) Every application made by any partner of the judgment-debtor under sub-rule *(3)* shall be served on the decree holder and on the judgment debtor, and on such of the other partners as do not join in the application and as are within British India

(6) Service under sub rule *(4)* or sub rule *(5)* shall be deemed to be service on all the partners, and all orders made on such applications shall be similarly served

[*Cf* R S C, O 46, Rr 1A, 1B]

Synopsis

1. Attachment of partnership property. — This rule and the next deal with the mode of execution affecting partnership property Execution can be taken against any partnership *property* only on a decree passed against the firm or against all the partners thereof as such [1] Where the decree is only against an individual partner the *property* of the partnership cannot be attached but an order creating *a charge on the interest* of the judgment debtor in the partnership can be obtained with or without the appointment of a receiver [2] The prohibition against attachment and sale contained in sub rule (1) is mandatory and therefore a sale in execution contrary to the provision thereof is invalid and inoperative [3] The provisions of this rule are closely modelled on Section 23 of the English Partnership Act (53 & 54 Vict Chap 39)

Order 21 Rule 49 — Note 1

[*See* (70) 5 Beng L R 386 (386 387)
(19) AIR 1919 Cal 296 (304)]
[But see (93) 20 Cal 693 (696) (Decision under the Code of 1882)]

3 (35) AIR 1935 Cal 275 (278)
(38) AIR 1938 Lah 437 (439)

O. 21 R. 49
Notes 1-5

The interest of a partner in partnership business is moveable property, although part of the partnership property may consist of immovable property The reason is that the share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money and applied in liquidation of the partnership debts[4]

2. "Against the partners in the firm as such." — These words do not occur in Section 23 of the English Partnership Act The introduction of these words in this rule makes it clear that a decree against partners as such is on the same footing as a decree against the firm for the purposes of this rule

3. Decree against individual partner. — The holder of a decree against an individual partner gets no higher rights in execution than what a voluntary assignee of a partner of his share in the partnership gets under such assignment Such an assignment does not as against the other partners, entitle the assignee during the continuance of the partnership *to interfere in the management or administration of the partnership* business or affairs or to require any accounts of the partnership transactions or to inspect the partnership books but entitles the assignee only *to receive the share of profits* to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners [1]

In case of a *dissolution* of the partnership whether as respects all the partners or as respects the assigning partner the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners and for the purpose of ascertaining that share, to an account as from the date of the dissolution [2]

4. "Direct accounts." — See Note 3 above

5. *Order under this Rule and insolvency.* — An order under this rule charging the interest of the judgment debtor in partnership property is not a "transaction" protected by Section 57 of the Presidency Towns Insolvency Act or by Section 55 of the Provincial Insolvency Act 1920 [1]

O. 21 R. 50

Execution of decree against firm

R. 50. [New] *(1)* Where a decree has been passed against a firm, execution may be granted —

(a) against any property of the partnership;

(b) against any person who has appeared in his own name under rule 6 or rule 7 of Order XXX or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner;

4 (38) AIR 1938 Lah 65 (65) (O 21 R 78 applies to sale of partner s interest—O 21 Rule 50 does not apply)

Note 3

1. See S 31 (1), Partnership Act 1890 (53 and 54 Vict Chapter 39)
('32) AIR 1932 Pat 15 (19 20) 10 Pat 792 (Nor can receiver appointed under this rule sue for accounts of a continuing partnership)
(1895) 2 Q B 126 (132) Brown Janson v Hutchinson (Accounts directed only under special circumstances e g with a view to dissolution)

2 See Section 31 (2) English Partnership Act 1890 (53 & 54 Vict Chap 39)
('84) 10 Cal 669 (672 673)
('90) 13 Mad 417 (450)
('78) 3 Cal 193 (209) 4 Ind App 247 (PC) (Obiter)

Note 5

1. (189?) 1 Q B 317 (370) Wild v Southwood
(1895) 1 Ch 325 (330, 331) O Shea, Re Courage v O Shea

(c) against any person who has been individually served as a partner with a summons and has failed to appear: O 21 R. 50 Note 1

Provided that nothing in this sub-rule shall be deemed to limit or otherwise affect the provisions of section 247 of the Indian Contract Act, 1872

(2) Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-rule (1), clauses (b) and (c), as being a partner in the firm, he may apply to the Court which passed the decree for leave, and where the liability is not disputed, such Court may grant such leave, or, where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined.

(3) Where the liability of any person has been tried and determined under sub-rule (2), the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree

(4) Save as against any property of the partnership, a decree against a firm shall not release, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer

[Cf R S C, O 48A, R 8]

Local Amendment

PATNA

In sub rule (2) *add* the words ' or to the Court to which it is sent for execution ' after the words ' passed the decree ' and before the words ' for leave

Synopsis

1. Scope of the Rule — This rule should be read with the provisions of Order 30 *infra* the latter deals with the procedure in suits instituted by or against

O. 21 R. 50
Notes 1–3

firms, while this rule deals with the mode of *execution* of decrees which have been obtained *against* firms in the firm name [1]

As will be seen in Note 1 to O 30 R 1, a decree against a firm in the name of the firm has the same effect as a decree against all the partners It can therefore be executed against the whole of the partnership property[2] [sub rule (1) clause (a)] It can also be executed against any one or more of the partners *personally*[3] (i e against their person or their personal property) though before this is done certain conditions have to be satisfied and a certain procedure has to be followed as prescribed by this rule Thus it can be executed personally against any person coming under clauses (b) and (c) of sub rule (1)[4] inasmuch as in such cases it may safely be presumed that the person proceeded against knows of the suit and that his liability as a partner is in some way established [5] The decree can also *with the leave of the Court* be executed personally against any *other* person as being a partner of the firm [sub rule (2)] [6]

Sub rule (1) of this rule does not require the holder of a decree against a firm to exhaust his remedy under clause (a) and then proceed under the other clauses Under that rule he has three courses open to him any of which he may pursue regardless of the order in which they are set out

As regards execution against a *dissolved firm* see O 30 R 3 Note 2 and the undermentioned case [8]

The provisions of this rule do not apply to a decree obtained against a limited liability company [9]

2 **'Where a decree has been passed against a firm"** — See Order 30 Rule 6 Note 4

3 **Award.** — An award can be validly passed against a *firm*[1] as well as against individuals and when the award against a firm is filed in Court under the provisions of the Arbitration Act 1899 it is enforceable as a decree of the Court and the provisions of O 21 R 50 apply thereto [2] But though an award when filed in Court is on the same footing as a decree of Court the proceedings before the arbitrators up to the stage of the passing of the award do not constitute a suit for the application of the provisions of Order 30 (See Note 11 to O 30 R 1) Consequently the service of any notice or

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Order 21 Rule 50 — Note 1

1 (3?) AIR 193? Bom 334 (335)
2 (15) AIR 1915 Mad 1073 (1073) (Leave of *Court necessary only for arresting partner not served*)
3 (6) AIR 19?6 Lah ?36 (236)
[*See also* (37) AIR 1937 Bom 365 (3 0) I L R (193?) Bom 631]
4 (?) AIR 19?6 Sind 51 (5? 53)
(15) AIR 1915 Cal 238 (?42) (Case of constructive service as partner under O 30 R 5)
(23) AIR 19 3 Lah 528 (5?) (Individual service construed)
('35) AIR 19?5 Cal 316 (317 318) (Mere fact that other persons are stated to be the remaining partners of the firm in the petition for execution of the decree cannot make the execution invalid)
[*See* (11) 12 Ind Cas 1006 (100) 3? Mad 414]
5 (??) AIR 19?? Bom 44 (44?) 51 Bom ?91
[*See also* (?6) AIR 19?6 Cal 2?1 (2?4 2?6 ?) 53 Cal ?14]
6 (15) AIR 1915 Cal ?38 (212)
(?5) AIR 19?5 Rang 317 (318) (Deputy Registrar empowered to grant leave cannot determine *liability of contesting party*)
(25) AIR 1925 Sind 31 (318) 19 Sind L R 14? (The fact that a decree itself provided for execution personally against certain persons as partners is no bar to applying for leave against others under sub-rule (2))
(39) AIR 1938 Cal 316 (317 318)
[*See* (30) AIR 1930 Lah ?43 (244)]
7 (33) AIR 1933 Lah 472 (47?)
(25) AIR 19?5 Lah 3?9 (379)
8 (?4) AIR 19 4 Bom 3?6 (3?7 3?8)
9 (37) AIR 1937 Lah 59 (60)

Note 3

1 (?0) AIR 19?0 Cal 35? (35?) 47 Cal 2?
(33) AIR 19?3 Bom 433 (431) 59 Bom 1?
(?1) AIR 1931 Lah 78? (3) 13 Lah 3 7
(But see (2) AIR 19 Bom 4? (430) (*Ov er*))
2 (20) AIR 19 0 Cal 3 ? (3) 47 Cal ??
(3?) AIR 1933 Bom 4 3 (435) 58 Bom 16

summons by the arbitrators on an alleged partner of the firm, is not service within the meaning of sub rule (1) so as to enable the decree holder to take out execution against the *person* of such partner without the leave of the Court Before ordering execution of an *award*, the Court will, therefore, have to determine in every case whether the alleged partner is liable as a partner or not and grant or refuse leave under sub rule (2)[3]

4. Against any person who has appeared. — Where an alleged partner *refuses* a summons sent to him under O 30 R 3, he must be deemed to be 'individually served" and if he fails to appear, execution can proceed against him under sub rule (1), clause (c) without any leave of the Court[1] The words "or who has been adjudged to be a partner" in sub rule (1) evidently provide for a case where the person served on behalf of the firm denies that he is a partner, and the plaintiff asks for an issue being raised in the suit, as to whether the service on him is good service or not[2] Where a person served with summons under O 30 R 3 as a partner of a firm enters appearance and makes an application denying liability on the allegation that he is not a partner, the appearance is one 'under protest' under O 30 R 8 and not one under O 30 R 6 and hence, in such a case an enquiry under sub rule (2) of this rule is not excluded[3]

See also Notes on Rules 3, and 5 to 8 of Order 30

5. Execution against persons other than those referred to in sub-rule (1) — Sub-rule (2).— It has already been seen in Note 1 above that execution of a decree *against a firm can be taken against the property of the partnership as well as personally* against the partners referred to in clauses (b) and (c) of sub rule (1) and that as against an alleged partner not referred to therein, the leave of the Court is a condition precedent to an order for execution The principle of the distinction is that, in the case of persons who cannot in law be fixed individually with the knowledge of the suit against the firm an opportunity must be given to them to dispute the liability under the decree[1] See also sub rule (4)

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(24) AIR 1924 Cal 117 (118)
(31) AIR 1931 Lah 736 (737 738) 13 Lah 327
(25) AIR 1925 Sind 293 (294) 19 Sind L R 1
(29) AIR 1929 Sind 28 (29) 23 Sind L R 422
('31) AIR 1931 Sind 82 (84) 25 Sind L R 460
(36) AIR 1936 Sind 211 (211) 30 Sind L R 6
(35) 61 Cal L Jour 515 (518) 62 Cal 833
[*See also* (24) AIR 1924 Lah 544 (544)]
[**But see** ('27) AIR 1927 Bom 428 (430) (*Obiter*)]

3. (29) AIR 1929 Lah 228 (229 230)
(31) AIR 1931 Lah 736 (738) 13 Lah 327
(13) 19 Ind Cas 363 (366 367) 6 Sind L R 127 (The arbitrator cannot decide this question)
[*See* (25) AIR 1925 Sind 293 (294) 19 Sind L R 1)]

litigated when an application under O 21 R 50, C P C is made and cannot be gone into in proceedings for filing the award)]

Note 4

1 (15) AIR 1915 Cal 238 (240, 241)
2 (32) AIR 1932 Sind 199 (201) 26 Sind L R 228
[*See also* (35) AIR 1935 Lah 520 (521) (Person appearing under protest asking Court to frame

tion and claim the benefit of a fresh inquiry under sub rule (2) of this rule)]

3 ('37) 41 Cal W N 566 (568)

Note 5

1 (32) AIR 1932 Bom 516 (519)
[*See also* (26) AIR 1926 Cal 271 (274, 275) 53 Cal 214
('36) AIR 1936 Pat 496 (497) (Decree against firm cannot be executed against individual partners without leave of Court under sub-rule (2)—*Ex parte* decree against firm mentioning also names of individual partners — In peculiar circumstances of this case it was held that the decree holder was precluded from contending that the decree was against individual partners)]

O. 21 R. 50
Note 5

Ordinarily, a decree is binding on the executing Court and no question of the liability of the judgment debtor under the judgment can be allowed to be raised in execution But as in the case of a suit against a firm the decree is passed on service of summons in an extremely technical form as set forth in O 30 R 3, and as each partner is not necessarily a defendant in the suit and is not required to be served with the summons in the suit before the decree is passed, it is provided specifically in sub rule (2) read with sub rule (4) that *in the case of persons not served in the suit, their liability under the decree, when disputed, may be heard and determined in execution* [2]

Where a person appears in answer to a notice issued to him under sub rule (2) and admits that he is a partner in the firm against whom a decree is passed, he cannot at the same time urge that the decree is not binding on the firm [3] The reason is that the words where the liability is not disputed mean and can only mean liability as a partner in the firm and that is the only question which can be decided in proceedings *taken under this sub rule* [4]

As to the *nature of the defence that can be taken where the person on whom* notice is served disputes liability as a partner see Notes 3 and 4 to Rule 8 *of Order 30* and the cases cited therein and also the undermentioned cases [5]

When the liability is decided in favour of the decree holder and leave is granted, the effect is that the decree against the firm which was executable or had been executed[6] against the property of the firm or against the persons referred to in clauses (b) and (c) of sub rule (1) becomes also *executable personally* against partners not served in the suit *Accordingly an application for leave under sub rule (2) is only ancillary to an application for execution* and will *not be barred by reason of its being* made beyond *three years from the date of the decree so long as the decree itself is otherwise kept alive according to law* [7] *Though the words "may apply occur in* sub rule (2) it has been held that no separate application for leave is necessary as *the* application for execution itself implies a prayer for leave [8]

In the case of a Hindu son when the Court finds under sub rule (2) that the son is *not a partner*, the application against him under O 21 R 50 as such must be disallowed, and the decree holder left to remedies otherwise available to him [9]

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2 ('3) AIR 1932 Bom 516 (520 521 522) (In absence of fraud or collusion the liability must be contested in execution and not by separate suit) (See ('33) AIR 1933 Lah 591 (591) (The decree holder must establish the liability of the objector partners)]
[See also ('32) AIR 1932 Sind 199 (199 201) 26 Sind L R 229 (A case of appearance under protest under O 30 R 8)]

3 ('34) AIR 1934 Sind 135 (135) (If he wants to dispute the decree he should take proceedings in the suit to have the decree set aside)

4 ('34) AIR 1934 Sind 135 (135)

5 ('32) AIR 1932 Bom 516 (520) (Award— Defence on the ground that reference to arbitration was unauthorized)
('40) AIR 1940 Cal 23 (25) 43 Cal W N 997 (999) (Objection to liability not confined to ground that the person is not a partner but may be based on other grounds also— Objection may be taken that the contract was beyond the scope of the partnership or that a reference to arbitration was unauthorized)

6 ('31) AIR 1931 Lah 736 (739) 13 Lah 327

7 ('32) AIR 1932 Bom 516 (519)
('35) AIR 1935 Sind 12 (13) 29 Sind L R 236
('31) AIR 1931 Lah 736 (739) 13 Lah 327
('31) AIR 1931 Sind 82 (83) 25 Sind L R 400
('36) AIR 1936 Sind 138 (139) 30 Sind L R 68 (An application under O 21 R 50 (2) is an application in execution of a decree — Dissenting from AIR 1930 Sind 180)
('35) AIR 1935 Mad 926 (926)
[*See also* ('39) AIR 1939 Sind 161 (162) *I L R* (1939) Kar 589 (FB) (Application under O 21 R 50 (2) is application in execution of decree)]
[**See however** ('30) AIR 1930 Sind 180 (181, 182) 24 Sind L R 132 (*Though application for leave is not an execution application falling* under Art 182 Limitation Act it falls under Art 181 and must be filed within three years *of the decree*)]

8 ('29) AIR 1929 Lah 228 (230)
('31) AIR 1931 Lah 736 (739) 13 Lah 327

9 ('20) AIR 1920 Pat 20 (207)
('27) AIR 1927 Sind 247 (248)

Order 30 Rule 2 provides that in a suit by a firm the plaintiff shall declare on demand by the defendant the names of all the partners constituting the plaintiff firm Where in such a suit the defendant makes a counter claim against the plaintiff firm and succeeds the persons so declared as partners cannot be proceeded against personally without an adjudication of liability against them under sub rule (2) of this rule The reason is that *O 21 R 50* is not controlled by *O 30 R 2*[10]

As regards execution under sub rule (2) in case of death of a partner see Note 14 to Rule 1 Note 2 to Rule 3 and Rule 4 of Order 30

As to whether a Court to which the decree is sent for execution can grant leave under sub rule (2) there is a conflict of decisions for which see the undermentioned cases[11] But in such cases the Court which passed the decree does not cease to have jurisdiction to grant leave under this sub rule[12]

6 Determination of liability under sub-rule (2) operates as a decree — In the case of persons referred to in clauses (b) and (c) of sub rule (1) they can be deemed to be parties to the decree by reason of service of summons or admission or adjudication as partners The proceedings in execution as against them fall under Section 47 of the Code and an order therein will be a decree under Section 2 sub section (2)[1] But a person not coming under clauses (b) and (c) of sub rule (1) cannot be considered to be a party to the decree as the very fact of his being a partner or of his liability to the decree is allowed to be put in issue under sub rule (2) for determination The proceedings as against him under sub rule (2) cannot fall under Section 47 nor is the determination of the liability one in the *suit* having arisen only after decree Hence it is not a decree In order however to confer a right of appeal which does not otherwise exist from such adjudication sub rule (3) lays down specifically that the order shall have the force of a decree[2] It may also be noted that sub rule (4) requires a *summons* to be served and sub rule (2) prescribes that the issue of liability be tried as in a *suit* Where however the partner is *ex parte* and there is no trial and determination of the liability the order granting leave *ex parte* does not have the force of a decree.[3] An application to set the *ex parte* order aside is not governed by Article 164 of the Limitation Act as the said Article applies only to *ex parte decrees*[4]

An order having the force of a decree under sub rule (3) is governed by Schedule I Article 1 and not Schedule II Article 11 of the Court fees Act[5] The

10 (27) AIR 1927 Bom 447 (448) 51 Bom 794

11 (21) AIR 1921 All 199 (201) 43 All 394 (Transferee Court can grant leave)
(29) *AIR 1929 Lah 228 (230) (Do)*
(31) AIR 1931 Lah 507 (508) (Do)
(31) AIR 1931 Lah 736 (738) 13 Lah 327 (Do)
(26) 98 Ind Cas 855 (856) (Lah) (Do)
[illegible]

[illegible] (Do)
(36) AIR 1936 S nd 138 (139) 30 Sind L R 88 (Do)
(36) AIR 1936 Sind 11 (12) 30 Sind L R 290 (Do)

12 (37) AIR 1937 All 758 (759) I L R (1937) All 946
[*See also* (35) AIR 1935 Pat 409 (411) 14 Pat 857 (Executing Court cannot go behind the order passed by trial Court under this sub-rule)]

Rul 300
(39) AIR 1939 Sind 161 (163) I L R (1939) Kar 589 (FB)

Note 6

1 (15) AIR 1915 Cal 238 (239)

2 (32) AIR 1932 Bom 516 (518)
[*See* (29) AIR 1929 Bom 386 (387 388) 53 Bom *839*]

3 (29) AIR 1929 All 390 (391 39?)
[**But see** (35) AIR 1935 Pat 409 (411) 14 Pat 857]

4 (29) AIR 1929 Bom 386 (387 388) 53 Bom 839

5 (30) AIR 1930 Lah 825 (827) (Court fee to be paid *ad valorem*)

O.21 R.52
Notes 1-2

1. Scope of the Rule. — This rule deals with the attachment of property in the custody of a *Court* or of a *public officer.*[1] The property sought to be attached must, however, *belong to the judgment debtor.* Thus, Government promissory notes standing in the name of the judgment debtor in a bank, but which have been declared to belong *to another, cannot* be attached under this *rule*[2] Where a judgment-debtor's property is sold in execution and the sale proceeds are deposited in Court, the surplus amount of the sale proceeds payable to the judgment debtor after payment of the decretal amount can be attached under this rule[3]

The Court has no discretion to refuse to order attachment in cases under this rule[4] The circumstance that one decree-holder has attached the property is no ground *for preventing another* decree-holder *of the same judgment*-debtor from attaching the same property[5]

Where a decree-holder seeks to attach money of the judgment debtor already deposited in Court, it is necessary that he should put in an execution application in his suit to that effect and give notice to the judgment-debtor[6] The attachment is to be *made by issuing a notice to the custody Court, to hold the property subject to the orders* of the Court issuing the notice[7] Where the attaching Court and the custody Court are the same the High Court of Lahore[8] has held that it would be a meaningless formality to issue a precept to itself requesting it to hold the property subject to its own orders

2. Property in the custody of the Court or public officer. — The rule permits of *attachment of property not merely* in the custody of Court but also of property in the custody *of* public officer, such as moneys in the hands of the Official trustee[1] or insured letters addressed to the judgment debtor lying in the custody of the post office[2] Revenue or interest *or* dividends payable in *future* can also be attached under this *rule.*[3] For *definition of* public officer, *see* Section 2 (17) *As to* assets in the hands *of the* Collector in execution, see the undermentioned cases[4] The word custody in the rule means *actual custody*[5]

See also the undermentioned case[6]

Order 21 Rule 52 — Note 1

1 ('8) AIR 1935 Sind 214 *(215)* 29 Sind L R 251 (Rule 52 deals not only with money deposited in Court in pursuance of a decree but also with money which comes into the hands of an officer of the Court in various ways)

2 ('97) 1 Cal W N 170 (172)
[*See also* ('15) AIR 1915 Lah 147 (149) (Money *deposited by agreement as security for decree to* be passed cannot be attached)]

3 ('37) AIR 1937 Nag 391 (392, 393) *I L R (1938)* Nag *402*

4 ('81) 8 Cal L Rep 17 (18)

5 ('30) AIR 1930 Mad 4 (11)

6 ('26) AIR 1926 Mad 1104 (1105)

7. ('16) AIR 1916 Cal 570 (573)
('76) 19 Suth W R 37(40) (Service of notice on the custody *Court* sufficient to complete attachment)
('14) AIR 1914 Upp Bur 15 (16) (Courts in different districts—Attachment without transfer *held* illegal)
([illegible]) Ind Cas 859 (859) (Low Bur) (Attachment [illegible] custody Court *irregular*)
([illegible] takes holding property—Refusal *of* presiding officer *to* acknowledge attachment will not affect validity of attachment — When attached property is *money custody Court must make it over to the* attaching Court when called upon *to do so*)
[*See also* ('36) AIR *1936 Cal 112 (114)*]

8 ('28) AIR 1928 Lah 593 (594)

Note 2

1 ('89) 12 Mad 250 (252)

2. ('30) 13 Mad 242 (247)
('16) AIR 1916 All 336 *(337)*

3. ('15) AIR 1915 Bom 313 (314) 39 Bom 60
('90) 3 C P L R 147 (150)

4. ('12) 16 Ind Cas 59 (60) 36 Bom 519 (Assets held by *Collector in execution are assets of* the Court transf rring *the decree* — No other Court can attach them)
('92) 18 Suth W *R 58* (59) (Assets held by Collector in execution are assets of the Court transferring the decree — Attachment of such assets — Notwithstanding the attachment, assets continue to be the property of judgment debtor until order of the attaching Court for payment of the assets *to the decree holder*)

5. ('84) 7 Mad 47 (48)

6. ('34) AIR 1934 All 357 (358) (A *sapardar in*

3. Property in the hands of a receiver. — Moneys in the hands of a receiver must be regarded as being in the custody of the Court and can be attached under this rule[1] Leave of Court is, however, necessary before such attachment of property in his hands can be levied The present rule does not affect the prevailing practice as to the necessity of obtaining leave in such cases[2]

Where a receiver is appointed for the assets of a partnership in a partnership suit, the practice on the original side of the High Court of Bombay has been, to pass a *charging order* against the assets held by the receiver, on the application of an attaching creditor By virtue of such order the receiver is bound to deal with the charge as per order of the Court issuing the same[3] Where a receiver is appointed in a suit for administration of the estate of a deceased but no decree is passed, it has been held that the receiver appointed in the suit ought not to be directed to pay a judgment creditor who has obtained an attachment under this rule[4]

See also the undermentioned case[5]

4. Property in the hands of the Official Assignee. — The *Official Assignee* is a public officer coming within the definition of Section 2, clause (17), sub clause (d) of the Code The amount in his hands payable by way of dividend to the judgment-debtor can be attached under this rule[1]

5. Anticipatory attachment. — The rule applies only to attachment of property actually in the hands of the Court or the officer and not of property expected to reach the hands of such Court or officer[1]

6 Determination of questions of title and priority — Proviso. — Under the proviso to this rule a question of title or priority arising between the decree holder and any other person is to be determined by the *custody* Court and not by the *attaching* Court[1] Thus where Courts B, C and D have, in execution of decrees obtained by X, Y and Z respectively, successively attached a fund in the custody of Court A it is the latter Court that has to determine the priority between X, Y and Z

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whose custody the amin has left the attached property is not a public officer)

Note 3

perty in hands of receiver can be attached with

Mirza J)
(27) AIR 1927 Bom 405 (410) (Do)]

4 (20) 22 B ... L R 1315 (1319)

5 (36) AIR 1936 Rang 83 (84) (Appointment of receiver by consent of parties in suit by *A* against *B*—It was held that the other creditors of *B* could attach in hands of receiver only the amount which was in excess of the amount due to *A*)

Note 4

1 (25) AIR 1925 Bom 344 (344) 49 Bom 638 [*See also* (37) AIR 1937 Rang 538 (539) (Dividend in Official Assignee s hands to which

Note 5

1 (98) 22 Bom 39 (41)
(11) 11 Ind Cas 422 (425) (Cal)
(17) AIR 1917 Cal 13 (15) 44 Cal 1072
(15) AIR 1915 Mad 236 (236)

Note 6

1. (81) 7 Cal 553 (555)
(31) 35 Cal W N 517 (519)

O.21 R.52 Note 6

It has been held by a Full Bench of the High Court of Madras[2] that X is entitled as being the first attaching decree holder to priority over the claims of Y and Z and that the custody Court A is not entitled to award a *rateable distribution* among X, Y and Z. The reason given is that Section 73 does not in terms apply to such cases inasmuch as the decree holders have not applied to Court A for execution of their decrees before the receipt by it of such assets and that there cannot be any rateable distribution of property apart from Section 73 on equitable grounds among any other class of decree holders than those specified in Section 73. And until the money is actually transferred to the credit of the suit in execution of the decree in which it was attached the Court continues to be merely the *custody Court*.[3] The High Court of Calcutta[4] has on the other hand held that attachment does not create any title in the attaching creditor and that the custody Court is bound to apply the rules of justice, equity and good conscience and distribute the fund attached rateably amongst the attaching decree holders. In the undermentioned case the same High Court has held that where the custody Court is different from the attaching Court the custody Court has no authority to make any rateable distribution and that it could only determine the question of priority and thereafter act under the instructions of the attaching Court.[5] The question has arisen in the High Court of Bombay with reference to the attachment of funds in the hands of a receiver appointed in a partnership action. In the undermentioned case[6] Farran J held that one of several creditors cannot by attachment obtain priority over the other creditors and that a Court of Equity will refuse permission to attach except on terms which ensure equality among all the creditors. A contrary view was taken by Mirza J in the cases cited below[7] following the Madras Full Bench case. The same High Court has also held that a creditor who has obtained a charging order in his favour is entitled to priority over other non attaching creditors.[8] The Lahore High Court has in the undermentioned case[9] held that the decree holder who attaches the money first is entitled to priority.

Where X obtains a decree in Court B and in execution thereof attaches a fund in Court A and before the transfer of the fund to Court B to the account of X's suit other decree holders have applied for execution to the Court B the matter falls within Section 73 and X and other decree holders will be entitled to rateable distribution.[10] As to the right of rateable distribution in cases in which the attaching Court and the custody Court are one and the same see Note 11 to Section 73.

The order passed under the proviso is not an administrative but a *judicial* order

(68) 10 Suth W R 43 (43)
(73) 20 Suth W R 73 (75)
(23) AIR 1923 Mad 505 (507) 46 Mad 506
(16) AIR 1916 Pat 321 (322) 1 Pat L Jour 449
(18) AIR 1918 Upp Bur 33 (39) 2 Upp Bur Rul 136
(38) AIR 1938 Sind 165 (166) 32 Sind L R 345 (*Held* the Official Receiver is entitled to priority over attaching decree holders.)
(81) 6 Cal 149 (148) (Collector having custody cannot however decide claim.)
(70) 13 Suth W R 301 (303) (Do.)
(95) 19 Bom 710 (713)
(39) AIR 1939 Mad 210 (213) I L R (1939) Mad 1004 (Determination need not be deemed to be in same suit in which property was placed in custody of Court.)

2 (21) AIR 1921 Mad 219 (221) 44 Mad 100 (Overruling AIR 1916 Mad 791.)
[*See also* (19) AIR 1919 Mad 66 (68) 42 Mad 692
(15) AIR 1915 Mad 236 (236).]

3 (33) AIR 1933 Mad 342 (343) (Attachment by *two Courts of different grades*—Public officer sending money to superior Court though attachment of inferior Court was prior—*Held* decree holder of inferior Court had no priority.)

4 (17) AIR 1917 Cal 13 (17) 44 Cal 1002
(But see (91) 7 Cal 553 (555).)

5 (33) AIR 1933 Cal 814 (814 815) (AIR 1917 Cal 13 distinguished as a case where the attaching and the custody Courts were the same.)

6 (92) 16 Bom 577 (579)

7 (27) AIR 1927 Bom 40 (410)
(27) AIR 1927 Bom 334 (337 339)

8 (30) AIR 1930 Bom 451 (455) 54 Bom 66?

9 (35) AIR 1935 Lah 914 (915)

10 (21) AIR 1921 Mad 219 (217) 44 Mad 100
(35) AIR 1935 Lah 914 (915)

binding on the parties[11] The enquiry under the proviso is of the same nature as an *investigation of claim proceedings and a suit lies to set aside the order passed therein*[12] Further, a decision in a proceeding under the proviso between the decree holder and a stranger will not be one under Section 47[13] Hence a separate suit to agitate the dispute between the attaching decree holder and a stranger claiming the money or other property attached will not be barred[14]

A obtains a decree against *B* *C* and *D* The decree is joint and several against all the judgment debtors as regards a portion of the decretal amount and as regards the balance the decree is against *B* exclusively Certain money is lying in Court which *A* wants to attach as being the exclusive property of *B* *C* and *D* claim that the property is the joint property of *B*, *C* and *D* and not the exclusive property of *B* The dispute is one between the parties to the suit and falls under Section 47[15]

7. Effect of attachment under this Rule on any previous attachment. — *A* files a suit against *B* and attaches before judgment certain moveable properties belonging to *B* The attached property being perishable is sold and the proceeds are kept in Court *C* who has obtained a decree against *B* attaches the amount in Court deposit under the provisions of this rule If at that time *A* has not obtained a decree in his suit and applied for execution thereof, *C* will be entitled to apply the amount attached in satisfaction of his decree and the prior attachment before judgment obtained by *A* will confer no right in his favour so as to affect the right of *C*[1] But if *A* has actually obtained a decree and applies for execution at the time of *C*s attachment different equities will arise and both *A* and *C* will be entitled to share the proceeds rateably between themselves[2]

8. Step-in-aid. — Where an attachment is effected under this rule of moneys lying to the credit of the judgment debtor in the treasury, and more than three years after the attachment an application is made for payment of the amount attached, the latter application is not one for execution but one to take a step in aid of the prior execution application and is not barred[1]

9. Appeal. — It was held in the undermentioned case that where a decree holder in a Munsif s Court obtained an order of attachment under this rule of certain moneys lying to the credit of the judgment debtor in the sub Court and in pursuance thereof obtained an order of payment from the sub Court, an appeal lay to the District Court and not directly to the High Court The dispute was held to be one relating only to the Munsif s Court's decree[1] As to whether the question arising under the proviso to this rule falls within the scope of Section 47 so as to be open to appeal, see Section 47, Note 5 and the cases cited there

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Note 7

1 (15) AIR 1915 All 275 (276 277) 37 All 578 [*See also* (36) AIR 1936 Cal 112 (114) (Moveable property attached before judgment by *A* and in custody of Court—Same property subsequently sold by *B* in execution of his decree against same judgment debtor and purchased by himself — *B* gets a good title — But where he has not complied with *O* 21 *R* 52 and the property is again sold in execution of the decree which *A* gets the latter cannot be made liable for any loss sustained by *B* on account of such re-sale)]

2 (06) 33 Cal 639 (642 644)

Note 8

1 (01) 24 Mad 188 (194)

Note 9

1. (18) AIR 1918 Mad 921 (921)

O.21 R.52 Note 10 **10. Revision.** — No revision lies from an order by the custody Court determining a question of priority under the proviso to this rule as there is no question of *jurisdiction* involved [1]

O.21 R.53 **R. 53.** [S 273] *(1)* Where the property to be attached is a decree, either for the payment of money[3] or for sale in enforcement of a mortgage or charge,[3a] the attachment shall be made, —

Attachment of decrees

(a) if the decrees were passed by the same Court,[5] then by order of such Court, and

(b) if the decree sought to be attached was passed by another Court,[6] then by the issue to such other Court of a notice by the Court which passed the decree sought to be executed, requesting such other Court to stay the execution[8] of its decree unless and until —

(i) the Court which passed the decree sought to be executed cancels the notice, or

(ii) the holder of the decree sought to be executed or his judgment-debtor applies to the Court receiving such notice to execute its own decree

(2) Where a Court makes an order under clause *(a)* of sub-rule *(1)*, or receives an application under sub-head *(ii)* of clause *(b)* of the said sub-rule, it shall, on the application of the creditor who has attached the decree or his judgment-debtor, proceed to execute the attached decree[9] and apply the net proceeds in satisfaction of the decree sought to be executed

(3) The holder of a decree sought to be executed by the attachment of another decree of the nature specified in sub-rule *(1)*[4] shall be deemed to be the representative[10] of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof

(4) Where the property to be attached in the execution of a decree is a decree other than a decree of the nature referred to in sub-rule *(1)*, the attachment shall be made, by a notice by the Court which passed the decree sought to be executed, to the holder of the decree sought to be attached, prohibiting him from transferring or

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Note 10

1 (36) AIR 1930 Lab 521 (523)

charging the same in any way; and, where such decree has been passed by any other Court, also by sending to such other Court a notice to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was sent. O.21 R.53

(5) The holder of a decree attached under this rule shall give the Court executing the decree such information and aid as may reasonably be required.

(6) On the application of the holder of a decree sought to be executed by the attachment of another decree, the Court making an order of attachment under this rule shall give notice of such order to the judgment-debtor bound by the decree attached; and no payment or adjustment[11] of the attached decree made by the judgment-debtor in contravention of such order after receipt of notice thereof, either through the Court or otherwise, shall be recognized by any Court so long as the attachment remains in force.

[1877, S. 273.]

Local Amendments

ALLAHABAD

(1) In sub rule (1) (b) and in sub rule (4), *after* the words "to such other Court" *add* the words "and to any other Court to which the decree has been transferred for execution "

(2) In sub-rule (6) *for* the words "after receipt of notice thereof," *read* the words "after receipt of notice, or with the knowledge thereof "

CALCUTTA

(1) In sub rule (1) (b) after the words "to such other Court " *insert* the words "and to any Court to which it has been transferred for execution", also insert therein the words "or Courts" after the words "requesting such other Court "

(2) In sub-rule (1) (b) (ii) *cancel* the words "to execute its own decree" and *substitute* therefor the words "to execute the attached decree with the consent of the said decree-holder expressed in writing or the permission of the attaching Court "

(3) In sub rule (4) *insert* after the words "by sending to such other Court" the words "and to any Court to which it has been transferred for execution "

(4) In sub rule (6) *substitute* the words "in contravention of the said order with knowledge thereof " for the words "in contravention of such order after the receipt of notice thereof "

LAHORE

(1) *Add* the following words to sub rule (1) (b), *after* the words "to such other Court"

"and to the Court to which it has been transferred for execution "

(2) In sub rule (1) (b) (ii), *substitute* the words "the attached " for the words "its own", and *insert* the following words between the words "executed or" and "his judgment debtor ":

O. 21 R 53 with the consent of the said decree holder expressed in writing or with the permission of the attaching Court

(3) In sub rule (6) *substitute* the words with the knowledge *for* the words after receipt of notice

MADRAS

(1) In sub rule (1) (b) (ii)

(i) after the words judgment debtor and before the words applies *add* the words if he has obtained the consent in writing of the decree holder or the permission of the attaching Court and

(ii) *for* the words its own *substitute* the words the attached

(2) *Add* the following as sub rule (1) (c)

(c) If the decree sought to be attached has been sent for execution to another Court the Court which passed the decree shall send a copy of the said notice to the former Court and thereupon the provisions of clause (b) shall apply in the same manner as if the former Court had passed the decree and the said notice had been sent to it by the Court which issued it

NAGPUR

(1) In sub clause (i) of clause (b) of sub rule (1)

(a) *After* the word judgment debtor *insert* the words with the consent of the said decree holder expressed in writing or with the permission of the attaching Court

(b) *For* the words its own *substitute* the words the attached

(2) In clause (b) of sub rule (1) and in sub rule (4) *after* the words to such other Court *insert* the words and to any other Court to which the decree has been transferred for execution

N W F P

(1) In sub rule (1) (b) and in sub rule (4) *after* the words to such other Court *add* the words or to any other Court to which the decree has been transferred for execution

(2) In sub rule (1) (b) (ii) *for* the words its own decree *substitute* the words the attached decree

(3) In sub rule (6) *for* the words after receipt of notice thereof *read* after receipt of notice or with the knowledge thereof

OUDH

(1) In sub rule (1) (b) and in sub rule (4) *after* the words to such other Court *add* the words and to any other Court to which the decree has been transferred for execution

(2) In sub rule (6) *for* the words after receipt of notice thereof *read* the words *after receipt of notice or with the knowledge thereof*

PATNA

Substitute the following for sub rule (1) (b)

(b) If the decree sought to be attached was passed by another Court then by the issue to such other Court (or to the Court to which the decree may have been transferred for execution) of a notice by the Court before which the application has been made requesting such other Court (or the Court to which the decree may have been transferred for execution as the case may be) to stay the execution of the decree sought to be attached unless and until —

(i) the Court which has issued the notice shall cancel the same or

(ii) the holder of the decree sought to be executed, or his judgment debtor, with the consent of the said decree holder expressed in writing or the permission of the attaching Court, applies to such other Court (or to the Court to which the decree may have been transferred for execution) to execute the attached decree " **O. 21 R. 53 Notes 1-2**

RANGOON

(1) In clause (b) *of* sub rule (1) *after* the words "to such other Court" the words "and to any Court to which it may have been transferred for execution" shall be added, and for the word "its ' the word "the" shall be substituted

(2) In sub clause (ii) of clause (b) of sub rule (1) for the words "its own," the words "the attached ' shall be substituted

(3) To sub clause (ii) of clause (b) of sub rule (1) the following shall be added, namely —

"with the consent of the said decree holder expressed in writing or with the permission of the attaching Court

(4) In sub rule (6) for the words "after receipt of notice thereof ' the words ' with the *knowledge thereof ' shall be substituted*

Synopsis

1. Legislative changes. —

1 In sub rule (1) the words " or for sale in enforcement of a mortgage or charge" have been newly added

2 In clause (b) (ii) of the same sub rule the words "or his judgment debtor" are new

3 Sub rules (2), (3) and (6) and clause (a) of sub rule (1) are new

2. Scope of the Rule. — This rule makes a distinction, for the purposes of attachment, between decrees for the payment of money or for sale in enforcement of *a mortgage or charge, and other decrees Where a decree of the former class is* attached the mode of realization of the attached decree is by *execution* thereof [1] The holder of the decree sought to be executed is conferred the power of executing such attached decree and for that purpose the rule declares that he should be deemed to be a representative of the holder of the attached decree

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Order 21 Rule 53 — Note 2

1 (78) 2 All 200 (201)
(85) 1885 All W N 123 (123)
(93) 20 Cal 111 (114)
[*See also* (71) 15 Suth W R 31 (35)]

O. 21 R. 53 Notes 2-3

In the case of other decrees sub rule (4) prescribes the manner of attachment thereof. But the rule is silent as to how they should be realized after attachment. Such decrees should therefore be *sold* after attachment by Court auction as being 'other saleable property of the judgment debtor' under Section 60.[2] In Madras, by virtue of Rule 178 of the Civil Rules of Practice, even in cases not falling under sub rule (1) of this rule, a decree cannot be ordered to be sold in execution of another decree. That rule has been held to be not *ultra vires* of the rule making powers of the High Court.[3]

A mere *order* for attachment will not effect the attachment of a decree under this rule. The attachment will not be complete unless the formalities prescribed by the rule are observed. Thus in the case of an attachment of a decree for money passed by a Court other than the Court which orders the attachment, it is essential that notice must be issued to the Court by which the decree has been passed under sub rule (1) clause (b).[4]

Notice to the holder of the decree sought to be attached is not necessary for effecting an attachment of a decree for the payment of money or for sale in enforcement of a mortgage or charge. Such notice is only necessary in the case of other decrees under sub rule (4).[5]

The rule applies to attachment of decrees whether made before or after judgment.[6] It does not apply to a case where the creditor of a mortgagee attached the deposit made in Court by the mortgagor to redeem the property before sale in execution.[7] For the attachment and the subsequent execution of decrees of Civil Courts in execution of certificates issued under the provisions of certain local Public Demands Recovery Acts, see the undermentioned provisions.[8]

Where an *ex parte* decree which has been attached in execution of another decree is set aside on the application of the judgment debtor and a fresh decree in favour of the plaintiff is passed after trial on the merits, the original attachment must be taken to have revived as soon as a fresh decree on the merits is passed.[9]

3 Decree for money. — A decree for the payment of money is not attachable as a debt under Rule 46 but should be attached under this rule.[1] The following have been held to be money decrees attachable as such under this rule —

1 Decree for mesne profits[2] whether ascertained or unascertained.[3]

2 Decree for arrears of rent.[4]

3 A certificate as to deficiency of price granted under Rule 71 of this Order.[5]

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2 ('32) AIR 1932 Cal 80 (82) 58 Cal 934

3 ('34) AIR 1934 Mad 692 (694 695) 58 Mad 285 (Judgment debtor should be allowed to take objection to the saleability of the attached decree in view of R 178 Civil Rules of Practice.)

4 ('39) 43 Cal W N 374 (377) (In absence of such notice the holder of the decree sought to be executed does not become representative of decree sought to be attached and cannot execute the same.)

5 ('38) AIR 1938 Cal 401 (402)

6 ('12) 22 Mad L Jour 394 (395)

7 ('33) AIR 1933 Cal 39 (41) 59 Cal 1464

8 The Bengal Public Demands Recovery Act III of 1913 S 19 (9) The Bihar and Orissa Public Demands Recovery Act IV of 1914, Section 21 (2)

('37) AIR 1937 Cal 468 (472 473) (Bengal Public Demands Recovery Act S 19—Attaching certificate holder is representative of original decree-holder only for purposes of execution and cannot agree to adjustment of decree.)

9. ('33) AIR 1933 Rang 316 (317)

Note 3

1 ('83) 6 Mad 418 (419)

('25) AIR 1925 All 264 (265) (Revenue Court decree—Attachable under this rule.)

('99) 21 All 405 (406 407) (Revenue Court decree —Held under the old Code cannot be attached as a debt.)

2 ('18) AIR 1918 Pat 65 (67) 4 Pat L Jour 83

('67) 8 Suth W R 9 (11)

3 ('92) 2 Mad L Jour 288 (289 290) (A decree for unascertained mesne profits.)

('67) 8 Suth W R 9 (10) (Do.)

4 ('98) 25 Cal 322 (323)

5 ('26) AIR 1926 All 379 (382)

But the rule applies only to cases where the right attached is expressly settled by the decree Thus, a right to recover mesne profits by way of restitution by reason of reversal of the decree in appeal cannot be attached [6]

As noticed in Note 2, after attachment under this rule the money decree should be executed and not sold See also Note 9 below

3a. "Decree for sale in enforcement of a mortgage or charge." — In the absence of these words under the old Code there was a conflict of opinion as to whether a decree for sale in enforcement of a mortgage was or was not a money decree and as to the mode of execution of such a decree after attachment The High Courts of Allahabad[1] and Calcutta[2] held that it was not a money decree and that it should be *sold* after attachment The High Court of Madras,[3] on the other hand, held that it was a money decree which should be attached and *executed* under the corresponding Section 273 The conflict has been set at rest by the Legislature by giving effect to the Madras view Under the present rule such decrees are placed on the same footing as money decrees [4] In the case of a decree for maintenance charging immovable property also, the proper course for the decree holder is to apply for execution, and not for the sale of the decree attached [5]

If, however, in contravention of the provisions of this rule a decree for money or a mortgage decree for sale is sold and not executed, after attachment, the sale cannot be regarded as a nullity which confers no rights on the purchasers The rule is merely one of procedure and ought not to be given a scope which will interfere with the substantive rights of creditors conferred by Section 60 of the Code [6]

A *preliminary* decree in a mortgage suit is neither a decree for the payment of money nor one for sale in enforcement of a mortgage and is not covered by sub rule (1) of this rule [7] Such a decree is, however, attachable property of the judgment debtor [8]

4. Other decrees. — A decree relating to immovable property is not itself immovable property Such a decree should therefore be attached only under this rule and not under the next rule [1] Thus a decree for possession of immovable property,[2] or a preliminary decree for partition,[3] or a decree for foreclosure,[4] should be attached under this rule As pointed out in Note 1, such decrees should be *sold* after attachment, and cannot be executed

6 (01) 24 Mad 341 (345)

Note 3a

1 (06) 28 All 771 (774)
2 (10) 5 Ind Cas 302 (304) (Cal)
(03) 6 Cal W N 5 (6)
(99) 4 Cal W N xxxv (xxxvi)
(05) 2 Cal L Jour 499 (502 503)
3 (09) 1 Ind Cas 535 (536, 537) 31 Mad 442
(But a sale held in execution of a decree for money is not altogether invalid and without jurisdiction)

e

(Do)]
l 442

(1937)

(36) AIR 1936 All 857 (858) (Attaching decree holder has no *locus standi* to apply for final decree— Nor does mere attachment amount to assignment creation or devolution of any interest within Order 22 Rule 10)
(37) AIR 1937 Oudh 365 (366) 13 Luck 237

8

1. (19) AIR 1919 Nag 19 (20) 16 Nag L R 72.

(81) 6 Cal 213 (217)

O. 21 R. 53
Notes 4a-7

4a Preliminary decree for accounts — Attachability of — There is a conflict of decisions as to whether a preliminary decree for accounts can be attached under this rule It was held by the Bombay High Court in the undermentioned case[1] that a preliminary decree for the dissolution of a partnership and for accounts is a decree for money within the meaning of this rule and can be attached But the Calcutta High Court in the case cited below[2] dissented from this view and held that such a decree is not a decree for money and also that it could not be attached and sold in execution But in the undermentioned case[3] the same High Court held that a preliminary decree in a suit for accounts is saleable property which is attachable under Section 60 The question arose before the Madras High Court in the case noted below[4] but the Judges who presided differed in their opinion

5 Decree passed by the same Court — In the case of a decree for the payment of money or for sale in enforcement of a mortgage or charge where the decree sought to be executed and the decree sought to be attached are passed by the same Court the attachment is made under sub rule (1) clause (a) by order of the Court In the case of other decrees the attachment is made under sub rule (4) by the issue of a *notice* to the holder of the decree sought to be attached prohibiting him from transferring or charging the same in any way

6 Decree passed by different Courts — An order of attachment under this rule by Court X of a decree passed by Court Y can be made either by Court X or by the Court to which the decree is transferred for execution[1]

After receiving notice of attachment under this rule the Court whose decree is attached has no jurisdiction to proceed with the sale ignoring the order The sale if held in such a case will be void[2]

The attachment of a decree for money passed by another Court is complete as soon as a notice under sub rule (1) clause (b) is served on the Court which passed such decree[3]

7 Effect of attachment — The effect of attachment of a decree under this rule is to stay execution of the attached decree until the conditions mentioned therein happen[1] The decree is not permanently rendered incapable of execution by reason of the attachment nor is the decree holder's interest destroyed[2] The judgment creditor as pointed out by Maclean C J still had an interest in the decree which he had obtained and the attachment order did not prevent him from presenting the decree with a view to execution The addition of the words or his judgment debtor in sub rule (1) clause (b) gives legislative recognition to the right of the holder of the decree attached to apply for execution after attachment[3]

Note 4a

1 ('03) 27 Bom 556 (560)
2 ('37) AIR 1937 Cal 4 (6 7)
3 ('35) AIR 1935 Cal 751 (752)
4 ('29) AIR 1929 Mad 641 (643 649) 52 Mad 563 (FB) (Preliminary decree directing taking of partnership accounts is money decree — Per Phillips J —Thiruvenkatachariar J *contra*)

Note 6

1 ('12) 17 Ind Cas 373 (376 379) (Mad) (Even if the attachment by the transferee Court is considered defective it is not void—Such defect if any may be waived by parties—Per Sundara Iyer J)
2 ('05) 32 Cal 1101 (1105)
3 ('37) AIR 1937 All 63 (64)

Note 7

1 ('12) 13 Ind Cas 907 (907) (Cal)
2 ('16) AIR 1916 Cal 620 (621)
('33) AIR 1933 Oudh 349 (349 350) (Preliminary decree for foreclosure obtained by *A*—Attachment of preliminary decree by *B* — Subsequent final decree obtained by *A* — *A* is entitled to execute — [illegible])

The rule mentions only the *holder of the decree* sought to be executed or his *judgment debtor* as having the right to apply for execution after attachment. But, can a *transferee* of the decree, whose transfer is prior to the attachment, apply for execution of the decree after attachment under this rule? The High Court of Madras in its earlier decisions[4] held that the words 'his judgment debtor' do not include a transferee from the judgment debtor and that the remedy of the latter is only to prefer a claim under Rule 58 of this Order and have the attachment raised before he can apply for execution. In a later decision[5] however, the same High Court has dissented from this view and held that the transferee is entitled to execute the decree notwithstanding the subsequent attachment inasmuch as his rights are prior to the attachment and Rule 16 confers a right of execution in his favour. The High Court of Rangoon[6] and the Judicial Commissioner's Court of Nagpur,[7] have also held that a transferee stands in the same position as his transferor, and is entitled to apply for execution. The High Court of Patna[8] has gone a step further and held that a transferee of the decree *even after attachment* is entitled to apply for execution by virtue of Rule 16. The reasoning of the Patna High Court is that in the case of money decrees the present rule does not prohibit a transfer of the decree during the pendency of the attachment, and the general prohibition contained in Section 64 does not apply to the specific provision in this rule. But the right of the assignee to execute the decree in such a case is subject to the right of the attacher just as the assignor's right would be.[9]

A filed a suit against *B* and attached before judgment a decree which *B* had obtained against *C*. *C* paid into Court various sums of money towards the latter decree. Then a decree was passed in favour of *A* in the suit which he had filed against *B*. Thereupon *A* applied to draw out the moneys which had been deposited by *C*. It was held that *A* was entitled to do so.[10]

8. Stay of execution — Sub-rule (1). — The object of the stay is to prevent the holder of the attached decree from realizing and taking away the fruits of that decree.[1] But the stay is not an absolute stay but a limited one and, as already noticed, does not prevent the holder of the decree sought to be executed or his judgment debtor from executing the attached decree.[2] The provision in clause (b) (ii) of sub rule (1) does

('34) AIR 1934 Cal 140 (142)
('34) AIR 1934 Lah 142 (143) (Either may apply —Original decree holder applying and receiving money before satisfaction of attaching decree holder's claim — Court can order refund under Section 151.)
('35) AIR 1935 Mad 413 (414) (The fact that the attachment of the decree is in execution of a decree for restitution of conjugal rights and that under O. 21 R. 32 property attached in execution of such a decree cannot be sold before one year of the attachment does not preclude the execution of the attached decree under this sub rule before one year.)
('35) AIR 1935 Bom 416 (417) (But amount realized should be deposited in Court for benefit of creditor.)

4. ('12) 13 Ind Cas 659 (660) (Mad)
('10) 5 Ind Cas 1010 (1010) (Mad)
('09) 3 Ind Cas 959 (959) 33 Mad 62

5.

6.

7. ('27) AIR 1927 Nag 132 (133) 23 Nag L R 20

8. ('29) AIR 1929 Pat 1 (3) 7 Pat 726

against *A*.)
[*See also* ('38) AIR 1938 Cal 401 (401, 402) (In this case, the assignee wanted to execute the decree for his own exclusive benefit without

10.

decree in favour of *A*, the attachment operates ... decree ... the ... the

Note 8

1. ('97) 24 Cal 778 (782)
2. ('24) AIR 1924 Bom 393 (394) 48 Bom 495

O. 21 R. 53
Notes 8–10

not mean that when the holder of the decree sought to be executed makes such an application, the attached decree ceases to be an attached decree it only means that a period is provided by the rule up to which a stay of execution is to be made by the Court to which notice is sent to enable the attaching decree holder to apply for execution of the attached decree [3]

9. Execution of attached decree — Sub-rule (2). — Under sub rule (2) the attaching decree holder is entitled to apply for execution of the attached decree He can take the necessary steps for the realization of the proceeds of the attached decree and apply them in satisfaction of his decree [1]

10. Representative — Sub-rule (3). — Sub rule (3) makes it quite clear that once a decree has been attached by another decree holder, the latter becomes a representative of the holder of the attached decree and is entitled to take out execution in the same way as the original holder thereof could have done [1] See also Note 2[?] to Section 47

Thus where in execution of a decree obtained by *A* against *B* a decree which *B* holds against a company in liquidation is attached the Court will direct the liquidator to recognise *A* as the representative of *B* and allow him to prove for the decree debt in the name of *B* and to receive and apply dividends payable to *B* in satisfaction of *A*'s decree debt [2]

The attaching decree holder is entitled to take moneys deposited by the judgment debtor and certify payment [3] Moneys brought into Court by the judgment debtor become forthwith available for the satisfaction of the decree sought to be executed and interest ceases to run from the date of the deposit [4] The attaching creditor has the same remedies as his judgment debtor and can also proceed against any sureties for the decree amount [5] If the decree is attached after execution sale but before confirmation it has been held that the attaching decree holder is entitled to

3 ('35) AIR 1935 Lah 194 (196) 15 Lah 910

Note 9

1 ('93) 17 Mad 58 (60)
(1900) 1900 All W N 99 (100) (Death of judgment debtor after transfer of the attached decree to the attaching Court—Legal representative not to be impleaded)
[*See* ('26) AIR 1926 Mad 371 (372 376) (Debt

[illegible]

per Reilly J)]

Note 10

1 ('30) AIR 1930 All 659 (661)
('0?) 29 Mad 318 (319)
('93) 16 Mad 20 (2?)

('88) 15 Cal 371 (375)
('35) AIR 1935 All 125 (125) (Attaching decree holder is entitled to make objection in execution [illegible] default — *Held* that this was no bar to [illegible] proceeding with the execution of the attached decree)
[illegible] sary for attaching decree holder to execute attached decree)
[*See also* ('97) 24 Cal ?78 (783)]
2 ('07) 30 Mad 533 (?35)
3 ('30) AIR 1930 All 6?9 (661)
('39) 43 Cal W N 1076 (1078) (Suit by *A* against *B* — Attachment before judgment of *B*'s decree against *C* — Payment into Court by *C* — Then decree passed in *A*'s suit — *A* is entitled to draw the moneys deposited by *C*)
4 ('21) AIR 1921 Cal 580 (581 582)
5 ('19) AIR 1919 Lah 275 (276) 1919 Pun Re No 44

apply for confirmation of sale in his favour [6]

Where an alleged attachment under this rule is invalid for want of compliance with the prescribed formalities the attaching decree holder does not become the representative of the holder of the attached decree In such a case the mere fact that the name of the attaching decree holder is substituted in the record for that of the original holder of the attached decree will not preclude the judgment debtor under the latter decree to object to the execution of such decree by the substituted person, when no notice of the substitution was given to him and he had no opportunity to contest the same [7]

A question arising between a person attaching a decree under this rule and an assignee of such decree will be a question between persons claiming to be representatives of the same party and as such will not be within Section 47 of the Code [8] See also the undermentioned cases [9]

11. Adjustment of attached decree — Sub-rule (6) — As pointed out by their Lordships of the High Court of Madras in the undermentioned Full Bench decision [1] clause (6) of the rule provides an exception to the general rule embodied in Section 64 of the Code and is a special case of the application of the well known principle of justice and equity intended for the protection of parties to a *bona fide* transaction After the judgment debtor under the attached decree receives either through Court or otherwise notice of the order of attachment any payment or adjustment by him to his decree holder will not be recognized by the Court [2] But if such judgment debtor should in ignorance of the attachment have made any payment or adjustment it should be regarded as a payment or adjustment properly made under the decree to the rightful person [3] The judgment debtor under the attached decree cannot plead as against the attaching decree holder an uncertified payment or adjustment made before the date of attachment [4] The reason is that the judgment debtor could not have successfully raised the same plea as against his decree holder by reason of the provisions of O 21 R 2 *ante*

The rule prohibits an adjustment between the judgment debtor under the decree attached and the decree holder thereof and not an adjustment between the attaching decree holder and the judgment debtor [5]

If an application for execution by the attaching decree holder is struck off for default it has been held that the attachment is not put an end to and the judgment debtor cannot therefore make any payment to his decree holder The provisions of

6 (07) 11 Cal W N 158 (160)

7. (39) 43 Cal W N 374 (378 379)

8 (27) AIR 1927 Mad 1025 (1025 1026)
[But see (16) AIR 1916 Cal 471 (472) (Submitted not correct)]

9 (35) AIR 1935 Oudh 272 (273) 11 Luck 26 (Question between holder of attached decree and holder of decree sought to be executed by the attachment is not one between parties to the attached decree and S 47 does not apply)
(37) AIR 1937 Cal 177 (178) (Dispute between two persons attaching same decree—Judgment debtor under attached decree interested — S 47 applies)
(39) 43 Cal W N 1076 (1077) (Dispute between attaching decree holder and another decree holder against same judgment debtor in respect of certain moneys lying in Court to the credit of the latter is not within S 47 and no appeal lies)

Note 11

1 [illegible]
debtor can be implied)
(31) AIR 1931 Rang 185 (188) 9 Rang 140 (Adjustment after knowledge of attachment though imperfect is invalid)
[*See also* (21) AIR 1921 Mad 135 (136)]

2 (75) 24 Suth W R 215 (216)
(3?) 193? All L Jour 79? (794)
(37) AIR 1937 All 63 (64)

3 (39) 43 Cal W N 374 (377)
(38) AIR 1938 Cal 401 (402)
(39) AIR 1939 Nag 17 (18) (Notice served after adjustment—Adjustment is valid)

4 (33) AIR 1933 Rang 239 (240) 11 Rang 4?0

5 (24) AIR 1924 Pat 696 (698)

Rule 57 of this Order do not apply to a default on the part of the attaching decree-holder[6]

12. Step-in-aid. — An application for execution of a decree under attachment by the attaching decree holder is a step in aid of execution of the decree within the meaning of Article 182 of the Limitation Act[1] But an application for attachment of a decree is not a step in aid of execution of the attached decree[2] The reason is that instead of being a step in aid of execution, it rather arrests the execution of that decree, for the Court has to stay the execution under clause (b)

O. 21 R. 54

R. 54. [S. 274.] *(1)* Where the property is immoveable,[1] the attachment[3] shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge.

Attachment of immoveable property.

(2) The order shall be proclaimed[6] at some place on or adjacent to such property by beat of drum[7] or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property[8] and then upon a conspicuous part of the court house,[9] and also, where the property is land paying revenue to the Government, in the office of the Collector[10] of the district in which the land is situate.

[1877, S. 274; 1859, Ss. 235, 239. See S. 64 and O. 21 R 67.]

Local Amendments

ALLAHABAD

Add the following as sub rule (3)

(3) The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property, and against all other transferees from the judgment debtor from the date on which such order is made"

Note — See the undermentioned decision[1] under the sub rule

BOMBAY

Add the following to sub rule (1)

"Such order shall take effect, where there is no consideration for such transfer

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[**But see** (37) AIR 1937 Cal 468 (473) (Attaching decree holder becomes representative of original decree holder only for executing attached decree and satisfying his own decree — Attaching decree holder is not clothed with original decree holder's right to adjust decree in any way he likes)]

6 [illegible]

[illegible]) (A in execution of decree against B attaching B's decree against C and also proceeding against other properties of B—Execution case dismissed for default as regards the latter — Still, A can execute the attached decree)]

Note 12

[illegible]

or charge from the date of such order and where there is consideration for such transfer or charge from the date when such order came to the knowledge of the person to whom or in whose favour the property was transferred or charged **O 21 R. 54**

CALCUTTA

Add the following as sub rule (3)

(3) Such order shall take effect where there is no consideration for such transfer or charge *from the date of the order and where there is consideration for* such transfer or charge from the date when such order came to the knowledge of the person to whom or in whose favour the property was transferred or charged or from the date when the order is proclaimed under sub rule (2) whichever is earlier

LAHORE

(1) At the end of sub rule (2) *substitute* a semicolon for full stop and *add*

Where the property is land situated in a Cantonment a copy of the order shall also be forwarded to the Military Estates Officer in whose area that Cantonment is situated

(2) Add following as sub rule (3)

(3) The order shall take effect as against persons claiming under a gratuitous transfer from the judgment debtor from the date of the order of attachment and as against others from the time they had knowledge of the passing of the order of attachment or from the date of the proclamation whichever is earlier

MADRAS

Add the following as sub rule (3)

(3) The order of attachment shall be deemed to have been made as against transferees without consideration from the judgment debtor from the date of the order of attachment and as against all other persons from the date on which they respectively had knowledge of the order of attachment or the date on which the order was duly proclaimed under sub rule (2) whichever is the earlier

NAGPUR

Add the following as sub rule (3)

(3) The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property and against all other transferees from the judgment debtor from the date on which such order is made

Note — See the undermentioned case [1]

N W F P

Add the following as sub rule (3)

(3) The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property and against all other transferees from the judgment debtor from the date on which such order is made

OUDH

Add the following as sub rule (3)

(3) The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property and against all other transferees from the judgment debtor from the date on which such order is made

RANGOON

Add the following as sub rule (3)

(3) The order of attachment shall take effect as against transferees without consideration from the judgment debtor from the date of the order of attachment and as against all other persons from the date on which they respectively had knowledge of the order of attachment or the date on which the order was duly proclaimed under sub rule (2) whichever is the earlier'

O 21 R 54 (Nagpur Amendment)

1 (30) 19 Nag L Jour 94 (97) (The word purchaser in sub-rule (3) to R 54 of O 21 is used in its technical English legal sense and includes a mortgagee)

O.21 R.54
Notes 1-3a

Synopsis

1. Attachment of immovable property—General. — The rule deals with attachment of *immovable property* The word "attachment" in Section 64 of the Code means, so far as immovable property is concerned, an attachment effected in the manner provided for by this rule[1] An attachment is a necessary preliminary to execution proceedings[2] and the object of the rule in prescribing a particular way of notifying the attachment is, as pointed out by Mahmood, J, in *Ganga Din* v *Khushali*,[3] "to give notice to the judgment debtor not to alienate his property and to the public not to accept any alienation from him."

See Note 2 to Section 64, *ante*

As already pointed out in Rule 53 above, a decree, though relating to immovable property, is not itself immovable property, and cannot be attached as such under this rule but only under Rule 53[4]

This rule extends to attachment of immovable property under the Chota Nagpur Tenancy Act, VI of 1920 See Section 50.

2. Attachment of mortgage debt. — See Note 4 to Rule 46

3. Immovable property. — See Note 4 to Section 16, *ante*, for the meaning of the words 'immovable property." The following have been held to be immovable property within the meaning of this rule —

(1) The equity of redemption in a mortgage[1]

(2) The life interest taken by a Parsee widow under her husband's will *in* the income of his immovable property[2]

3a. Attachment of property belonging to a Hindu coparcener. — An attachment of the share of an undivided coparcener in a joint Hindu family should be made in respect of his undivided share in the *whole family property*, and not of his share in *each item* of it[1] Such an attachment has the effect of preventing the accrual of title by survivorship to the other members, in the event of the member,

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Order 21 Rule 54 — Note 1

1. ('17) AIR 1917 Cal 832 (832)
2. ('30) AIR 1930 Pat 108 (110) 8 Pat 801
('83) 5 All 86 (91)
('91) 15 Bom 222 (228) 18 Ind App 22 (PC) (No attachment is necessary in the case of mortgage *decree for sale*)
('80) 4 Bom 515 (520) (Do)
('94) 21 Cal 639 (641) (Do)
('95) 18 Mad 437 (439) (Do)
[*See* ('88) 12 Bom 368 (370) (Do)
('99) 26 Cal 127 (129) (Do)]
3. ('85) 7 All 702 (707)
4. ('19) AIR 1919 Nag 19 (19) 16 Nag L R 252
('02) 6 Cal W N 5 (6)
('86) 10 Bom 444 (447)
[But see ('71) 9 Bom H C R 64 (65) (Not good law)]

Note 3

1. ('21) AIR 1921 Cal 801 (803)
('97) 21 Bom 226 (228)
2. ('99) 23 Bom 1 (11)

Note 3a

1. ('20) AIR 1920 Mad 1035 (1036)

whose share is attached, dying after attachment and before sale [2]

4. Attachment, when complete. — An attachment under this rule is not complete unless *first*, the *order* of attachment has been issued and *secondly*, in execution of that order, the other formalities prescribed by the Code have been complied with [1] No notice is necessary before ordering an attachment of property [2] See for a full discussion Note 3 to Section 64, *ante*

5. Service of prohibitory order. — The mere writing of an order is not enough It must be served on the judgment debtor and he must have an opportunity of knowing that he is prohibited [1] There is a presumption that official acts are regularly performed Where it was found that the prohibitory order was duly served on the judgment debtors, but that portion of the record which would show that the service was effected in the prescribed manner had been destroyed, it was held that the execution sale was not vitiated on that account [2]

Where the property to be attached is within the jurisdiction of the Court, there is nothing to prevent the Court from issuing the prohibitory order to the judgment debtor living outside the jurisdiction of the Court [3]

6. Proclamation of order of attachment. — A mere prohibitory order will not constitute a sufficient attachment so as to operate as a valid prohibition against any alienation by the judgment-debtor unless the proclamation described in the second part of the rule is carried out [1] The publication of the proclamation as required by

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2 [illegible]

('14) AIR 1914 Mad 118 (118) (Attachment before judgment followed by decree has the same effect)

(94) 17 Mad 144 (145) (Attachment before judgment — Def ndant dying before decree — *Held* survivorship not affected)

[**But see** (14) AIR 1914 Bom 256 (257) 21 Ind Cas 330 (332) 38 Bom 105 (Attachment before judgment without an order for sale is not sufficient to operate as a bar to survivorship)]

Note 4

[illegible]

house—Attachment is not effective)

('16) AIR 1916 Cal 489 (489)

[illegible]

court house—No valid attachment — But that fact will not affect the right of person obtaining order of attachment to apply under O 21 R 90 to set aside sale of property in execution of another decree held after his order of attachment and decree)

(37) AIR 1937 Lah 671 (672) (Omission to affix notice etc , and make proclamation cannot to looked upon as a trivial irregularity as that is the only way in which the public is informed of the existence of an attachment)

[illegible]

to the contrary—Attachment is presumed to be valid)]

[**See however** (38) AIR 1938 Cal 236 (237) (Conditional order of attachment under O 38, R 5—No process issued under O 21 R 54 but bailiff observing all formalities required by R 54 —Attachment *held* to be effectual)]

2. (36) AIR 1936 Nag 77 (78)

Note 5

1. ('19) AIR 1919 Mad 594 (595) 42 Mad 565

(05) 27 All 258 (259) (Warrant of attachment should show the amount for which property is attached)

[illegible]

Note 6

1. ('23) AIR 1923 Lah 423 (424) 4 Lah 211

[illegible]

[*See also* (37) AIR 1937 Cal 375 (376) (Attachment before judgment—Order of attachment in form No 5 of Appendix F published—No publi-

the rule constitutes sufficient notice to the judgment-debtor[2]

The proclamation is merely a *ministerial act*, and the delay on the part of the officer in effecting it as for instance where an attachment which was ordered before judgment is not completed till after judgment, does not vitiate the proceedings[3] As to the effect of the omission to publish the sale proclamation, see Notes to Rule 90, *infra*

See also the undermentioned case[4]

7. Beat of drum — A proclamation of attachment should be made by beat of drum at some place on or adjacent to the property attached The omission to have the drum beaten as required by the rule is a material irregularity which will vitiate the execution sale[1]

8. Affixing copy on conspicuous part of the property. — A copy of the proclamation order must be affixed on a conspicuous part of the property[1] Where *prima facie* this is not done it is a material irregularity which will afford a ground for setting aside the execution sale[2]

9 Affixing copy in court-house — A copy of the proclamation of sale must, under Rule 67 *infra* read with this rule be affixed on a conspicuous part of the court house and under Rule 68 the sale must take place only after the expiration of at least 30 days from the day on which it was so affixed[1]

An omission to affix a copy of the attachment order in a conspicuous part of the court house is also a material irregularity within the meaning of Rule 90[2]

Where the process server s report which purports to say what was done by him, omits to mention that a copy of the attachment order was affixed on the court house, it must be presumed, until the contrary is proved, that such copy was not affixed, and the attachment must be held to be invalid[3]

10. Affixing copy in Collector's office — Where the property attached is land paying revenue to Government the rule requires in addition that the order of attachment should be affixed in the Collector s office[1] Rent payable in the case of

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case of attachment in form No 24 Appendix F as laid down under O 21 R 54—Attachment is invalid — No reference in order sheet to O 21 R 54 or to publication of attachment order as required by it — No presumption under S 114 Evidence Act can be drawn that attachment was properly made)]

2 ('26) AIR 1926 Oudh 45 (46)

('39) AIR 1939 Rang 434 (435) 1939 Rang L R 591 (S B) (Personal service of the prohibitory order on the judgment debtor is not necessary)

('36) AIR 1936 Rang 403 (405) (Personal service on judgment debtor not necessary)

3 ('19) AIR 1919 Mad 752 (753) 42 Mad 1

4 ('33) AIR 1933 Oudh 225 (226) (Process fee for proclamation of order of attachment—Non payment of—*Held* in circumstances of case there was no negligence on decree holder s part and that dismissal of execution application for default was not justified)

Note 7

1 ('66) 10 Bom 504 (505)

('32) AIR 1932 Oudh 76 (76) (Drum not beaten owing to resistance—Order proclaimed in a loud voice—*Held* there was sufficient compliance)

Note 8

1 ('81) 7 Cal 466 (469)

('35) AIR 1935 Lah 57 (58) (Mere affixture in the village is not sufficient compliance)

('76) 25 Suth W R 364 (365)

('28) AIR 1928 Pat 25 (27) 6 Pat 568 (A separate proclamation of sale need not be served on every *mauza comprising an estate or tenure*)

('36) AIR 1936 Rang 403 (405) (Single parcel of land with buildings thereon — Copy of order of attachment may be affixed on any building or conspicuous part of land)

2 ('23) AIR 1923 Lah 671 (671)

('97) 1897 Pun Re No 5 page 20

('78) 1878 Pun Re No 37 page 190

('18) AIR 1918 Pat 266 (269)

Note 9

1 ('18) AIR 1918 Nag 213 (214)

2 ('20) AIR 1920 Lah 24 (25)

[*See also* ('80) 2 All 58 (60)]

[**See however** ('98) 1898 Pun Re No 83 p 331]

3. ('39) AIR 1939 Lah 234 (235)

Note 10

1 ('31) AIR 1931 Pat 58 (59) 9 Pat 860

('82) 8 Cal 932 (932) (Decision under O 21 R 67)

enfranchised *shrotriem* villages in the Presidency of Madras is "revenue" within the meaning of this rule and the procedure prescribed should be followed in attaching such properties[2] Where a house stands on a site which is assessed to revenue, the property is still land paying revenue to Government and omission to affix a copy of the order in the Collector's office constitutes a material irregularity under Rule 90, *infra*[3]

See also the undermentioned case[4]

11. Effect of attachment and re-attachment. — An attachment under this rule does not constitute dispossession of the party in actual possession[1] Nor does it confer any interest or title in the property in favour of the attaching party[2] As noticed in Note 5 to Section 64 *ante*, the effect of attachment is to restrain alienation by the judgment debtor and any rights acquired by reason of a private transfer subsequent to the attachment are void against all claims enforceable under the attachment[3] But, an agricultural lease granted by a landlord in the *ordinary course of management* would not be prohibited under this rule[4] It has also been held that a sale effected in pursuance of a contract for sale entered into before the attachment is not affected by the attachment[5]

A re attachment of property *ex majori cautela* after decree does not imply an abandonment of the attachment obtained before decree[6] See also Note 7 to Section 64

12. Absence of attachment and irregular and invalid attachment. — Attachment is a step taken only in order to keep the property of the judgment debtor intact and to enable the decree holder to bring it to sale It is a step in execution designed for the protection of the judgment creditor and not for the benefit of the judgment debtor[1] Where therefore a sale takes place without the property sold having been attached it is not a nullity and will not be set aside unless substantial loss or injury is proved to have resulted therefrom[2] The absence of attachment is only an *irregularity* which does not affect the jurisdiction of the Court to sell[3] Similarly, any

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presumed under S 114 Evidence Act)

Note 11

1 (30) 4 Bom 529 (535)
(26) AIR 1926 Sind 199 (200) 19 Sind L R 35
(26) AIR 1926 Mad 42 (43) (Adverse possession not put an end to by attachment)
(07) 30 Mad 207 (209) (Attaching creditor cannot maintain an action for wrongful removal of attached property)
[**See however** ('36) AIR 1936 Nag 120 (120, 121) 31 Nag L R Sup 212 (Immoveable property attached in execution is in possession of Court)]
2 (29) AIR 1929 Bom 200 (201)
(38) AIR 1938 Mad 860 (863) ILR (1938) Mad 741 (F B) (Hence attaching creditor is not secured creditor)
See also Note 5 to S 64
3 *See Notes 5 and 10 to S 64 and also the following cases*
(03) 25 All 431 (434) (Property not belonging to judgment-debtor attached—Rightful owner not prevented from alienating)
(89) 1889 All W N 132 (133)
('17) AIR 1917 Cal 231 (292)
(73 14 Moo Ind App 543 (549, 550) (P C)
(
(Property attached—Rightful owner not prevented from alienating)
('27) AIR 1927 Mad 190 (191)
(35) *AIR 1935 Lah 71 (75) 16 Lah 328*
[*See also* (37) AIR 1937 Mad 811 (812)]
4. ('36) AIR 1936 All 265 (266) (Attachment of malguzari share—Letting out lands in ordinary course of management is not prohibited — Such power however cannot be exercised to defraud attaching creditor)
5. (35) AIR 1935 Mad 872 (873) 59 Mad 1 (Attachment fastens to debtor's right to unpaid purchase money)
6 (15) AIR 1915 Mad 336 (33?)
(16) AIR 1916 Pat 353 (355)

Note 12

1 (34) AIR 1934 Bom 241 (243)
2 (18) AIR 1919 Mad 1262 (1263)
(12) 16 Ind Cas 438 (438) (Mad)
(98) 8 Mad L Jour 1 (3)
(16) AIR 1916 Cal 465 (467, 468)
(07) 34 Cal 797 (80?)
(1900) 27 Cal 789 (792)
(91) 18 Cal 188 (19?)
[**But see** (88) 10 All 506 (511)]
3. (99) 21 All 311 (314)
(30) AIR 1930 Lah 685 (686)

O. 21 R. 54 Note 12 defect or error in the *mode* of attachment is only an irregularity which does not render the sale *ipso facto* void [4] See Notes to Rule 90 *infra*

But as between the decree holder and the auction purchaser on the one hand, and an alienee from the judgment debtor on the other, different equities come into operation [5] As pointed out in Note 4 a *regularly perfected attachment* is a condition precedent to a restraint on alienation after attachment so as to attract the provisions of Section 64 [6] A private alienation of property after an order of attachment which has not been carried into effect is valid unless proof is given that all the requirements of the rule have been complied with [7]

An attachment which is *prima facie invalid* as for instance, where the decree is set aside on appeal at the time of attachment, cannot confer any jurisdiction on the Court to sell and the sale if held in pursuance of such attachment, is *void* [8]

O. 21 R. 55 **Removal of attachment after satisfaction of decree**

R. 55. [S 275] Where —

(*a*) the amount decreed with costs and all charges and expenses resulting from the attachment of any property are paid into Court, or

(*b*) satisfaction of the decree is otherwise made through the Court or certified to the Court, or

(*c*) the decree is set aside or reversed,

the attachment shall be deemed to be withdrawn, and, in the case of immoveable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule

[1877, S 275; 1859, S 245 See Rule 57 and Order 38 Rule 9]

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4 ('10) 6 Ind Cas 713 (715) 1910 Pun Re No 40
(85) 7 All 731 (733) (Order not affixed in Collector s office)
(96) 18 All 469 (471) (Attachment under wrong provision of law)
(19) 52 Ind Cas 167 (167) (Upp Bur B R) (Case of revenue sale)
(30) AIR 1930 Cal 353 (355)
(91) 18 Cal 422 (426)
(07) 5 Cal L Jour 80 (84)
(07) 6 Suth W R Misc 52 (53)
(95) 5 Mad L Jour 70 (73 74) (Delay in affixing sale proclamation)
(23) AIR 1923 Nag 78 (79)
(10) 5 Ind Cas 798 (799) 13 Oudh Cas 43
[*See* (29) AIR 1929 Lah 441 (442)]
[**But see** (90) 1890 Pun Re No 76 page 227]

5 (16) AIR 1916 Oudh 169 (173)

6 (85) 7 All 702 (708 710)
(35) AIR 1935 Lah 57 (59) (Failure to affix copies of order on conspicuous part of the attached property)
(81) 3 All 698 (701)

7

Local Amendments

ALLAHABAD

Substitute the following for Rule 55

"55 (1) Notice shall be sent to the sale officer executing a decree of all applications for rateable distribution of assets made under Section 73 (1) in respect of the property of the same judgment debtor by persons other than the holder of the decree for the execution of which the original order was passed

(2) Where —

(a) the amount decreed [which shall include the amount of any decree passed against the same judgment debtor notice of which has been sent to the sale officer under sub section (1)] with costs and all charges and expenses resulting from the attachment of any property are paid into Court or

(b) satisfaction of the decree [including any decree passed against the same judgment debtor notice of which has been sent to the sale officer under sub section (1)], is otherwise made through the Court or certified to the Court or

(c) the decree [including any decree passed against the same judgment debtor, notice of which has been sent to the sale officer under sub section (1)] is set aside or reversed

the attachment shall be deemed to be withdrawn and in the case of immovable property the withdrawal shall if the judgment debtor so desires be proclaimed at his expense and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule

OUDH

[illegible]

[illegible] le to the Court under Section 73 sub sec [illegible] in respect of the property of a judgment debtor by a person other than the holder of the decree for the execution of which the original order of attachment was passed notice shall be sent to the sale officer executing the decree

(2) Where —

(a) the amount decreed [which shall include the amount of any decree passed against the same judgment debtor notice of which has been sent to the sale officer under sub rule (1)] with costs and all charges and expenses resulting from the attachment of any property are paid into Court or

(b) satisfaction of the decree [including any decree passed against the same judgment debtor notice of which has been sent to the sale officer under sub rule (1)] is otherwise made through the Court or certified to the Court or

(c) the decree [including any decree passed against the same judgment debtor, notice of which has been sent to the sale officer under sub rule (1)] is set aside or reversed

the attachment shall be deemed to be withdrawn and, in the case of immovable property the withdrawal shall if the judgment debtor so desires be proclaimed at his expense and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule

Note — See the undermentioned case [1]

Synopsis

1 Legislative changes
2 Scope of the Rule
3 Attachment shall be deemed to be withdrawn
4 Revival of attachment

O 21 R 55 (Oudh Amendment)

1 (36) 161 Ind Cas 1031 (1032) (Oudh) (Unless along with the decree of the attaching creditor, the decree of an applicant for rateable distribution is also satisfied the attachment shall not be deemed to be withdrawn)

O.21 R.55
Notes 1–3

1. Legislative changes. —

1 The words "or certified to the Court" are new

2 The words "the attachment shall be deemed to be withdrawn, etc," have been substituted for the words "an *order* shall be issued for the withdrawal of attachment"

2. Scope of the Rule. — On any of the three things mentioned in clauses (a), (b) and (c) happening, the attachment is automatically deemed to be withdrawn No express *order* is now necessary, as it was, under the old Code [1]

The rule applies only where the decree is fully and entirely satisfied [2] An attachment cannot be partially raised by consent of parties without an express order of the Court [3]

The words "amount decreed" mean, in the case of an instalment decree, the instalment which has become due and in respect of which the attachment has been made [4]

A mere tender of money before the Judge is not sufficient to entitle the judgment debtor to have the sale of properties stayed, the law contemplates that payment should be made in accordance with the rules and forms of the Court [5]

It is the duty of the judgment debtor to apprise the Court of the fact of satisfaction of the decree otherwise, if the Court executes the decree in ignorance of the satisfaction thereof the sale will not be held to be invalid on that ground alone [6]

This rule applies to proceedings in respect of immovables under the Chota Nagpur Tenancy Act see Section 210 (3) (b), Bengal Act, VI of 1908, as amended by Bihar and Orissa Act, VI of 1920, Section 50 (1)

As to whether money paid under this rule is available for rateable distribution to other decree holders who have not attached the properties, see Note 4 to Section 73 *ante*, and also the undermentioned case[7] under the Allahabad amendment to this rule

The rule is not exhaustive of the modes in which attachment ceases [8] Thus, an attachment ceases as soon as the sale of the property attached takes place [9]

3. "Attachment shall be deemed to be withdrawn." — As has been seen already, an attachment will automatically cease on payment made under clause (a) Where, therefore by reason of such payment an attachment ceases, another decree holder who has applied for execution against the same judgment-debtor, but who has not attached the properties, cannot have the property sold under the attachment that has ceased [1]

Even under the old Code it was held that, on payment of the decree amount into Court, the attachment became inoperative even though it was not formally withdrawn [2] and that a private alienation after the attaching creditor had been satisfied would prevail against subsequent attachments [3]

Order 21 Rule 55 — Note 2

1. (09) 4 Ind Cas 97 (97) (Mad)
2. (12) 15 Ind Cas 677 (678) (All)
3. (27) AIR 1927 Mad 648 (649)
4. ('28) AIR 1928 Nag 65 (66)
5. 2 Hay 302
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attaching decree holder)

8. (37) AIR 1937 Cal 390 (392) (O 21 R 60 mentions one of the circumstances under which attachment may be withdrawn)
('37) AIR 1937 Pesh 90 (91)
9. (37) AIR 1937 Pesh 90 (91) (Attachment ceases with sale and does not subsist till confirmation—Therefore objection under O 21 R 58 cannot be considered after sale)

Note 3

1. ('11) 12 Ind Cas 911 (912) 36 Bom 156
2. ('05) 28 Mad 380 (385)
3. (08) 1908 Pun Re No 81, page 381

As seen in Note 4 to Section 73 *ante* the payment under this rule is subject to the claims of other decree holders for rateable distribution It has been held that where the decretal amount is paid into Court under clause (a) of this rule but owing to the claims of other decree holders for rateable distribution the attaching decree holder gets only a portion of the money deposited the attachment will not cease[4] The reason given is that the rule contemplates a cessation of attachment only on the decree being fully satisfied

4 Revival of attachment — The rule provides that the attachment shall be deemed to be withdrawn when the decree is set aside or reversed But if on second appeal the reversal of the decree by the first Appellate Court is in turn reversed and the original decree restored the attachment will be revived and a sale can be ordered on the strength thereof[1] See also Note 9 to Section 64

R. 56. [S 277] Where the property attached is current coin or currency notes, the Court may, at any time during the continuance of the attachment, direct that such coin or notes, or a part thereof sufficient to satisfy the decree, be paid over to the party entitled under the decree to receive the same

Order for payment of coin or currency notes to party entitled under decree

[1877, S 277 , 1859, S 242 See Rr 64, 79 and 81 *Cf* O 39, R 10]

1 "Current coin" — The word current has been newly added before the word *coin* If the coin is not current it has to be dealt with as any other moveable property

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R. 57. [New] Where any property has been attached in execution of a decree but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date Upon the dismissal of such application the attachment shall cease

Determination of attachment

[See Rr 55, 60 and 63 *Cf* O 38, Rr 8, 9 and 11]

Note 4

1 ('18) AIR 1918 Oudh 275 (278)
[See however ('37) AIR 1937 Lah 169 (170 171) (Attachment in execution of decree — Reversal of decree and consequent order removing attachment — Subsequent decree after remand in favour of decree-holder — Original attachment cannot revive and alienation between removal of original attachment and subsequent attachment is not void)]

O 21 R 57
Note 1

Local Amendments

CALCUTTA

Add the following words at the end of the rule

Unless the Court shall make an order to the contrary

MADRAS

Substitute the following *for* Rule 57

57 (1) Where any property has been attached in execution of a decree and the Court hearing the execution application either dismisses it or adjourns the proceedings to a future date it shall state whether the attachment continues or ceases Provided that when the Court dismisses such an application by reason of the decree holder s default the order shall state that the attachment do cease

(2) Where the property attached is a decree of the nature mentioned in sub rule (1) of Rule 53 and the Court executing the attached decree dismisses the application for execution of the attached decree it shall report to the Court which attached the decree the fact of such dismissal Upon the receipt of such report the Court attaching the decree shall proceed under the provisions of sub rule (1) and communicate its decision to the Court whose decree is attached

NAGPUR

Substitute the following rule *for* Rule 57

57 Where any property has been attached in execution of a decree and the Court for any reason passes an order dismissing the execution application the Court shall direct whether the attachment shall continue or cease If the Court omits to make any such direction the attachment shall be deemed to have ceased to exist

N W F P

Cancel the concluding sentence of Rule 57 upon the dismissal shall cease , and *substitute* the following

'In dismissing such application the Court shall direct whether the attachment shall continue or cease In the absence of any such direction the attachment shall be deemed to cease

OUDH

Substitute the following *for* Rule 57

57 Where any property has been attached in execution of a decree and the Court for any reason passes an order dismissing the execution application the Court shall direct whether the attachment shall continue or cease If the Court omits to make any such direction the attachment shall be deemed to subsist

PATNA

Delete the last sentence and *add* the following sub paragraph

Upon every order dismissing an execution case in which there is an attachment the attachment shall cease unless the Court otherwise directs

Synopsis

1 Scope and object of the Rule
2 'By reason of the decree holder's default'
3 Effect of dismissal of application
4 Dismissal of application by Collector
5 Execution removed from file for statistical purposes
6 Responsibility of sapurdar of attached property after dismissal for default
7 Revival of attachment when possible
8 Attachment before judgment
9 Default in executing attached decree See Note 11 to Rule 53

Other Topics (miscellaneous)

Limitation inapplicable to execution petition subsequent to striking off order See Note 5
Not retrospective See Note 1
Proper course on default See Note 5
Striking off —Effect See Note 5

1. Scope and object of the Rule. — This rule is new There was no corresponding provision in the Code of 1882 enabling the executing Court to *dismiss*

an execution application when the decree holder was not diligent in prosecuting the same The Court could not act under Chapter VII (now Order 9) or under Section 157 (now O 17 R 2) as those provisions applied only to *suits*, nor could the Court apply those provisions by virtue of Section 647 (now Section 141), inasmuch as the Judicial Committee held in *Thakur Prasad* v *Fakirulla*, I L R 17 Allahabad 106 (P C), that that Section did not apply to execution proceedings Hence, with a view to prevent the accumulation of execution applications from encumbering the files of the Courts and in order to show a better statistical return, the subordinate Courts resorted to the practice of disposing of them by passing such orders as "recorded" or "struck off" on such applications Such a practice was not authorized by the provisions of the Code and, in spite of the fact that the High Courts condemned the same,[1] and although a Full Bench of the High Court of Allahabad[2] pointed out that the Court could, under its *inherent* power, *dismiss* an application for the laches of the decree-holder, this unauthorized practice nevertheless persisted Such disposals also led to further doubts and complications as to whether an attachment previously effected did or did not subsist after the passing of the order It was held in several cases that the attachment was not necessarily put an end to by reason of the order "striking off" the application and that it was a question of *intention* depending on the circumstances of each case as to whether or not it subsisted [3]

The present rule prescribes the procedure to be followed, where after attachment in execution the application for execution cannot further be proceeded with *by reason of the decree holder's default* [4] The object of the rule is —

(1) to put an end to the practice of disposing of execution applications by such orders as application struck off" or "lodged" [5] and,

(2) to remove the doubt that existed under the old Code as to the effect of an order of dismissal upon attachment, by providing in explicit terms that the attachment should cease upon the dismissal, *irrespective of any question of intention* [6]

Under the present rule, the Court should not "strike off" execution applications for default of the decree holder [7] If it does pass such an order, it will be deemed to be one of dismissal [8]

The provisions of this rule have been held to have no retrospective effect and do not apply to orders passed before the coming into force of the present Code [9]

2. "By reason of the decree-holder's default." — The default referred to by the rule is not confined merely to a default in appearance or in the payment of

Order 21 Rule 57 — Note 1

1. ('84) 10 Cal 416 (422)
('95) 18 All 49 (51)
('93) 15 All 84 (90 95)
2. ('93) 15 All 84 (95)

('37) 1937 Mad W N 480 (486)
5. ('19) AIR 1919 Lah 337 (339) 1919 Pun Re No 154

9. ('15) AIR 1915 Mad 1121 (1122)
('16) AIR 1916 Mad 390 (390)
('10) AIR 1910 Mad 1104 (1105)

process fees, or in production of documents It means failure to do what one is legally bound to do, that is, to go on with the application and have the property sold [1] Thus, an omission to serve notice on the judgment-debtor as required by Rule 66 of this Order,[2] or failure to furnish any information called for by the Court,[3] amounts to a default within the meaning of this rule Similarly, if the decree holder withdraws his application,[4] or requests the Court to strike it off,[5] or consents to an application for adjournment of the sale made by the judgment debtor,[6] he thereby precludes himself from proceeding with the execution application and the Court can dismiss the same for default under this rule But an omission to do anything which he is not under an obligation to do, such as not being present at the time of the sale, or his failure to bid at such sale, does not constitute a default[7] and, therefore, a dismissal of the application for want of bidders at the sale will not have the effect of putting an end to the attachment under this rule [8]

The default contemplated by this rule refers to a stage *after* the attachment and not *before* the attachment Applying this principle, the High Court of Madras has held in a case where, though there was an attachment, the parties as well as the Court were proceeding in ignorance of the attachment, as though there was none, the dismissal of the application at a stage when the Court thought that the attachment was yet to be effected, does not come within the scope of this rule [9] This view has also been followed by the Lahore High Court [10]

As to the effect of dismissal on a ground other than the default of the decree-holder, see Note 3 below

3. Effect of dismissal of application. — Where an execution application is dismissed for default of the decree holder under this rule, the attachment previously effected ceases forthwith [1] No question of any intention arises, under the present Code, a mistaken impression on the part of the decree-holder that the attachment continued notwithstanding the dismissal of the application or the fact that he prays for sale only of the attached property in a subsequent petition will not have the effect of nullifying the imperative provisions of this rule [2] The decree holder can only apply for a *fresh attachment* and then bring the property to sale, if he wants to proceed against that property [3]

Note 2

1. ('19) AIR 1919 All 194 (195, 196) 41 All 157.
('34) AIR 1934 Lah 395 (396)
('35) AIR 1935 Mad 17 (20)
('11) 9 Ind Cas 558 (560) 38 Cal 482
[illegible] 3 Lah 7.
[illegible] 23 Oudh
[illegible]
('34) AIR 1934 Lah 697 (698)
('38) AIR 1938 Bom 18 (20) I L R (1937) Bom 890

2. ('11) 9 Ind Cas 558 (560) 38 Cal 482
('13) 18 Ind Cas 441 (442) (Cal) (Proclamation not made)

[illegible]

6. ('23) AIR 1923 Pat 446 (447).

7. [illegible]

8 [illegible]
[**But see** ('33) AIR 1933 Rang 169 (171)]

9. ('23) AIR 1923 Mad 703 (705)

10. ('38) AIR 1938 Lah 728 (728, 729) (AIR 1938 Lah 123, Reversed)

Note 3

1 [illegible] 942 [illegible] ... n dismissal of execution application for default under this rule the execution proceedings come to a close and any intermediate order passed in the course of such proceedings becomes a nullity)]

2. ('15) AIR 1915 Mad 337 (337)

[illegible]

Where the Court passes an order "Petition dismissed, attachment to continue", what is the legal effect of the direction regarding the continuance of the attachment? On the one hand, the High Courts of Calcutta,[4] Lahore[5] and Madras[6] and the Judicial Commissioner's Court of Nagpur[7] have held that the direction is of no legal effect or consequence and that attachment ceases forthwith The High Court of Allahabad[8] has, on the other hand, held that the order though not a proper one, cannot be treated as a nullity having no effect upon the parties, but that it should be treated as an order adjourning the case *sine die* Under the rule as amended in Nagpur in 1930, the Court has power, while dismissing an application for execution, to continue the attachment [9]

The rule applies, in terms only to cases of dismissal by reason of the *decree holder's default* Where the dismissal is not due to the default of the decree holder, the question whether the attachment ceases by reason of the dismissal, depends upon the circumstances of each case [10] It has thus been held that where the dismissal is due to a mistake of the Court,[11] or in consequence of an order of stay,[12] or of injunction[13] passed by a competent Court, the attachment is not put an end to by reason of the order of dismissal But the Court has power *to direct* even in such cases by an *explicit order*, that the attachment should cease even though there is no default on the part of the decree holder [14]

4. Dismissal of application by Collector. — Where execution proceedings are transferred to the Collector he has power to dismiss the execution application for default *under this rule and upon such a dismissal the attachment ceases* [1]

5. Execution removed from file for statistical purposes. — As seen in Note 1 the Court should under this rule either dismiss or adjourn the application and not simply ' strike it off Even in cases to which the rule does not apply, there is no provision of law authorizing the Court to lodge an application or record it or strike it off from the file for what is commonly called statistical purposes [1] The proper course in such cases is to adjourn the application and not to strike it off the file Where the

4 (11) 9 Ind Cas 558 (560) 38 Cal 482
5 (38) AIR 1938 Lah 590 (592)
6 (30) AIR 1930 Mad 414 (415)
[**See however** (35) AIR 1935 Mad 17 (20) (One of the conditions in the instalment order under O 20 R 11, sub rule (2) being that the execution petition of the decree holder should be dismissed but that the attachment should ... under O 21 R 57)]
7 (29) AIR 1929 Nag 82 (83)
8 (25) AIR 1925 All 456 (456)
(22) AIR 1922 All 62 (63) 44 All 274
[**But see** (19) AIR 1919 All 194 (195, 196) 41 All 157]
9 (36) AIR 1936 Nag 277 (278) I L R (1939) Nag 316
10 (17) AIR 1917 Mad 705 (705)
(33) AIR 1933 Pat 609 (610)
(18) AIR 1918 Mad 1010 (1011)
(18) AIR 1918 Pat 599 (600) 3 Pat L Jour 310
(No default by decree holder—*Held* attachment ...

Note 4

1. (23) AIR 1923 Nag 18 (19)
(22) AIR 1922 Nag 267 (270) 18 Nag L R 152

Note 5

1. (26) AIR 1926 Mad 453 (454)

O 21 R 57
Notes 5-8

Court does however pass such an order as struck off or recorded or closed or consigned to the record room etc it would only amount to an adjournment *sine die* and the application will be deemed nevertheless to be pending [2] The removal for statistical purposes is not a judicial determination and no fresh application is necessary to continue the same [3]

6 Responsibility of sapurdar of attached property after dismissal for default — A *sapurdar* is responsible to the Court for the production of the property entrusted with him He cannot escape liability by pleading that owing to the decree holder s default the execution application was dismissed with the result that the attachment terminated under this rule and that therefore he handed over the property to the judgment debtor [1]

7 Revival of attachment, when possible — On the dismissal of an execution application for default the attachment ceases A revival of the execution proceedings for instance by an application for review does not operate to revive the attachment so as to prejudice the rights of a third party in the property acquired in the meantime [1] Thus if the judgment debtor transfers the property after an order of dismissal under this rule the transferee gets the property free from attachment [2] But where there is no question of prejudice to third parties the attachment can also be revived [3]

8 Attachment before judgment — There is a conflict of judicial opinion as to the effect of an order of dismissal of an execution application under this rule upon attachment effected *before judgment* The High Courts of Allahabad [1] Calcutta[2] and Patna[3] have held that the present rule applies only to cases where the property is *attached in execution of a decree* as the rule itself expressly states and that consequently the dismissal of an execution application for default does not put an end to the attachment before judgment A Full Bench of the High Court of Madras[4] and the Judicial

trained by temporary injunction—Petition recorded)
(30) AIR 1930 Mad 303 (305) (Petition recorded because appeal pending—Attachment not put an end to)
(28) AIR 1928 Mad 398 (399) (Petition closed—Must be deemed pending)
(30) AIR 1930 Lah 647 (651) (Sale stayed —

of the application)]
3 (20) AIR 1920 Mad 358 (358) (Limitation inapplicable to execution petition after struck off order)
(16) AIR 1916 Mad 937 (938) (Do)
(67) 9 Suth W R 205 (206)

Note 6

1 (19) AIR 1919 Lah 108 (108) 1919 Pun Re No 60

Note 7

Note 8

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Commissioner's Court of Nagpur[5] have, on the other hand, taken a contrary view According to them, the words "any property attached in execution of a decree" should be construed as meaning "where property has been in a state of attachment in execution" and the decree holder by electing to take the benefit of O 38 R 11 and proceeding to execute the decree without a fresh attachment is, in effect, asking the Court to treat the attachment as one in execution the attachment before judgment therefore ceases upon the dismissal of the application for execution The High Court of Bombay[6] has accepted the view of the Madras Full Bench but held that the dismissal of an execution application in relation to *moveable* property has not the effect of putting an end to an attachment of *immovable* properties

O. 21 R. 57 Notes 8-9

9. Default in executing attached decree. — See Note 11 to Rule 53 *ante*

Local Amendment

RANGOON

The following shall be inserted as Rule 57A

"57A A judgment-debtor may secure release of his attached property by giving security to the value thereof to the Court "

O. 21 R. 57A (Rangoon)

INVESTIGATION OF CLAIMS AND OBJECTIONS

O. 21 R. 58

R. 58. [S. 278.] *(1)* Where any claim is preferred[3] to, or any objection is made[3] to the attachment of, any property attached[7] in execution of a decree[2] on the ground that such property is not liable to such attachment,[4] the Court shall proceed to investigate the claim[20] or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit :

Investigation of claims to, and objections to attachment of, attached property.

Provided[21] that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it pending the investigation of the claim or objection.

Postponement of sale.

[1877, S 278; 1859, S. 246. See S. 47.]

Local Amendments

ALLAHABAD

Add the following words to sub rule (2)

'or may in its discretion make an order postponing the delivery of the property

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5. ('21) AIR 1921 Nag 57 (59) 17 Nag L R 121
('22) AIR 1922 Nag 81 (81)

6. ('31) AIR 1931 Bom 550 (554) 55 Bom 603 (Affirming AIR 1929 Bom 371)
('29) AIR 1929 Bom 321 (322, 323) 53 Bom 543.

O. 21 R 58 after the sale pending such investigation And in no case shall the sale become absolute until the claim or objection has been decided

CALCUTTA

Add the following words at the end of sub rule (2)

upon such terms as to security or otherwise as to the Court shall seem fit

LAHORE

Add the following to proviso under sub rule (1)

and that if an objection is not made within a reasonable time of the first attachment the objector shall have no further right to object to the attachment and sale of the same property in execution of the same decree unless he can prove a title acquired subsequent to the date of the first attachment

NAGPUR

In sub rule (2) *after* the word objection where it occurs for the second time *insert* the following words

or where the property to be sold is immovable property the Court may in its discretion direct that the sale be held but shall not become absolute until the claim or objection is decided

OUDH

Add the following words to sub rule (2)

or may in its discretion make an order postponing the delivery of the property after the sale pending such investigation And in no case shall the sale become absolute until the claim or objection has been decided

PATNA

Substitute the following for Rule 58

58 (1) When any claim is preferred to any property the subject matter of the execution proceedings or any objection is made to the attachment thereof on the [illegible] which is not bound under the decree [illegible] the Court shall proceed to investigate [illegible] ards the examination of the claimant or objector and in all other respects as if he was a party to the suit

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed

(2) Where the property to which the claim or objection applies has been advertised for sale the Court ordering the sale may in its discretion make an order postponing the delivery of the property after the sale pending the investigation of the claim or objection And in no case shall the sale become absolute until the claim or objection has been decided

Synopsis

1 Investigation of claims and objections
- 2 Attachment before judgment See Note 6 to Rule 63

3 [illegible]
- 4 [illegible]
- 5 [illegible]
- 6 Burden of proof is on claimant to establish possession in himself

7 Any property attached
- 8 Claim to debts attached in execution
- 9 Claim to decree attached in execution
- 10 Claim to property seized by receiver
- 11 Claims to properties ordered to be sold under a mortgage decree
- 12 Claim to property attached in execution of rent decree
- 12a Property attached in execution of decree in favour of company in liquidation—Claim to such property

13 Who can prefer claim
- 14 Parties and representatives
- 15 Trustees and shebaits
- 16 Claim by Official Receiver or Official Assignee
- 17 Claims by third persons
- 18 Claims by transferee of property from the judgment debtor
- 19 Assignee of decree from the judgment debtor
- 19a Objection by tenant of judgment debtor See Notes to O 21 R 61

1. Investigation of claims and objections. — Where property is attached in execution of a decree, it is possible that third parties, or even the parties themselves, have objections to such attachment being made Where a *party or his representative* has any such objection, the question is one falling also within Section 47 and therefore must be decided by the Court *executing* the decree and *not by a separate suit*[1] The enquiry under that Section is a *full* enquiry and the determination of the question after such enquiry amounts to a *decree*[2] The remedy of the party aggrieved by the order is by way of appeal[3] On the other hand, where a *third party* has a claim or an objection to the attachment of property attached in execution of a decree, there are two courses open to him He may straightway file a *suit* claiming the appropriate relief, or he may file an *application* under this rule to the Court executing the decree But he cannot prefer an *appeal* against the order of attachment[4] He is not *bound* to prefer a claim or an objection under this rule[5] The reason is that the remedy provided by this rule is a *summary and concurrent* remedy provided with the object of securing a speedy settlement of title raised at execution sales,[6] and, as has been seen in Note 63 to

Order 21 Rule 58 — Note 1

1 [illegible] 47

('29) AIR 1929 Pat 141 (142) 8 Pat 717 (Objection by defendant against whom suit was dismissed falls under Section 47)

must be deemed a party within S 47)

only legal representatives but also representatives-in interest—Objection by representative in inte-

See also the following cases
('95) 17 All 215 (250) (Objection by judgment debtor's representative that attached property is his own)
('09) 2 Ind Cas 432 (432) (Mad) (Judgment debtor's representative claiming charge on land sold in execution)
('17) AIR 1917 Mad 168 (169) (Claim preferred by legal representative)
('29) AIR 1929 Oudh 21 (21) (Objector legal representative of deceased judgment debtor)
('27) AIR 1927 Lah 905 (906) (Objection by transferee from judgment debtor — *Held* to fall under S 47)
('87) 10 Mad 117 (121)
('01) 24 Mad 658 (659)
('07) 30 Mad 215 (216)
('26) AIR 1926 Oudh 64 (64) (Objection by *pro forma* defendant falls under S 47)
[But see ('39) AIR 1939 Pat 354 (356) (Repre

2 [illegible]
Court cannot shut out any party from producing evidence)
3. See Note 84 to Section 47.
4. ('37) AIR 1937 Lah 313 (313)
5. ('13) 18 Ind Cas 949 (951) 40 Cal 598 40 Ind App 56 (P C) (The remedy under this rule

6 [illegible]
('85) 11 Cal 673 (679)

O. 21 R. 58
Notes 1–4

Section 9, *ante*, the existence of such a remedy does not bar a regular suit or other available remedy to the party aggrieved[7] Where such third party prefers a claim under this rule the enquiry is only a *summary investigation* and not a full trial of the issues between the parties[8] The party aggrieved by an order passed after such investigation should file a suit under Rule 63 within one year thereof for setting aside the order

Where a decree holder applies for the attachment of a certain property as belonging to the judgment debtor, it is not for the Court to anticipate proceedings under this rule and refuse to order attachment on the ground that the property does not belong to the judgment debtor[9]

As seen in Note 2 to Section 70, a Collector to whom the execution of a decree has been transferred has no power to inquire into objections to attachment under this rule[10]

This rule and Rule 63 do not apply to the Vizagapatam Agency Tracts[11]

2. Attachment before judgment. — See Note 6 to Rule 63

3. "Where any claim is preferred to or any objection is made" — The rule is very wide and comprises claims of *third* parties whether put forward by themselves or on their behalf by the parties to the suit or their representatives[1]

See also the undermentioned case[2]

4 "On the ground that such property is not liable to such attachment." — The rule pre supposes the *existence of an attachment* and the ground of the application is that the property is *not liable* to attachment[1] Where there is *no attachment* at all, an objection under this rule is incompetent[2] Nor can the objector prefer an application under this rule merely on the ground that he has not been made a party to the execution proceedings[3] It has been held by the High Court of Allahabad[4] that the words 'on the ground that such property is not liable to attachment' have reference merely to a case where an *objection is made to an attachment* and not to a claim preferred to the property The High Court of Madras[5] has also held that it is open to a claimant to put forward his claim under this rule on the ground that the Court which passed the decree had no *jurisdiction* to pass it or that the Court which executes the decree has

[See however (35) AIR 1935 All 183 (185) (Procedure to be followed is not a summary procedure)]

7

(27) AIR 1927 Mad 37 (38) (Omission to take action under O 21 R 58 by withdrawing claim does not bar action under Rule 69))

8 (20) AIR 1920 Mad 187 (189)
(26) AIR 1926 Nag 197 (198)

9 (35) AIR 1935 Lah 114 (114 115) (If the decree holder misused his powers he is liable to pay damages and costs and that is a sufficient guarantee against a frivolous application by the decree holder)

10 (36) AIR 1936 Bom 227 (231) 60 Bom 516

11 (16) AIR 1916 Mad 4 (5)
(22) AIR 1922 Mad 271 (272) 46 Mad 35

Note 3

1 (99) 23 Mad 195 (202) (FB)

2 ('33) AIR 1933 Sind 126 (127) (Decree holder not objecting to oral objections to attachment —He cannot subsequently urge that no written application was submitted)

Note 4

1 (23) AIR 1923 Bom 381 (382)
(24) AIR 1924 Mad 889 (889)

no jurisdiction to do so or that the attachment made is not legal or valid[6]

But it is not open to a claimant to attack the *validity* of the decree[7] or the decree holder's *right to execute* the same, it is thus not open to him to plead that the execution application is barred by limitation[8]

5. Objections raised after sale. — It has been held by the High Courts of Calcutta, Lahore, Patna and Rangoon and the Judicial Commissioner's Court of Peshawar that a Court has no jurisdiction to entertain a claim under this rule after the execution sale has taken place[1] The reason is that the attachment is *ipso facto* determined after the sale has taken place[2] But the High Courts of Madras and Nagpur and the Judicial Commissioner's Court of Sind have expressed the view that a claim can be preferred after court auction sale but before confirmation of the same, on the ground that the attachment subsists till the confirmation of the sale[3] The Patna High Court[4] has also held in a recent case that under the amendment of the rule by that Court, a Court can deal with a claim petition under Rule 58 even after a sale has taken place provided that it has not been confirmed The amendment of the rule by the Allahabad High Court also contemplates that an objection under this rule can be dealt with after an execution sale but before its confirmation[5]

An objection by a *party* to the suit or his representative falls under Section 47 and can be raised even after the sale[6]

6. Burden of proof is on claimant to establish possession in himself. — Rule 59 prescribes that the claimant must adduce evidence to show that on the date of the attachment he had some interest in, or was possessed of, the property attached The burden of proof is therefore clearly upon the claimant or objector to establish possession in himself[1]

7. Any property attached. — The rule applies to *any* property attached in execution of a decree Thus it will include a claim to moveables,[1] or to a fractional share of the immovable property attached,[2] or to a share of the moveables seized in

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6 ('27) AIR 1927 Mad 450 (455)
7 ('35) AIR 1935 Lah 549 (550) (Mortgage de [illegible] was not liable to sale in execution)
('39) AIR 1939 Pat 430 (432) (Question of justification for decree cannot be gone into in suit under O 21 R 63)
8 ('21) AIR 1921 Pat 311 (311)
('29) AIR 1929 Rang 152 (152, 153) 7 Rang 132

Note 5

1 ('26) AIR 1926 Cal 468 (468)
('12) 15 Ind Cas 53 (53) (Cal)
('69) 11 Suth W R 54 (55)
[illegible]
('37) AIR 1937 Pesh 90 (91) (Order rejecting such objection is not conclusive)
('37) AIR 1937 Pesh 97 (99)
[illegible] (497)
4. ('39) AIR 1939 Pat 430 (431) 1939 Pat W N 229 (230)
5 ('39) AIR 1939 All 598 (599) 1939 All L Jour 622 (623)
6 ('37) AIR 1937 Pesh 82 (83) (Widow of deceased judgment debtor added as legal representive can object that property attached and sold is her dower property)

Note 6

[illegible] ment debtor is on decree-holder)

Note 7

[illegible]

O.21 R.58
Notes 12a-14

motion and the person preferring the objection is merely in the position of a defendant defending a suit

13 Who can prefer claim — All persons who at the date of the attachment have some interest in or are possessed of the property attached can prefer a claim under this rule[1] (see Rule 59) Thus an objection by a person who *subsequent* to the attachment purchases the property in execution of another decree is not one within this rule[2] The Court has however inherent power to deal with such an objection[3]

In the undermentioned case[4] where certain post office cash certificates standing in the name of a person were attached in execution of a decree it was held that an objection by the Postmaster General having custody of the cash certificates came within this rule It has also been held that an objection taken by the Secretary of State for India to whom notice is issued under O 21 R 48 for the attachment of the salary of a Government servant, comes under this rule[5]

A co operative society has an interest in the shares of a member as these shares form part of its capital Hence where these shares are attached in execution of a decree against the member the society has *locus standi* to object to the attachment under this rule[6]

There is a difference of opinion as to whether an application by a mortgagee praying that the sale may be subject to his mortgage is one falling under Rule 66 or under this rule See Note 2 to Rule 62

As to whether a usufructuary mortgagee can make a claim under this rule see Rule 62 *infra*

14 Parties and representatives — It has been seen in Note 46 to Section 47 that objections to attachment raised by parties or their representatives *as representing third parties or as trustees* are really objections by third parties and do not fall within the scope of Section 47 Such objections will therefore have to be decided under the provisions of Rules 58 to 63[1] Thus, a claim by the *karnavan* of a Malabar *tarwad* that the whole of the *tarwad* property is not liable to attachment in execution of a personal decree against him falls under this rule[2]

A a Hindu debtor dies leaving *B* a daughter, and *C* a daughter s son *A* s

Note 13

1 (34) AIR 1934 Pat 511 (511 512) 13 Pat 765 (Where the interest of a claimant accrued after the attachment which was effected he cannot come under Rule 58)
(38) AIR 1938 Lah 677 (678) (Occupancy rights of judgment debtor attached — Landlord has sufficient interest in the property to entitle him to prefer objection)
2 (34) AIR 1934 Pat 511 (512) 13 Pat 765 (*Dismissal of objection on ground of claimant not having any interest in the attached property at the date of the attachment does not affect the claimant s title as the order does not come under O 21 R 63*)
(35) AIR 1935 Nag 171 (172) 31 Nag L R 301
(39) AIR 1939 Lah 380 (381) 41 Pun L R 305 (0)
3 (35) AIR 1935 Nag 171 (172) 31 Nag L R 301
(39) AIR 1939 Lah 380 (381)
4 (38) AIR 1938 Cal 445 (445)
5 (36) AIR 1936 Lah 761 (762)
6 (39) AIR 1939 Lah 305 (306)

Note 14

1 *See the cases cited in Note 46 to Section 47 and the following cases*
(85) 7 All 547 (549 550)
(01) 23 All 263 (265)
(89) 4 All 190 (192) (Decree against firm—Claim by a partner that property attached is his private property — Falls under this rule)
(36) AIR 1936 Pat 256 (257) (Above rule not confined to cases where objection is made by shebait mutawalli or trustee — Judgment debtor *objecting that property in his possession* —*Objec*... *e against* one member of a firm and attachment — Other members claim is one under this rule)]
2 (1900) 10 Mad L Jour 85 (86)
(16) AIR 1916 Mad 789 (789)

creditor sues C alone and obtains a decree against A s assets in his hands In execution of the decree property in the hands of B (the daughter) is attached as being the assets of the deceased B objects on the ground that the property is her personal property and does not form part of the assets of the deceased It was held that B s objection was one by a *stranger* and as such came within this rule and not under Section 47 [3] See also Notes 45 and 46 to Section 47 **O 21 R 58 Notes 14–17**

15 Trustees and shebaits — On the same principle as discussed in Note 14 above a personal decree against a trustee or *shebait* does not estop him from asserting the claim of the beneficiary or of the charitable institution under this rule when the latter s property is attached in execution [1] Thus where A in execution of a decree for money against B personally attaches and proceeds to sell property of which B alleges that he is in possession not in his own right but as *shebait* of a deity to whom the property has been dedicated B s claim will fall under this rule [2]

See also Note 46 to Section 47 and the cases cited therein

16 Claim by Official Receiver or Official Assignee — If the vesting order takes place before attachment the Official Receiver can prefer a claim under this rule [1] But if the vesting order is subsequent to the attachment then the claim of the Official Reciever does not fall under this rule but is a statutory claim under Section 51 of the Provincial Insolvency Act which should be dealt with under Section 151 of the Code Articles 11 and 13 Limitation Act do not apply to the latter class of cases [2]

See also Note 93 to Section 47

17 Claims by third persons — The procedure under this rule applies as has been seen in Note 1 *ante* only to claims of *third* persons [1] Pending suit by a creditor against his debtor s estate the Administrator General was authorized to collect the debts due to the deceased debtor The creditor on obtaining decree in his suit

[See however (04) 14 Mad L Jour 187 (188)]
3 (32) AIR 1932 All 263 (264)
[*See also* (38) AIR 1938 Na 321 (3?2)
(Decree against sons as legal representatives of the deceased — W do not in pleaded—Objection by w dow)]

Note 15
1 (13) 21 Ind Cas 748 (748) (Mad)
(88) 15 Cal 329 (340) 15 Ind App 1 (PC)
(04) 28 Bo 4 8 (400)
(19) AIR 1919 Cal 215 (246 247) 46 Cal 877
(15) AIR 1915 Cal 275 (276)

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Note 16
1 (36) AIR 1936 Cal 5 3 (574) I L R (193) 1 Cal 964 (Officel Receiver not representative of sol e t judgment d btor)
(35) AIR 1935 Mad 151 (15?) 58 Mad 403 (In such case Offcial Receiver does not act as representative of judgment d b or b t of the cred tors)
(36) AIR 1936 S nd 2 (3) 30 S nd L R 288

under th s ru)
2 (22) AIR 1922 Mad 189 (190 191) 45 Mad 70
See also the following cases
(85) 7 All 752 (755)
(96) 21 Bom 205 (216)
(96) 20 Bom 403 (406)
(01) 29 Cal 428 (432) (FB)

him S 47 does not apply — It is claim under O 21 R 58 and as such order on such application is not appealable)

Note 17
1 (85) 7 All 365 (366)
(9?) 16 Bom 700 (02) (As to form of application under the old Code)
[*See* 2 Ind Jur (N S) 339]

O.21 R.58
Notes 17-20

attached a debt due to the deceased It was held that the Administrator General was entitled to make a claim under this rule and have the attachment raised[2]

See also Note 13 above

18. Claims by transferee of property from the judgment-debtor — A transferee of property attached in execution of a decree is entitled to object under this rule to the attachment made subsequent to his transfer[1] A simple mortgagee can also prefer a claim under this rule[2] See also Notes under Rule 62

19. Assignee of decree from the judgment-debtor — The transferee of a decree from the judgment debtor can put in an application under this rule to remove an attachment of the decree made subsequent to the transfer[1]

19a Objection by tenant of judgment-debtor. — See Notes to O 21 R 61

20 "Shall proceed to investigate the claim" — It is the duty of the Court to investigate a claim preferred to it under this rule[1] unless it sees reason to reject it on the ground of delay It ought not without investigation simply *notify the claim* in the sale proclamation[2] although if the Court does pass such an order, it is not invalid and will be conclusive until set aside by a suit under Rule 63[3] Similarly the Court should not reject a claim without investigation merely on the ground that the question of possession or title is doubtful or complicated[4] In the undermentioned case[5] it was held by the Madras High Court that an order for merely notifying a claim does not preclude the executing Court from subsequently investigating the claim on the merits See also Note 5 to Order 21 Rule 63

As pointed out by Lord Hobhouse in delivering the judgment of the Board in *Sardhari Lal* v *Ambika Prasad*[6]

> The Code does not prescribe the extent to which the investigation should go and though in some cases it may be very proper that there should be as full an investigation as if a suit were instituted for the very purpose of trying the question in other cases it may also be the most prudent and proper course to deliver an opinion on such facts as are before the Subordinate Judge at the time leaving the aggrieved party to bring the suit which the law allows to him

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2 ('99) 23 Bom 428 (430)

Note 18

1 ('26) AIR 1926 All 244 (245)
('67) 8 Suth W R 378 (379)
('17) AIR 1917 Mad 4 (5) (Attachment of pro

[See ('39) AIR 1939 Nag 183 (186) I L R (1939) Nag 548 (Transferee subsequent to attachment cannot claim under this rule he being bound by decree and being thus a representative of a

Note 19

1 ('28) AIR 1928 Rang 25 (26) 5 Rang 595
(1900) 10 Mad L Jour 116 (117)

Note 20

1 ('67) 8 Suth W R 26 (27)
('33) AIR 1933 Lah 421 (421) (Court should not allow claim hastily without investigation)
(1865) 4 Suth W R 35 (35)
('35) AIR 1935 All 183 (185) (Court cannot shut out any party from producing evidence)
('35) AIR 1935 Rang 207 (208) (Claimant setting up mortgage — Executing Court should inquire into existence and genuineness of mortgage— Merely leaving it to bailiff to make intimation to bidders that there was a claim of mortgage is not enough)

2

(FB) (Per Seshagiri Ayyar J)
('24) AIR 1924 Mad 147 (148) (AIR 1919 Mad 738 (FB) Followed)
('26) AIR 1926 Mad 216 (217)
('23) AIR 1923 Mad 295 (295)

3 ('19) AIR 1919 Mad 738 (742) 41 Mad 965 (FB)

It is not possible to define the amount of enquiry which constitutes an investigation. If the order purports to deal with the merits it must be taken that there has been an investigation [7]

What is to be investigated is indicated by the next three following rules, *viz*, Rules 59 to 61 The question to be decided is, whether on the date of the attachment the judgment-debtor or the objector was in possession and where the Court is satisfied that the property was in the possession of the objector, it must be found whether he held it on his own account or in trust for the judgment debtor [8] The sole question to be investigated is, thus, one of possession [9] Questions of *legal right* and *title* are not relevant, except so far as they may affect the decision as to whether the possession is on account of or in trust for the judgment-debtor or some other person [10] To that extent the title may be part of the enquiry But ultimate questions of trust,[11] or complicated questions like the *benami* nature of a transaction,[12] are not within the scope of the enquiry and are not intended to be gone into As pointed out by Mr. Justice Sadasiva Ayyar in *Ramaswami Chetty* v *Mallappa*[13].

> "In summary proceedings held in accordance with certain statutory provisions intended for speedy disposal of 'emergent' disputes, the Court may be prohibited from going into complicated questions of title or investigating complicated questions like fraud, trust and so on, while giving the party defeated in the summary enquiry, the right to have the whole matter and all the questions which are in dispute fully investigated in an ordinary regular suit . The Court is bound to order the release of an attached property if it finds possession in the claimant on his own account *even if there is title and disposing power remaining in the judgment debtor*"

The High Court of Allahabad[14] has however held that it cannot be said that the Court acts without jurisdiction if it does not go into the question of possession but decides the claim on some other basis Similarly, where the claimant adduced no

7. ('06) 29 Mad 225 (227)
('17) AIR 1917 Oudh 99 (101) 19 Oudh Cas 357 (Order passed on a perfunctory investigation is an operative order)

8. ('29) AIR 1929 Pat 278 (274)
('20) AIR 1920 Mad 748 (753) 43 Mad 760 (FB)
('39) AIR 1939 All 117 (119)
('35) AIR 1935 Pat 267 (268) (For this purpose, it is often necessary to go into the question if objector s possession was the result of a purchase and whether the purchase was a benami purchase or not)

9. ('31) AIR 1931 Lah 666 (666)
('02) 29 Cal 543 (546)
('15) AIR 1915 Cal 116 (117)
('28) AIR 1928 Mad 163 (163)
('27) AIR 1927 Nag 286 (288)
('29) AIR 1929 Nag 66 (67)
('26) AIR 1926 Nag 197 (198)
('22) AIR 192? Low Bur 16 (16) (Court should not go into the question whether possession is [illegible]

10. [illegible]
necessary)
('37) 1937 Mad W N 320 (320)
('30) AIR 1930 Rang 395 (396) (If necessary, Court can go into question of validity of registered or other document)
('34) AIR 1934 Rang 212 (213)
('35) AIR 1935 Pat 267 (268) (Possession of claimant as a result of purchase from judgment-debtor — Inquiry whether purchase is benami [illegible]

11 ('24) AIR 1924 Cal 744 (748) 51 Cal 548
('87) 14 Cal 617 (620)

12. ('24) AIR 1924 Pat 506 (507).
('29) AIR 1929 Pat 273 (274).
('36) AIR 1936 Bom 160 (162) 60 Bom 226.
[But see ('73) 20 Suth W R 202 (202)]

13. ('20) AIR 1920 Mad 748 (756) · 43 Mad 760 (F B)
[*See also* ('02) 29 Cal 543 (546) (Observations to the same effect)]

14. ('12) 14 Ind Cas 790 (792) : 34 All 865.

O.21 R 58
Notes 20-23

evid ence as to possession[15] or where the title of the claimant had been expressly negatived in a prior litigation to which he was a party[16] it was held that the Court rightly decided the claim on the basis of title alone

21. Proviso — If the Court is of opinion that the application preferred under this rule has been designedly or unnecessarily delayed it can refuse to investigate it But the Court cannot dismiss a claim petition under this rule on the ground of delay, without giving an opportunity to the claimant or his counsel to explain the delay and without considering the explanation that might be so offered[1] If the Court does entertain the claim and investigate the same it is bound to pass an order under Rule 60 or Rule 61 A dismissal on the ground of delay *after* investigation is illegal[2]

It has been held that an order rejecting a claim on the ground of delay has also to be set aside by a regular suit within one year from the date of the order Otherwise the order is conclusive within the meaning of Rule 63[3] But there is a conflict of decisions as to whether an order passed without investigation falls under Rule 63 See Note 5 to Rule 63

In the case of an attachment before judgment a claim or objection under this rule need not be preferred before a decree is passed in the suit a claim or objection preferred within a reasonable time after an application for execution is made by the decree holder cannot be considered to be unnecessarily delayed[4]

22 Dismissal for default — See Note 4 to Rule 63

22a Reference to arbitration — An objection under this rule is a *proceeding in execution* Hence Section 141 of the Code does not apply to such an objection Consequently Schedule II of the Code also does not apply to such an objection and so the Court has no power to refer it to arbitration[1]

22b Transfer of proceedings under this Rule — An objection under this rule can only be decided by the executing Court Hence a transfer to another Court of such an objection alone without transferring the execution proceedings also is not according to law[1]

23 Effect of order — Res judicata — An order passed on a claim petition disallowing the claim bars on general principles of *res judicata* a fresh application on the same grounds[1] and is conclusive between the parties subject to the result of suit contemplated by Rule 63 On the same principle a defeated claimant is not entitled to apply under O 21 R 100 *infra* the reason being that the scope of an enquiry under Rule 100 is the same as that of an enquiry under this rule[2] So also where a claim

15 ('17) AIR 1917 Mad 311 (311)
16 ('17) AIR 1917 Low Bur 79 (80)

Note 21

1 ('33) AIR 1933 All 751 (751)
('37) AIR 1937 Oudh 268 (269) 13 Luck 111
2 ('18) AIR 1918 Upp Bur 32 (32) 2 Upp Bur Rul 136
('17) AIR 1917 Cal 9 (10) (Proviso applies even to cases where Court has become possessed of the property attached by usurpation of authority)

1 Nag L R

Note 22a

1 ('36) AIR 1936 All 378 (380) 59 All 79

Note 22b

1 ('38) AIR 1938 Lah 95 (96)

Note 23

2 ('33) AIR 1933 Cal 233 (234)
('35) AIR 1935 Pat 122 (123)
('35) 158 Ind Cas 338 (338) (Pat)
[*See also* ('34) AIR 1934 Lah 193 (194) (Petitioner s father s claim under this rule dismissed and order becoming conclusive—He cannot object under R 97)]

under this rule is rejected the claimant cannot raise the same question by way of defence to a suit for possession by the auction purchaser [3]

But the order passed in a claim proceeding is only *quoad* the particular claimant or the particular property attached and cannot be regarded as a general decision enuring to the benefit of others who are not parties thereto [4] Thus, an order in favour of one of several decree holders disallowing a claim cannot be availed of in favour of the other decree holders who are not parties to the claim [5] *A* in executing a decree against *B* attaches certain properties and *C* prefers a claim thereto *C s* claim is dismissed and he does not file a suit under Rule 63 *A* purchases the property in court auction in execution of his decree and gets delivery of possession by dispossessing *D*, who is a *bona fide* court auction purchaser of *C s* interest in execution of a decree against him *D* is not barred from applying under Rule 101 for restoration of possession of which he was dispossessed by reason of the fact that *C* became concluded by the order against him in his application under this rule [6] But where a claim under this rule has been disallowed and the order disallowing the claim has not been set aside by a suit under Rule 63, it has been held that a person holding a decree against the defeated claimant and seeking to attach the property in execution of his decree will be bound by the previous order dismissing the claim of his judgment debtor [7] Where a claim is preferred by the manager of the Court of Wards on behalf of a minor ward without the sanction of the Court of Wards, the order disallowing the claim is not binding on the minor ward [8]

In execution of a decree by *A* against *B*, *C* prefers a claim on the basis of a transfer of the property (which has been attached) in his favour by the judgment-debtor The claim is upheld *A* does not get the order upholding the claim set aside by a suit under Rule 63 Then *B* is declared an insolvent and in the insolvency proceedings *A* applies for the annulment of the transfer in favour of *C* The application is not barred The reason is that in the execution proceedings *A* was acting on his own behalf, but in the insolvency proceedings he acts in a representative capacity on behalf of all the creditors of the insolvent generally [9]

Where on a claim by a third party that he is the owner of a property attached in execution of a decree against another, the attachment is set aside on that ground, the decision that the third party is the owner of the property is not binding on the judgment debtor But if the judgment debtor has appeared and opposed the claim and the matter is decided, the decision may be binding on him [10]

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3 ('35) AIR 1935 Cal 500 (50?) (Claimant asserting his own title to the property — Claim dismissed — Suit for possession by auction purchaser — Defence by defeated claimant on same ground is barred)
('35) AIR 1935 Rang 161 (162)
[**See however** ('39) AIR 1939 Mad 456 (461) I L R (1939) Mad 803 (SB) (Though dismissal of claim is based on finding that claimant was not in possession of the attached property adverse possession from before attachment can be relied on by claimant when he is sued for possession by auction purchaser)]

4 ('67) 8 Suth W R 27 (28)
('74) 21 Suth W R 230 (231)
('66) 6 Suth W R 157 (157)
('02) 25 Mad 721 (723)
('92) 15 Mad 477 (479)

5 ('96) 18 All 413 (413)

7. ('36) AIR 1936 All 722 (723) (A I R 1935 All 688, Relied on)

8 ('99) 27 Cal 242 (252 253)

9 ('35) AIR 1935 Mad 670 (671)

10 ('39) AIR 1939 All 723 (?29)

23a Proclamation of sale pending claim petition. — A Court cannot order the issue of a proclamation of sale while a claim petition is pending [1]

24 Appeal — No appeal lies against an order allowing or rejecting a claim under this rule The order is *conclusive* subject to the result of the suit contemplated by Rule 63 [1] Under the special provisions of the Agra Tenancy Act 1926 such an order passed by an Assistant Collector Second Class is however appealable to the Collector but the party aggrieved by the appellate order of the Collector is not barred from filing a suit under O 21 R 63 [2] There is a conflict of opinion as to whether an order dismissing a claim petition is a judgment within the meaning of Clause 15 of the Letters Patent and is appealable as such According to the High Court of Madras[3] it is a judgment and is appealable as such and the period of limitation for the suit under Rule 63 runs from the date of the appellate order The High Court of Rangoon[4] has on the other hand held that the refusal of the summary remedy under O 21 R 58 leaves open the right of bringing a regular suit and have the question finally decided and that it cannot therefore be a judgment within the meaning of Clause 13 of the Letters Patent (Rangoon) The High Court of Calcutta[5] has held without deciding whether the order is a judgment or not that the concluding words of Rule 63 *infra* preclude an appeal from the *order*

order passed thereon is a
dec described as one under
O with it as such [6]

25 Revision — See Notes 8 11 and 23 to Section 115 *ante* and the cases cited below [1]

Note 23a

1 (40) AIR 1940 Mad 6 (7) 1939 Mad W N 776 (776)

Note 24

1 (23) AIR 1923 All 292 (92)
(32) AIR 1932 All 263 (264)
(82) 4 All 190 (191 192)
(80) 2 All 52 (753)
(86) 1886 All W N 39 (40)
(88) 1888 All W N 77 (78)
(04) 28 Bom 458 (460)
(1900) 2 Bom L R 241 (242)

3 (0) 25 Mad 555 (559)
(16) AIR 1916 Mad 883 (884) 39 Mad 1196
Note The corresponding Clause in the Letters

25 AIR 025 02 05

later sue under O 21 R 63)
(39) AIR 1939 Lah 207 (208) (Person added as
1

fendant against whom suit was dismissed comes under Section 47)

Note 25

1 (87) 9 All 232 (233 234) (Refusal to entertain claim—Revision lies)

1

(decree holder s prayer to attach property of judg

R. 59. [S. 279.] The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached. **O. 21 R. 59**

Evidence to be adduced by claimant.

Local Amendment

PATNA

Substitute the following *for* Rule 59

"59 The claimant or objector must adduce evidence to show that at the date of the decree or of the attachment as the case may be, he had some interest in, or was possessed of, the property in question

Synopsis

1 The claimant or objector must adduce evidence
2 "Some interest"
3 "Or was possessed of"
4. Limits of enquiry under Rules 59 to 61 See Note 20 to Rule 58

1. The claimant or objector must adduce evidence. — The burden is on the claimant to prove that on the date of the attachment he was in possession of the property attached [1] If he proves that, then the burden of proving that he is not the owner or holds it in trust for the judgment debtor is upon the decree holder [2]

2. "Some interest." — The claimant may raise an objection not only on the ground that he is in possession of the property attached but also on the ground that he has some interest in the property [1] A beneficial interest is as much an interest within the meaning of the rule as a legal interest in the property attached [2] The Upper Burma Judicial Commissioner s Court[3] has held that a mortgagor without possession can prefer a claim on the ground that his interest in the property, *viz*, the equity of

ment debtor without adequate reasons by allowing objections of third party before attachment is effected — High Court should interfere in revision)
(33) AIR 1933 Lah 421 (421) (Allowing claim without investigation—Revision will lie)
(33) AIR 1933 Pat 158 (159)
(33) AIR 1933 Rang 259 (260) (Wrong order on claim petition—There can be no defence to suit under Rule 63—In such a case High Court may interfere in revision)
(29) AIR 1929 Pat 751 (752) 9 Pat 647 (Not deciding question of possession—Revision lies)
(34) AIR 1934 Lah 176 (176) (Objection rejected treating the decree wrongly as a mortgage decree —Revision lies)
(36) AIR 1936 Lah 761 (762) (Revision does not lie)
(37) AIR 1937 Oudh 268 (269) 13 Luck 111 (No opportunity given to explain delay — Revision lies)
(34) AIR 1934 Rang 230 (230) (No revision lies

sion lies)
(36) AIR 1936 Rang 306 (308) 14 Rang 516 (Failure to make enquiry into the question of title when it was necessary—Revision lies)

Order 21 Rule 59 — Note 1

1. (69) 2 Beng L R 91 (102) (FB) (Per Peacock, C J)

2 (03) 2 Low Bur Rul 152 (155, 158)
(33) AIR 1933 Oudh 473 (474)
(37) AIR 1937 Cal 639 (640)

Note 2

1 [illegible]

redemption cannot be attached and sold in execution of a decree against the mortgagee in possession

The rule does not mean that if the claimant establishes that he has some interest in the property he is entitled to succeed irrespective of the question of possession nor does it imply that if he fails to establish the particular interest he sets up his claim must be disallowed irrespective of the question of possession In each of the cases mentioned in Rules 60 and 61 the Court must determine the question of possession of the judgment debtor and cannot base its decision merely on the question of validity of the claim or of title to the attached property The expression some interest means such interest as would render the possession of the judgment debtor possession not on his account but on account of or in trust for the claimant [4]

X advances money to A in order that A may advance it to B and B executes a mortgage in favour of A for the money A then sues B on the mortgage and gets a decree X has no interest in the decree and is therefore not entitled to object to the attachment of the decree [5]

An attachment of property does not by itself create any interest in the property in favour of the person at whose instance the attachment is made Hence the mere fact that a person has already attached the property will not entitle him to raise an objection under this rule [6]

See also Note 13 to Order 21 Rule 58

3. "Or was possessed of" — These words are not restricted merely to tangible or physical possession but include *constructive* possession and possession in law of debts and other intangible property [1]

4 Limits of enquiry under Rules 59 to 61. — See Note 20 to Rule 58

O. 21 R. 60

R. 60. [S 280] Where upon the said investigation the Court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on

Release of property from attachment

4 (15) AIR 1915 Cal 116 (117)
(33) AIR 1933 Nag 297 (298) [illegible]

may advance it to B X does not thereby obtain any rights in the bond that may be executed by B in favour of A)

6 (35) AIR 1935 Nag 171 (172) 31 Nag L R 301

Note 3

1 (04) 27 Mad 67 (70) (FB)
(07) 4 Low Bur Rul 289 (290)

account of some other person, the Court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment

[1877, S. 280; 1859, S. 220 See S. 63]

Local Amendment

PATNA

Substitute the following *for* Rule 60

"60 Where upon the said investigation the Court is satisfied that for the reasons stated in the claim or objection such property was not, at the date of the decree, or when attached, as the case may be, in the possession of the judgment debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall make an order releasing the property, wholly or to such extent as it thinks fit, from the execution proceedings, or from attachment

Where the property has been sold, such order shall have the effect of setting aside the sale , and if it has been purchased by a third party in good faith, the Court may make such order for his compensation by the decree holder or objector, to an extent not exceeding 12½ per cent of the purchase price, as it thinks fit '

Synopsis

1. Release of property from attachment — General. — A release from attachment can be made under this rule, only if the conditions prescribed in this rule are satisfied, namely—

(1) That the property was not, when attached, in the possession of the judgment-debtor or of some person in trust for him or in the occupancy of a tenant paying rent to him

(2) That the property being in the possession of the judgment debtor at such time, it was so, not on his own account or as his own property, but on account of, or in trust for, some other person, *viz* , the claimant

(3) That the property was in possession of the judgment debtor partly on his own account and partly on account of some other person [1]

In the last case, the release is to be ordered to *the extent* to which the possession of the claimant is established [2] In such a case the Court should define the share of the judgment debtor and that of the claimant and sell only the former [3]

Order 21 Rule 60 — Note 1

1 ('06) 8 Bom L R 794 (797)
('28) AIR 1928 All 668 (669)
('18) AIR 1918 Low Bur 32 (32) (Extent of enquiry into title laid down)
('97) 24 Cal 563 (566)

2 ('70) 13 Suth W R 63 (66, 67) (F B)
('97) 24 Cal 563 (566)
('87) 12 Bom 231 (235)
[*See also* ('32) AIR 1932 Bom 210 (212) (Undivided interest of a member of a joint family attached during pendency of partition suit — Final decree for partition passed subsequently —Court must take notice of partition and proclaim for sale ascertained share of the member)]

3. ('05) 27 All 404 (405)

O.21 R.61
Notes 1-3

Local Amendment

PATNA

Substitute the following *for* Rule 61

'61 Where the Court is satisfied that the property was at the time of the decree, or of the attachment, as the case may be, in the possession of the judgment debtor *as his own property and not on account of any other person*, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim

Synopsis

1. Disallowance of claim — Where the property attached is found to be in the possession of the judgment debtor *on his own account, or if the claimant* is in possession as trustee for the judgment debtor, the Court is bound to disallow the claim under this rule [1] Similarly, where the claimant, though in possession, is only a tenant of the judgment debtor *paying rent to him his possession is regarded as that of the* judgment debtor and his claim cannot be allowed [2]

2. Order without dealing with the question of possession. — As already pointed out in Note 20 to Rule 58, the sole question to be considered in the investigation of a claim is the question of possession But if the Court erroneously does not consider the question of possession, but decides the claim on some other ground, *e g* on the ground of title, the order cannot be considered to be one passed without jurisdiction and a nullity It will nevertheless be conclusive unless set aside in a suit under Rule 63 [1] But such an order can be revised by the High Court [2]

3 Effect of order under this Rule. — An order disallowing a claim under this rule is only *provisional* and if the defeated claimant succeeds in the suit filed under Rule 63 *his rights as on the date of attachment will be restored If the court* auction sale takes place the auction purchaser s rights will be subject to the result of the suit [1] An order under this rule when it becomes conclusive under Rule 63 *infra*, does not *operate as an order in rem* so as to render void the transfer upon which the claimant relied The order only precludes the defeated claimant from proceeding against the decree holder or the auction purchaser on the basis of that transfer but otherwise it *does not affect the validity of the deed of transfer* [3] *An order dismissing a claim* does not necessarily imply an *adjudication* that the claimant was not in possession at the

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Order 21 Rule 61 — Note 1

1 (12) 17 Ind Cas 12 (12) (Cal)
(33) AIR 1933 Mad 839 (840)
(83) 1883 All W N 205 (205) (After disallowing claim Court should not stay sale)
(17) AIR 1917 Oudh 92 (96) (Defeated claimant to pay full costs to decree holder though claim only to portion of attached property)
(36) AIR 1936 Rang 306 (307) 14 Rang 516

2 (35) AIR 1935 Mad 547 (548) 58 Mad 936

Note 2

1 (90) 17 Cal 260 (262)
2 (33) AIR 1933 Mad 879 (880 883) 57 Mad 195 (*A* obtained a decree against *B*—*B* had mortgaged his property to *C* — *A* attached *B* s properties — *C* preferred claim stating that he had purchased property mortgaged to him from ... der be-
mortgage revived under law—Mortgage ...

date of the attachment as under Rule 58 a claim may also be dismissed on the ground of undue delay [3] O 21 R 61 Notes 3-5

See also Note 16 to Rule 63 Note 4 to O 21 R 55 and Note 9 to Section 64

4 **Appeal** — No appeal lies from an order under this rule [1]

5 **Revision** — See Note 25 to Rule 58

R. 62. [S 282] Where the Court is satisfied that the property is subject to a mortgage or charge in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to such mortgage or charge O 21 R 62

Continuance of attachment subject to claim of incumbrancer

[1877, S 282]

Synopsis

1 **Scope of the Rule**
2 **"Subject to mortgage"**
3 **Mortgage in favour of a person not in possession**
4 **Notification of mortgage or charge** See Note 1
5 **Effect of order under this Rule**
6 **Appeal**
7 **Revision** See Note 25 to Rule 58

1 **Scope of the Rule** — The rule is an enabling provision which empowers the Court to direct the continuance of the attachment subject to a mortgage or charge in favour of a person not in possession

The question of the existence of a mortgage over the property attached can be raised in two ways and at two stages in execution One is when the Court has to prepare the proclamation for sale by public auction This is provided for in Rule 66 of this Order That rule enacts that the sale proclamation shall specify as fairly and accurately as possible any encumbrance to which the property is subject after giving notice to the decree holder and the judgment debtor The other stage is that provided for by this rule [1] The difference between the two provisions is very important Where properties are sold subject to a mortgage under this rule the Court does so *after being satisfied of the existence of the mortgage* and *sells only the judgment debtor s right of redemption* so that the purchaser does not acquire any greater rights than that of redeeming the mortgage [2] The order continuing the attachment subject to the mortgage or refusing to do so is conclusive as to the rights of the parties and if no suit is filed within the period of one year prescribed by Article 11 of the Limitation Act the mortgagee or the purchaser as the case may be cannot either as plaintiff or as defendant assert the right denied by that order [3] In the case of a proclamation of sale issued

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of C did not revive and the mortgage had become ext n u shed in sale)

3 (39) AIR 1939 Mad 456 (461) ILR (1939) M l 803 (S B) (Eve 1 if the lismissal is based on fin l ng that la n ant was not in po sess on he s t barre l fro 1 ra s ng pl a of adverse po ses on u su t for po sess on by auction pur chaser)

Note 4

1 (84) 6 All 109 (110)

(7) AIR 19? R ng 137 (138) 5 Rang 110

Order 21 Rule 62 — Note 1

1 (36) AIR 1936 Cal 590 (592)

2 (06) 28 All 418 (420)

(15) AIR 1915 Oudh 157 (158)

3 (?7) AIR 19?7 Bom 234 (235)

purchaser cannot cha enge valid ty of mortgage)

O.21 R.62
Notes 1-2

under Rule 66, the Court does not decide the question whether the mortgage subsists or not and the purchaser buys the property subject to such risks as the notice might involve he is not precluded from questioning the validity of the mortgage[4] The Chief Court of Oudh has in the undermentioned case[5] held that there is no difference between an order passed under this rule and an order passed under Rule 66 so far as the auction purchasers are concerned It is submitted that the view is not correct

The rule does not apply to claims arising in execution of a mortgage decree[6]

2 **"Subject to mortgage."** — Has the executing Court power to decide under this rule the question of the truth or validity of the mortgage? In other words, if the Court rejects a claim of the mortgagee on the ground that the mortgage is not true, is he bound to file a suit within the period of limitation prescribed by Article 11 of the Limitation Act on pain of losing his rights under the mortgage if he does not do so? Upon this point there is a conflict of judicial opinion The High Court of Bombay,[1] and the High Court of Allahabad[2] in a case decided under the old Code, have held that the rule is only a provision enabling the Court to continue an attachment subject to a mortgage if it finds that a mortgage exists and that the Court has no power to declare the mortgage invalid The *ratio* of these decisions is that it is only where the Court is satisfied as to the existence of the mortgage that it can act under this rule, but that where it is not so satisfied it can do nothing under this rule but can only notify the mortgage under R 66 The Lahore High Court[3] has also held that the objection of a mortgagee of the attached property does not come under Rule 58 and that an order rejecting his objection does not come under Rule 63 The High Court of Allahabad[4] in cases decided under the present Code, the High Courts of Calcutta,[5] Madras,[6] Patna[7] and Rangoon[8]

('39) AIR 1939 Cal 620 (621) ILR (1939) 2 Cal 291

('36) AIR 1936 Cal 590 (592) (Attachment continued subject to mortgage—Suit under Rule 63 not brought — Auction purchaser cannot challenge mortgage)

('39) AIR 1939 Mad 393 (395) ILR (1939) Mad 600 [See ('37) AIR 1937 Oudh 159 (164) 12 Luck 540 (Property purchased in execution subject [illegible] —As pur[illegible] out [illegible] in ques[illegible]

('14) AIR 1914 Bom 302 (303)] [But see ('94) 7 C P L R 73 (75)]

4 [illegible]

('15) AIR 1915 Oudh 163 (164)
('20) AIR 1920 All 165 (166)
('39) AIR 1939 Nag 305 (309) ILR (1939) Nag 665
[illegible]

5 ('25) AIR 1925 Oudh 154 (156, 157) 27 Oudh Cas 308

6 ('31) AIR 1931 Oudh 157 (159)
('17) AIR 1917 Oudh 92 (96)

Note 2

1 ('16) AIR 1916 Bom 179 (180) 41 Bom 64 (Distinguishing 22 Bom 640)

[illegible]

('09) 3 Ind Cas 793 (794) 31 All 583 26 Ind App 203 (P C)

[illegible]

and the Judicial Commissioner's Court of Nagpur[9] have, on the other hand, held that an order rejecting the claim of a mortgagee on the ground that the mortgage is not true or valid is an order which will be *conclusive* unless set aside in a suit under Rule 63 As pointed out by Ashworth, J, of the Allahabad High Court, the expression "where the Court is satisfied' *confers jurisdiction* on the Court to come to a finding of fact as to the existence of the mortgage Without such finding of fact it cannot be said to be satisfied about it The rule, in effect, provides for two alternative or mutually exclusive orders One is an order that, as the mortgage exists, the attachment shall be continued subject to it, and the other is that no mortgage shall be deemed to exist The latter order, no less than the former, is contemplated by Rule 63 [10] It may appear anomalous that an executing Court should thus be given power to decide as to the validity and existence of a mortgage in favour of a third party the value of which may exceed the pecuniary limits of the jurisdiction of the Court But the mortgagee is not bound to prefer a claim If he chooses to avail himself of the advantages of the speedy and summary remedy provided for in this Chapter, he must suffer its disadvantages as well [11] But, where a mortgagee does not file a petition of *objection or claim*, but merely informs the Court about his mortgage and prays that it may be notified in the sale proclamation, and the Court, on the allegation of the judgment debtor, goes into the question of the satisfaction of the mortgage and finds that it is discharged and dismisses the mortgagee s petition, the order is not one under this rule and hence, the mortgagee is not bound to bring a suit to set it aside within a year [12]

Where a claim is preferred on the ground that the properties attached in execution of a decree are subject to a mortgage, the Court is bound to investigate the claim and cannot order simply without investigation that the sale would be held with notice of the mortgage Such an order is not contemplated by this rule [13]

3. Mortgage in favour of a person not in possession. — The rule refers only to the case of a claim of a *mortgagee not in possession* [1] Can a mortgagee in *possession* ask the Court to direct the continuance of the attachment subject to his mortgage? The High Court of Bombay[2] has held that a mortgagee in possession is not in possession as *trustee* for the judgment debtor *but on his own account* and that, therefore he is *entitled to a release of the attachment under* Rule 60 and not merely to an order directing the sale subject to his mortgage The High Courts of Calcutta[3] and Patna[4] and the Judicial Commissioner's Court of Oudh,[5] while agreeing with the view of the Bombay High Court that he is entitled to a release under Rule 60, have held that in cases where the intention of the decree holder is to attach only the equity of redemption and not the whole property, the Court can order the continuance of the attachment of the equity of redemption alone The High Court of Rangoon[6] has also held that the equity of redemption in a possessory mortgage can be attached and sold

9 (30) AIR 1930 Nag 116 (119) 26 Nag L R 136 (F B) (AIR 1926 Nag 423 Overruled)

[illegible]

13 [illegible]

Note 3

1 (24) AIR 1924 Oudh 384 (385)

[illegible]

O. 21 R 62
Notes 3-7

It has been held in certain decisions[7] that a usufructuary mortgagee is not entitled to object to an attachment under Rule 58 and that if he does file an objection and such objection is dismissed he is not bound to sue to set aside the order within one year but may proceed under O 21 R 100 when he is dispossessed by the auction purchaser

See also the undermentioned case[8]

4 **Notification of mortgage or charge.** — See Note 1 above

5 **Effect of order under this Rule.** — The effect of an order under this rule continuing an attachment subject to a mortgage is that the purchaser at the auction sale takes only the mortgagor s right of redemption[1] But he is entitled to file a suit questioning the *bona fides* and validity of the mortgage within a year of the order[2] If the Court disallows the claim of the mortgagee the order *is* conclusive against him unless he files a suit within one year to vacate the order[3]

6 **Appeal.** — An order under this rule is not appealable See Note 24 to Rule 58

7 **Revision** — See Note 25 to Rule 58

O 21 R 63

Saving of suits to establish right to attached property

R. 63. [S 283] Where a claim or an objection is preferred, the party against whom an order is made[3] may institute a suit to establish the right which he claims[7] to the property in dispute,[17] but, subject to the result of such suit, if any, the order shall be conclusive[16]

[1877, S 283, 1859, S 220]

Synopsis

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7 (38) AIR 1938 Lah 568 (569) *I L R (1938)* Lah 593
(37) AIR 1937 Pat 63 (64) 16 Pat 54 (FB) (Claim by mortgagee dismissed for default—Suit under O 21 R 63 not necessary)
(22) AIR 1922 Pat 408 (408) 1 Pat 159
8 (36) AIR 1936 Oudh 263 (264) 12 Luck 144 (Usufructuary mortgagee s objection to attachment dismissed and property sold and delivered to auction purchaser—Usufructuary mortgagee is not entitled to sue under S 68 T P Act)

Note 5

1 (19) AIR 1919 Low Bur 124 (124)
(10) 5 Ind Cas 874 (875) (All)
(16) AIR 1916 Cal 349 (351)
[*See also* (10) 8 Ind Cas 117 (118) 35 Mad 95]
2 (31) AIR 1931 All 139 (140) 53 All 1032
(05) 2 Cal L Jour 593 (601) (He can do so even by way of defence to a suit by the mortgagee)
3 (93) 22 Bom 640 (645)
(39) AIR 1939 All 657 (659)
(39) AIR 1939 Pat 21 (22)

Other Topics (miscellaneous)

1 Legislative changes — The words 'Where a claim or an objection is preferred the party against whom an order is made have been substituted for the words the party against whom an order under Sections 280 281 or 282 is passed ' The result of the change is to widen the scope of the rule so as to include *any order* passed on an investigation of a claim [1] See also Notes 4 and 5 *infra*

2 Scope of the Rule — The rule gives a statutory right of suit to the party against whom an order is passed in the claim proceedings [1] Such a suit has to be filed within one year from the date of the order as prescribed by Article 11 of the Limitation Act [2] If no suit is filed the order becomes *conclusive* as to the rights

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Order 21 Rule 63 — Note 1

1 (16) AIR 1916 Mad 448 (444)

Note 2

1 (18) AIR 1918 Mad 76 (77)

(33) AIR 1933 Mad 340 (340) (Appointment of receiver under S 92—Attachment in execution of decree—Dismissal of claim and suit under O 21 R 63—Sanction to sue receiver is not *necessary—Statutory right of suit cannot be* defeated by a rule of practice)

(34) AIR 1934 Mad 435 (435) 57 Mad 822 (Claim under O 21 R 58 by party to suit and —[illegible] by way of [illegible] appropriate—Decree holder however attaching property—Claims and objection under O 21 R 58 Attachment in execution of decree against real owner—Objection by benamidar allowed—Suit by decree holder for declaration is maintainable)

[*See* (23) AIR 1923 Rang 82 (83 84) (No cause of action for suit under this rule before attachment and claim order)

(32) AIR 1932 All 502 (503) 54 All 767 (Claim in suit on Revenue Court—Order affirmed or reversed in appeal under S 247 Agra Tenancy Act by Collector—The appellate order is not final and aggrieved party has right of suit under this rule)

2 (19) AIR 1919 Cal 835 (836) 45 Cal 785 (Suit brought after one year was dismissed)

(29) AIR 1929 Pat 116 (117) (Dismissal on preliminary ground as to maintainability falls under this rule)

O. 21 R. 63
Note 2

asserted in the objection proceedings[3] The policy of the Legislature is to secure a speedy settlement of questions of title raised in execution sales and the finding of the Court in the claim proceedings is a summary decision from which the suit allowed under this rule is *in the nature of an appeal* The object of the Legislature in prescribing a suit by way of appeal is to give the parties an opportunity of placing their respective cases *fully* before the Court because a summary investigation might not furnish sufficient material for a decision by an Appellate Court[4] In a suit filed under this rule the Court is not restricted to the question of possession, but questions of title also can be fully gone into[5]

The object of the suit is to establish the right which has been negatived by the claim order[6] and is in substance to set it aside[7] But there is no other restriction prescribed as regards the *nature* of such a suit though the defeated party is placed at a disadvantage as regards the period of limitation for filing the suit[8] Thus his right of suit under this rule is not in any way governed or qualified by the proviso to Section 42 of the Specific Relief Act and a suit cannot be dismissed on the ground that a *further relief* than a mere declaration has not been asked for[9] On the other hand a plaintiff in a suit under this rule is not precluded from asking for *other reliefs* than a mere declaration of the right denied to him by the claim order[10]

The order passed in the claim proceedings as the rule itself says is *subject to the result of the suit*[11] The right restored to the parties on the termination of the suit is the right which they asked the Court to give a decision upon *on the date of attachment* and the decision places the parties in *status quo ante* either by vacating or confirming the order[12] See also Notes 7 and 24 *infra*

If an objection to attachment does not fall under O 21 R 58 an order disposing of the objection will not be governed by this rule[13]

3 (23) AIR 1923 Rang 156 (156)
(20) AIR 1920 Mad 206 (208)
[*See also* (34) AIR 1934 Bom 189 (193) (Two persons making unsuccessful claims asserting prior mortgages against oral charge—Suit by [illegible]

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(69) 11 Suth W R 489 (485)

7 (86) 8 All 6 (9) 12 Ind App 150 (PC)
(38) AIR 1938 Nag 376 (377) (The suit under O 21 R 63 is substantially one to set aside a summary decision or order of any Civil Court)

8 (31) AIR 1931 Lah 430 (431)

9 (30) AIR 1930 All 395 (396) (But a Court of equity has to see whether there is an honest suit for declaration or whether the declaration is sought on principles which would be held by a Court to be inequitable)
(38) AIR 1938 Mad 741 (742)

10 See Note 9 *infra*

11 (92) 2 Upp Bur Rul 255

12 (18) AIR 1918 Mad 579 (573)
(94) 18 Bom 260 (263)

[illegible] wrongly treated as one under O 21 R 58—Decision of objection falls under S 47—Remedy is by appeal and regular suit not maintainable)
(38) AIR 1938 Lah 760 (761) (Objection by [illegible]

O. 21 R. 63 Note 3

3. "The party against whom an order is made." — The rule does not speak of any party but only the party against whom the order is made[1] and the right of suit and the conclusiveness of the order in the absence of such suit are only with reference to such a party A person who is not a party to the claim proceedings and against whom there is no order, is not affected by the order, although he may be interested in the property attached, nor is he *bound* to file a suit under this rule Thus, a judgment debtor who is not, in fact a party to the claim proceedings does not, in the eye of law, become such by reason solely of his being the judgment debtor [2] He cannot be regarded as a necessary party to the claim enquiry and it depends on the facts and circumstances of each case whether he was in fact a party [3] In objection proceedings the contest is really between the decree holder who asserts that the property is liable to attachment and the claimant who alleges that it is not in the actual or constructive possession of the judgment debtor and therefore not liable to attachment The order made in such a case is either that the property is released from attachment as not being in the possession of the judgment debtor or the claim be disallowed But such an order does not affect the right or title of the judgment-debtor to the property The order is only conclusive between the claimant and the decree holder who is proceeding against the property [4] Hence, a suit by the judgment-debtor against the successful claimant[5] or a suit by the defeated claimant against the judgment debtor,[6] in cases where the judgment debtor is not a party to the claim enquiry, is not affected by the provisions of this rule and is not governed by the period of limitation prescribed by Article 11 of the Limitation Act But if the judgment debtor was in fact a party to the claim, he is bound by the order passed therein and he can also file a suit under this rule in case the order is against him [7]

A Hindu reversioner whose right to the estate is contingent and accrues only after the death of the limited owner, is not bound to sue within one year by reason of his having preferred a claim unsuccessfully in execution of a decree against the widow He is not debarred by reason of the claim order from filing a suit after the death of the widow [8]

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(37) AIR 1937 Pesh 97 (99) (In this case it was held that attachment ceases after sale and that [illegible]

tion—See Note 5 to O 21 R 58)

Note 3

1. ('19) 1919 Mad 739 (742) 41 Mad 985 (FB)
2 ('24) AIR 1924 All 302 (303) 46 All 45

[illegible] passed *ex parte* against him—he can sue under this rule)
8 ('96) 20 Bom 601 (603)

O 21 R 63
Note 2

asserted in the objection proceedings[3] The policy of the Legislature is to secure a speedy settlement of questions of title raised in execution sales and the finding of the Court in the claim proceedings is a summary decision from which the suit allowed under this rule is *in the nature of an appeal* The object of the Legislature in prescribing a suit by way of appeal is to give the parties an opportunity of placing their respective cases *fully* before the Court because a summary investigation might not furnish sufficient material for a decision by an Appellate Court[4] In a suit filed under this rule the Court is not restricted to the question of possession but questions of title also can be fully gone into[5]

The object of the suit is to establish the right which has been negatived by the claim order[6] and is in substance to set it aside[7] But there is no other restriction prescribed as regards the *nature* of such a suit though the defeated party is placed at a disadvantage as regards the period of limitation for filing the suit[8] Thus his right of suit under this rule is not in any way governed or qualified by the proviso to Section 42 of the Specific Relief Act and a suit cannot be dismissed on the ground that a *further relief* than a mere declaration has not been asked for[9] On the other hand a plaintiff in a suit under this rule is not precluded from asking for *other reliefs* than a mere declaration of the right denied to him by the claim order[10]

The order passed in the claim proceedings as the rule itself says is *subject to the result of the suit*[11] The right restored to the parties on the termination of the suit is the right which they asked the Court to give a decision upon *on the date of attachment* and the decision places the parties in *status quo ante* either by vacating or confirming the order[12] See also Notes 7 and 24 *infra*

If an objection to attachment does not fall under O 21 R 58 an order disposing of the objection will not be governed by this rule[13]

3 ('23) AIR 1923 Rang 156 (156)
('20) AIR 1920 Mad 206 (208)
[*See also* ('34) AIR 1934 Bom 189 (193) (Two

order does not become conclusive even against

passed becoming conclusive under this rule—Subsequent suit for partition by plaintiffs as heir to their father s estate is not barred)]
4 ('26) AIR 19 6 Nag 197 (198)
5 ('20) AIR 1920 Mad 748 (753 756) 43 Mad 760 (FB)
('69) 11 Suth W R 482 (485)

7 ('86) 8 All 6 (9) 12 Ind App 170 (PC)
('38) AIR 1938 Nag 376 (377) (The suit under O 21 R 63 is substantially one to set aside a summary decision or order of any Civil Court)
8 ('31) AIR 1931 Lah 430 (431)
9 ('30) AIR 1930 All 395 (396) (But a Court of equity has to see whether there is an honest suit for declaration or whether the declaration is sought on principles which would be held by a Court to be inequitable)
('38) AIR 1938 Mad 741 (742)
10 See Note 9 *infra*
11 ('92) 2 Upp Bur Rul 255
12 ('18) AIR 1918 Mad 572 (573)
('94) 18 Bom 260 (263)

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such order has been passed without notice to the decree holder, it has been held that the Court has inherent power to set aside the order [2]

5. Order refusing to investigate. — Section 283 of the old Code applied only to orders *passed under* Sections 280, 281 and 282 and consequently it was held that an order passed without investigation rejecting a claim on the ground of delay was not an order contemplated by the Section and hence, the one year's rule of limitation would not apply to such a case [1] Under the present rule, it has been held that orders passed, whether with or without investigation, are placed on the same footing, with the result that, if the party against whom the order of rejection is made under the proviso to Rule 58 does not file a suit within one year, the order becomes conclusive against him [2] (See also Note 21 to O 21 R 58 and Notes 4 and 4a to this rule) Thus, an order passed on a claim, that the allegation of the claimant will be notified to the bidders as the petition was put in too late, has been held by a Full Bench of the High Court of Madras[3] to be a conclusive order against the claimant within the meaning of this rule But in several decisions, even under the present Code, it has been held that an order passed without investigation is not within this rule [4]

An order refusing to entertain a claim on the ground that the Court has no *jurisdiction* to entertain it, has been held not to amount to an order under this rule [5] Similarly, an order saying "Whatever right the defendant has will pass by the sale The petition *does not require any investigation* The claim put forward by the petitioner will be noted in the sale proclamation"[6], or an order "Sale stopped The claim cannot be

2 ('36) AIR 1936 Pat 176 (177) (*Ex parte* order made without notice to decree holder — Such order is made subject to the implication that it may be revoked at the instance of decree holder)

Note 5

1. ('74) 6 N W P H C R 185 (188)
('79) 4 Bom 21 (23)
('10) 5 Ind Cas 298 (300) (Cal)
('86) 12 Cal 108 (109)
('72) 8 Beng L R App 39 (41)
('71) 7 Beng L R 238*n* (239*n*)
('67) 7 Suth W R 441 (445)
('70) 13 Suth W R 431 (431)
(1865) 2 Suth W R 263 (263, 264)
('70) 14 Suth W R 364 (364)
('08) 31 Mad 5 (6)
('95) 18 Mad 265 (266)
('94) 1894 All W N 14 (14)
2. ('28) AIR 1928 All 327 (328)

to investigate claim—Rule applies)
('38) AIR 1938 Lah 677 (677, 678) (There is a right of suit when the objections are dismissed without enquiry on the ground that they were belated)

does not apply where a claim has not been disposed of on the merits or has been rejected as being too late)
('37) AIR 1937 Nag 149 (149) ILR (1939) Nag 450 (No investigation under R 58—O 21 R 63

execution having been already transferred to Collector — Rejection is on ground of want of *jurisdiction*)
[*See also* ('37) AIR 1937 Pesh 90 (91)]
6. ('23) AIR 1923 Mad 295 (295, 296)
('82) 11 Cal L Rep 352 (354)

O. 21 R. 63
Notes 5-6

investigated by this Court Petition dismissed"[7] has been held not to amount to an order against the claimant under this rule So also, an order merely recording the objections by reason of the claimant withdrawing or not pressing his claim is not, according to the High Courts of Madras,[8] Bombay[9] and Rangoon[10] and the Judicial Commissioner's Court of Nagpur,[11] an order negativing the claim and, therefore, is not an order *against* the claimant within the meaning of this rule The proper order to be passed in such a case is to record on the petition "withdrawn" and not "dismissed," and even if the Court has stated that it is dismissed, the claimant is not affected by the order and is not bound to sue within one year from the date of the order [12] A Full Bench of the Chief Court of Oudh[13] has, however, held that an order passed on a claim which is not pressed, and therefore dismissed, is conclusive against the claimant until set aside in a suit under this rule See also Note 5a below

Where after the filing of a claim, the execution petition itself is struck off for default and the claim petition is thereupon ordered to be closed, there is no order against the claimant so as to compel him to file a suit [14]

The High Court of Calcutta[15] has held that the present rule and Article 11 of the Limitation Act have no application to a consent order The High Court of Madras[16] has, on the other hand, held that an order passed by consent, without objection, is an 'order against the claimant or the decree holder as the case may be, within the meaning of this rule

5a. Withdrawal of claim. — It has been held that where an objector voluntarily withdraws his claim and the claim is dismissed in consequence of such withdrawal, there is no order 'against' the claimant within the meaning of this rule which, therefore, does not apply [1]

6. Attachment before judgment. — The rule applies also to orders on claims preferred to property attached before judgment [1] Hence, a party aggrieved by reason of the dismissal of his claim in respect of an attachment before judgment is bound to file a suit under this rule, and the suit, if instituted, cannot abate by reason of the dismissal of the suit in which the attachment was effected [2] But with regard to the period of

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[*See also* (25) AIR 1925 Mad 1113 (1114)
(35) AIR 1935 Mad 1015 (1017) (A previous order on a claim petition the petition is filed [illegible]

place from investigating the claim on the merits)]

7. (21) AIR 1921 Mad 488 (488, 489)

8 (28) AIR 1928 Mad 878 (879)
(28) 110 Ind Cas 511 (513) (Mad)
(20) AIR 1920 Mad 822 (824) 52 Ind Cas 938 (933)
[illegible]

10. ('29) AIR 1929 Rang 123 (125)
(07) 4 Low Bur Rul 75 (75)

11. ('25) AIR 1925 Nag 2 (6) 20 Nag L R 106
[*See also* (73) 20 Suth W R 456 (456) (Case [illegible]

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13.
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16. (15) AIR 1915 Mad 1129 (1129)

Note 5a

1 (35) AIR 1935 Mad 328 (330)
(35) AIR 1935 Mad 544 (544)

Note 6

1. ('18) AIR 1918 Mad 26 (28, 29) 41 Mad 649

(The appli[illegible] ttach-

ment before judgment)

2 (16) AIR 1916 Mad 295 (296)

limitation for such suits the question arises whether Article 11 of the Limitation Act will apply That Article in terms applies only to an order on a claim preferred to or objection made to the attachment of property attached *in execution of a decree* Therefore if the claim is preferred and decided *before decree* Article 11 would not apply and the period of limitation to set aside the order would be governed by the residuary Article 120[3] But where after decree the decree holder applies for execution and a claim to the attachment is thereafter *raised and decided in the course of execution* it has been held by a Full Bench of the High Court of Madras that Article 11 would apply[4] The reason is that an attachment before judgment becomes one in execution by virtue of the decree holder s application for execution and a claim preferred thereafter may be considered to be one preferred to property attached *in execution* of a decree

Under O 38 R 9 the Court is bound to withdraw the attachment upon the dismissal of the suit The reversal of the dismissal does not operate so as to revive the attachment A fresh attachment is necessary and the objector is entitled to prefer a *fresh* claim in respect of such attachment and the period of one year should be counted from the date when such claim is rejected[5] Under Rule 13 of Order 38 a Provincial Small Cause Court has no jurisdiction to attach immovable property before judgment or to determine any claim or objection in respect of such an attachment[6]

7. "May institute a suit to establish the right which he claims"—An order in a claim proceeding is not conclusive a suit may be brought to contest it within the period prescribed by Article 11 of the Limitation Act[1] This right of suit cannot be defeated or affected by reason of the fact that the property has been sold away in court auction[2]

The suit contemplated by the rule is a suit *to establish the right claimed in the enquiry*[3] that is the liability or non liability of the property attached to satisfy the decree under execution[4] and not the liability of third persons to satisfy the decree by the sale of their right title and interest in the property[5] The suit is in essence a continuation of the execution proceedings[6] though the scope of the enquiry is much wider What is decided in the suit is the question of *title* and not merely

3 (34) AIR 1934 Pat 580 (581)
(21) AIR 1921 Mad 163 (166 167) 44 Mad 902 (FB)
4 (21) AIR 1921 Mad 163 (166 167) 44 Mad 902 (F B)
5 (25) AIR 1925 Cal 1147 (1148)
[*See also* (11) 9 Ind Cas 918 (920 921) (Cal)]
6 (24) AIR 1924 Cal 193 (196)

Note 7

1 (89) 15 Cal 521 (5 6) 15 Ind App 1?3 (PC)
(03) 25 All 57 (59)
(35) AIR 1935 R r 161 (162) (Ord r can be got rid of o ly by st tuting a su t—Otherw se the order can ot be impeached even by way of def nce to a su t)
2 (23) AIR 1923 Pat 152 (152)
3 (28) AIR 19 8 Mad 840 (841)
(68) 11 Suth W R 40 (41)
(81) 7 Mad ?9? (9) (1 1)
(0) 1 Cal L Jour ?9? (?99 300)
(36) AIR 1936 I sh 206 (07) (But a d feated

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claimant—Frame of—Prayer for declaration of right as against decree holder is necessary—Suit merely for possession as against persons in possess on is not one under this rule)]
4 (36) AIR 1936 Lah 524 (52) 17 Lah 668 (Pla ntiff is not bound to establish his title to the property in every case)
5 (36) 23 Cal 302 (303)

und r O 21 R 63 is m re cont nuation of cla m p o ed g — Pur haser of property from clai mant after ord r has been pa sed in h s favour but before inst tut on of su t under O 21 R 63 is al nee *pendente lite* and hence is not necessary party to su t)
(38) AIR 1938 Pat 468 (471)

O. 21 R. 63
Notes 7–8

the question of possession [7] Suits brought under this rule are substantive suits and must be tried like any other suit subject to the ordinary rules of procedure and evidence [8] They are not limited by any special standard of evidence or law The claimant may if necessary, thrash out his title in the fullest and most ultimate sense [9]

In a suit by the decree holder under this rule he must establish that on the date of the attachment the judgment debtor had a subsisting right to the property and the suit must be tried as if it were a suit by the judgment debtor himself for possession [10] Similarly in a suit by a defeated claimant he must establish that the *judgment debtor* had no right to the property It is not necessary for the plaintiff in such a suit to establish his *own* title to the property where it is shown that the *judgment debtor* had no title to it and that at the time of the attachment the property was in the possession of the claimant [11] In a suit by a defeated claimant the discharge of the *attachment order* cannot properly be asked for The claimant s remedy is to establish his title by a declaratory decree and then to carry the decree to the Court by which the order of attachment was issued and such Court is bound to recognize the adjudication and govern itself accordingly [12]

Where the same property is attached by two different persons holding different decrees against the same judgment debtor and an objection preferred under Rule 58 is dismissed the two separate attachments give rise to two separate causes of action [13]

See also the undermentioned decisions [14] and also Notes 2 and 24

8 Parties to the suit. — When a suit is brought under this rule by an attaching decree holder to establish his right to attach and bring to sale certain property and in order to succeed it is necessary to avoid a transfer of the property on

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(37) AIR 1937 Pesh 13 (16)

of title)]

[But see (19) AIR 1919 Lah 200 (201) 1919

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(35) AIR 1935 Mad 596 (597)
(36) AIR 1936 Mad 971 (973)
[*See* (38) AIR 1938 Rang 447 (447) (Property of company attached — Objection by transferee of property — Transfer by Board of Directors and not by general body of share holders — Transferee s title not sufficient to entitle him to object under Rule 58 or to bring a suit under this rule)]

ur Rul

(Evidence taken in claim not *per se* evidence in the suit — Admissible for limited purpose)
[*See also* (22) AIR 1922 Lah 58 (59) (Defeated claimant filing suit cannot after dismissal of suit ask for stay of sale from the Appellate Court)

(75) 24 Suth W R 70 (71) (Sale ought to be stayed by executing Court)]

9 (24) AIR 1924 Cal 744 (748) 51 Cal 548
(33) AIR 1933 Mad 328 (329)

10 (10) 8 Ind Cas 639 (642) 35 Bom 79

11 (36) AIR 1936 Lah 524 (527) 17 Lah 668 (15 Cal 674 and 3 Cal L Jour 381 Followed)
[*See also* (39) AIR 1939 Sind 177 (177) I L R (1939) Kar 539 (Suit by decree holder under Rule 63 — Rules of evidence which require a plaintiff to prove his claim are not abrogated because he is suing a successful claimant)]

12 (81) 4 Mad 131 (133)

13 (37) AIR 1937 Lah 220 (221) (Suit by

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under O 21 R 63 alleging mortgage to be collusive is maintainable)
(39) AIR 1939 Pat 430 (432) (In suit under this rule the justifiability or otherwise of the decree under execution is not a relevant question)
(37) AIR 1937 Rang 531 (533) (Question under S 52 C P C must be decided by executing Court and not by separate suit — Hence such question cannot be raised in suit by attaching creditor under O 21 R 63)

the ground that the transfer has been made with intent to defeat or delay the creditors of the transferor the suit must be brought in the form of a representative suit on behalf of or for the benefit of all the creditors of the transferor as provided in Section 53 of the Transfer of Property Act as amended in 1929 and the provisions of O 1 R 8 *ante*, would be applicable to such a suit [1] But where the decree holder s suit under this rule seeking to avoid a transfer in favour of the claimant is not based on such transfer having been made with intent to defeat or delay the creditors of the transferor the suit need not be a representative suit [2] The transferee and the judgment debtors as transferors will be necessary defendants in a suit under this rule by a decree holder attacking an alienation of property by the judgment debtor in favour of the successful claimant [3] It is not necessary to implead any transferee from the successful claimant after the order in the claim proceedings and before the institution of the suit as such transferee must be held to be an alienee *pendente lite* [4]

The right of suit of the decree holder enures also to the benefit of the auction purchaser He can thus file a suit to declare that the mortgage subject to which the attachment and sale took place is not true and valid [5]

Where a defeated claimant files a suit under this rule the judgment debtor is a necessary party especially if the objector seeks to establish his title both against the judgment debtor and the decree holder [6] If the properties are sold away in court auction it is not necessary to implead the decree holder It is enough if the auction purchaser alone is impleaded [7] The right of suit under this rule is not personal to the

Note 8

2 (38) AIR 1938 Bom 289 (290 291) I L R

3 (01) 1901 All W N 14 (14) (*Obiter*)

(39) ... (In a suit under O 21 R 63 against the successful claimant the judgment debtors his vendors through whom he holds are not necessary parties))

4 (15) AIR 1915 Mad 495 (498) 38 Mad 535
(39) AIR 1939 Pat 188 (139) 17 Pat 588

(37) AIR 1937 Rang 249 (250) (Judgment debtor s legal representatives are necessary parties)
[But see (34) AIR 1934 Mad 587 (589) (Judgment debtor is not a necessary party)]

7 (23) AIR 1923 Mad 59 (59)
(35) AIR 1935 Pesh 29 (30) (Auction purchaser

Execution purchaser need not be joined as party)]
[But see (98) 1 Oudh Cas 83 (84)
(67) 8 Suth W R 42 (42)
(30) AIR 1930 Pesh 189 (190)]

O. 21 R. 63
Notes 8-10

claimant a transferee from the defeated claimant can also sue under this rule [8]

See also the undermentioned cases [9]

9 Consequential relief, if and when should be asked — As has been seen in Note 2 above this rule does not contain any limitation as regards the nature of the suit to be filed and does not exclude any particular prayer out of its scope [1] The suit is of a comprehensive nature and the words to establish the right are wide enough to cover not only a mere declaratory suit but also one for consequential reliefs such as the recovery of the value of the property if it had been already sold[2] or for possession [3] But the plaintiff is not *bound* to ask for a consequential relief He may ask for a mere declaration and the suit cannot be dismissed as offending the proviso to Section 42 of the Specific Relief Act 1877 [4] If the defeated claimant asks for a bare declaration and succeeds a subsequent suit for possession is not barred under O 2 R 2 [5]

The Court can grant a temporary injunction to prevent the sale of the attached property in execution pending a suit by the defeated claimant under this rule [6]

10 Damages for wrongful attachment, if can be asked for under this Rule — A defeated claimant can in a suit under this rule claim damages for wrongful attachment [1] or the value of the property if it had been already sold [2] In order to sustain a claim for damages it is not necessary for the claimant to allege and prove malice or want of reasonable and probable cause on the part of the decree holder in resisting the claim [3]

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8 ('04) 26 All 89 (91)

9 ('35) AIR 1935 Rang 489 (490) (Claim to attach property purchased in name of judgment debtor's wife as really bought by judgment debtor—Transferor is not necessary party to suit by decree holder under O 21 R 63)

('36) AIR 1936 Rang 56 (57) (Suit by decree holder — Judgment debtor is proper though not necessary party)

Note 9

1 ('18) AIR 1918 Nag 233 (233)

('19) AIR 1919 Mad 257 (258) 42 Mad 143

3 ('74) 11 Bom H C R 174 (181)

('92) 16 Bom 608 (617)

4 ('06) 29 Mad 151 (152) (FB) (Overruling 16 Mad 140)

('34) AIR 1934 Rang 332 (333) 12 Rang 670

('91) 14 Mad 23 (25)

('10) 8 Ind Cas 608 (609) (Low Bur)

('93 1900) 1893 1900 Low Bur Rul 481

('06) 4 Low Bur Rul 263 (264)

('04) 4 Low Bur Rul 88 (88)

('29) AIR 1929 Rang 104 (104) (*Held* a defeated claimant is not entitled to file a suit under S 42 Specific Relief Act)

('26) AIR 1926 Rang 124 (125) 4 Rang 22 (Do)

('37) AIR 1937 Rang 249 (250)

('37) AIR 1937 Rang 133 (134)

('38) AIR 1938 Mad 741 (742)

[But see ('98) 1 Oudh Cas 2 2 (279) (But when the property is released or sold and comes into the possession of private individuals a suit for a mere declaration without consequential relief is one brought in contravention of S 42 Specific Relief Act and is not

here is a substantial quest on in controversy between the

Note 10

1 ('86) 12 Cal 696 (705)

2 ('81) 7 Cal 608 (612)

('17) AIR 1917 Mad 393 (394 395) 40 Mad 733 (FB)

3 ('90) 17 Cal 436 (442) 17 Ind App 17 (PC)

('36) AIR 1936 Lah 524 (529) (Claimant need not prove his ownership of property in dispute—Possession is good as against wrongdoer)

In a suit for damages for wrongful attachment of property, the plaintiff is not entitled to recover the costs incurred by him as objector in the execution proceedings[4]

11. Suit not necessary if property is released from attachment. — When the attachment is withdrawn by the decree holder himself subsequent to the claim order, the object of a suit is gained and the defeated claimant is not obliged to bring a suit[1] As pointed out by Sir Charles Sargent, C J, in *Gopal Purushottam* v *Bai Divali*[2]

> "When the plaintiff withdrew his attachment, the parties were restored to the *status quo ante* The object of the claim which was preferred by the defendant was as contemplated by S 278, Civil Procedure Code, to obtain the removal of the attachment and when that attachment was removed by the judgment creditor's own act there was no longer an attachment or any other proceedings in execution on which the order could operate to the prejudice of the claimant and therefore no necessity for bringing a suit to set aside the order "

Where the attachment comes to an end,[3] as where the decree is *satisfied* or *set aside* or *reversed* or the decretal amount is paid into Court under Rule 55, or where the attachment is voluntarily withdrawn by the decree-holder himself,[4] or the attachment is raised owing to the default of the decree-holder under Rule 57 of this Order,[5] the parties are put back in the same position as they were in before execution proceedings were lodged, and the defeated claimant is not compelled to institute a suit within a year from the date of the claim order. When the attachment is raised the cause of action for the claim petition or for any suit founded upon an order in that claim also falls to the ground[6]

But the withdrawal or raising of the attachment or the satisfaction of the decree should, according to the High Courts of Calcutta[7] and Madras[8] and the Judicial Commissioner s Court of Nagpur[9] have taken place within the period of one year prescribed by Art 11, Limitation Act The High Court of Lahore[10] has, on the other

4. ('38) AIR 1938 Lah 334 (335, 336) (Nor is the plaintiff entitled to damages for personal worry)

Note 11

2.

3. ('36) 40 Cal W N 146 (148) (Execution sale set aside — Attachment comes to an end)
('36) AIR 1936 Lah 169 (170) (Attachment set ... promise between the claimant and the decree holder)

('83) 9 Cal 10 (13)
('82) 8 Cal 279 (282)
('21) AIR 1921 Bom 35 (36) 45 Bom 561
('89) 13 Bom 72 (74)
('10) 8 Ind Cas 157 (158) 34 Mad 583
('36) 40 Cal W N 146 (148) (Attachment withdrawn owing to subsequent satisfaction of decree)
[*See* ('20) AIR 1920 Mad 167 (190)]
[But see ('78) 1 All 541 (543)]

5. ('31) AIR 1931 All 608 (608) 53 All 918
('34) AIR 1934 All 267 (270 271) 56 All 537. (This principle applies also between representatives of decree holder and claimant)
('11) 12 Ind Cas 65 (67) (Cal)
('70) 14 Suth W R 367 (368)
('26) 94 Ind Cas 120 (120) (Cal)
('22) AIR 1922 Lah 108 (111) 3 Lah 7
[*See* ('25) AIR 1925 Mad 1113 (1114)]
[*See also* ('36) AIR 1936 Pesh 41 (43) (Once the attachment ceases to exist within one year provided by law for filing suit under R. 63 no duty is cast on the objector to proceed further)]

6. ('27) AIR 1927 Mad 893 (893)
('34) AIR 1934 All 267 (270) 56 All 537

7. ('24) AIR 1924 Cal 744 (751) 51 Cal 548

8. ('06) 29 Mad 225 (229 230)
('37) AIR 1937 Mad 44 (46)

9. ('26) AIR 1926 Nag 423 (425) 22 Nag L R 94.

10. ('31) AIR 1931 Lah 74 (76)

O. 21 R. 63
Notes 11–13

hand, held that it makes no difference whether the attachment is raised within or beyond a year after the order It is submitted that the former view is correct As pointed by their Lordships of the Madras High Court in *Koyanna* v *Dossy*, I L R 29 Madras 225

> "To hold that the right of an unsuccessful claimant to bring a suit remains in a state of suspended animation for an indefinite period after the expiration of a year from the date of the order against him liable to be revived at any moment by the payment off of the amount of the decree, would lead to great inconvenience "

Where, on a claim being preferred, the decree holder voluntarily withdraws the attachment and there is no adverse order against him in the claim proceeding he is, nevertheless, entitled under Section 42, Specific Relief Act, to sue for a declaration that the property is liable to attachment and sale in execution of his decree Such a suit does not fall under this rule [11]

It has been held by the Nagpur High Court[12] that where an order has been passed under O 21 R 62 directing the attached property to be sold subject to a mortgage, the order will become conclusive against the decree holder unless set aside by a suit under this rule, although subsequent to the order the execution proceeding is dismissed for default and the attachment itself is raised

12. Claimant can pay money under protest. — If an objector fails in his claim, he is not obliged to file a suit He may prevent the sale of the property attached by paying the decree amount under protest and then sue the decree holder for the recovery of the money so paid under compulsion [1]

13. Other remedies open to a claimant or objector. — No appeal or review[1] lies from an order passed in a claim proceeding The only remedy of the defeated party is to file a suit under this rule within the period of limitation provided by Article 11 of the Limitation Act [2] In the absence of such a suit he cannot, either as plaintiff or as [illegible] [3] The mere

Nag 665

Note 12

1 ('13) 18 Ind Cas 949 (951) 40 Cal 598 40 [illegible]

be recovered)

('96) 22 Bom 473 (475) (But executing Court cannot order re payment)

Note 13

('28) AIR 1928 Cal 514 (516)

(1900) 27 Cal 714 (722)

('97) 24 Cal 563 (566)

[illegible]

[illegible] 69 Pun Re

[illegible]

('09) 4 Ind Cas 970 (972) (Lah)

('16) AIR 1916 Lah 273 (274) 1916 Pun Re No 66

('94) 17 Mad 17 (19)

('87) 10 Mad 357 (361)

('87) 10 Mad 53 (54)

[illegible]

fact that a suit has been filed against him within one year or that he has filed his defence within one year of the claim order does not affect the conclusiveness of the order[4] It has been held in the undermentioned case[5] that a defeated claimant cannot also obstruct the auction purchaser in delivery proceedings under Rule 99 of this Order

The dismissal of a claim is however no bar to the claimant applying to set aside the court auction sale after making the necessary deposit under Rule 89 of this Order as a person interested in the property sold[6]

14 Objector can plead invalidity of attachment — A defeated claimant or an objector suing under this rule is entitled to plead that there was no attachment or that the attachment effected was not legal For instance he can show that the executing Court had no jurisdiction to attach and therefore his rights are not affected in any way by the claim order[1] In *Muthia Chetty v Palaniappa Chetty*[2] their Lordships of the Judicial Committee held that for purposes of Article 11 of the Limitation Act the property to which a claim is a made must be property which has been *de facto attached* Unless there has been attachment there can be no order made on an objection lodged to it nor can any claim be made to the property so attached and without such an order there is no *terminus a quo* for the running of limitation and with this the limitation itself is non existent

But an objector cannot question the legality or validity of the decree against the judgment debtor on the ground that it is colourable or collusive[3]

15 Limitation for suits under this Rule — Article 11 Schedule I of the Limitation Act IX of 1908 prescribes the period of one year from the date of the order as the time within which a suit has to be brought under this rule The policy of the Act is to secure speedy settlement of questions of title raised in execution sales and for that reason a year is fixed as the time within which the suit is to be brought[1] The Article applies to orders passed whether with or without investigation[2] Where a claim is allowed *inter alia* on the ground that there was no proper attachment over

under O 21 R 62 and if it is not set aside by a suit under Rule 63 the summary order becomes conclusive and the purchaser or the mortgagee cannot assert any right which that order denies) [*See* (05) 2 Cal L Jour 599 (601) (Purchaser claim of title)]

4 ('18) AIR 1918 Mad 693 (693)
('25) AIR 1925 Mad 368 (369)
5 ('12) 15 Ind Cas 683 (684) (Cal)
('85) 9 Bom 35 (38)
('70) 13 Suth W R 431 (431)
6 ('23) AIR 1923 Mad 487 (488 489)
('26) AIR 1926 Nag 10 (13) 21 Nag L R 107

Note 14

1 ('27) AIR 1927 Mad 450 (455)
('88) 10 All 479 (481)
[**But see** (1865) 4 Suth W R 99 (99)]
2 ('28) AIR 1928 P C 139 (141) 51 Mad 349 55 Ind App 56 (P C) (Reversing AIR 1922 Mad 447)
3 ('85) 1885 Bom P J 1 (719)
('86) 10 Bom 659 (661)
[*See also* (7) 21 Suth W R 394 (395) (Nor has he right to set up any irregularities in the execution as an answer to the execution creditor s

Note 15

1 ('88) 15 Cal 521 (526) 15 Ind App 193 (PC)
('67) 7 Suth W R 456 (456) (Limitation runs from the date of the order)
('73) 10 Bom H C R 19 (20) (Do)
('74) 22 Suth W R 68 (68) (Do)
('66) 3 Mad H C R 220 (221) (Do)
('88) 1 C P L R 3 (4) (Do)
('75) 7 N W P H C R 113 (115) (Do)
('31) AIR 1931 Rang 183 (185) (Do)
('91) 1 Mad L Jour 478 (479) (Order not dated—Extrinsic evidence can be adduced as to date)
('81) 8 Cal L Rep 54 (55)
('69) 12 Suth W R 33 (34) (*Held* Article does not apply)
('74) 21 Suth W R 133 (134)
('66) 3 Mad H C R 139 (140) (Case under the old Code)
(1864) 1864 Suth W R Gap 371 (372) (*Held* S 14 does not apply)
('08) 31 Mad 431 (438) (Limitation for wrongful

2
('32) AIR 1932 Lah 516 (51)
('27) AIR 1927 Lah 680 (681)

O 21 R 63
Notes 15-16

the properties Article 11 does not apply to a suit by the decree holder to establish the title of his judgment debtor[3] See also discussion in Note 14 *ante* In the case of a minor however the period of limitation is subject to be modified by virtue of Section 6 of the Limitation Act and he can file a suit within one year after he attains majority[4] As to whether this Article applies to orders on claims preferred in respect of attachments before judgment see Note 6 *ante*

16 Subject to the result of the suit the order is conclusive — As has been seen in Note 13 *ante* an order passed in a claim proceeding is conclusive against the defeated party unless he brings a suit within one year from the date of the order It is conclusive not only between the parties to the order[1] but binds also their representatives in interest[2] Thus the auction purchaser is bound by an order against the decree holder made under Rule 62[3] Conversely the auction purchaser is also entitled to plead in bar to a suit by the defeated claimant that the order rejecting his claim has become conclusive against him[4]

But the conclusiveness of the order is *subject to the result of the suit* In other words the order is only a *provisional* one and is liable to be set aside by the decision given in the suit filed under this rule[5] The effect of such a suit is to keep the execution proceedings pending till the decision of the suit[6] If the suit by the decree holder succeeds[7] or if the suit by the claimant fails[8] the proceedings continue If the suit by the decree holder fails or the suit by the claimant succeeds[9] the proceeding fails simultaneously If after a claim order the successful claimant transfers the property in dispute to a third person such transferee also takes it subject to the result of the suit by the decree holder[10] If the decree holder succeeds in the suit the attachment is revived and the transferee cannot assert his right against him[11] In other words the transfer is affected by the doctrine of *lis pendens*[12] The same principle will apply where after the claim is rejected the properties are sold in court auction the auction

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3 (33) AIR 1933 Lah 419 (450) (Article 120 will apply)

Note 16

1 (89) 17 Cal 260 (262)
(13) 20 Ind Cas 815 (816) (Cal)
(17) AIR 1917 Cal 669 (6 0) 44 Cal 698

3 (19) AIR 1919 Lah 125 (126)
(10) 8 Ind Cas 117 (118) 35 Mad 35

order)

(The words in the rule the result of such suit

7 (P C)

(75) 23 Suth W R 183 (184)
(76) 1 All 355 (357)
8 (30) AIR 1930 Oudh 265 (266) 5 Luck 680
9 (84) 7 Mad 167 (170)
(30) AIR 1930 Oudh 468 (471)
10 (96) 23 Cal 829 (834)
(21) AIR 1921 Cal 101 (103 104)
11 (18) AIR 1918 Oudh 275 (277)
(29) AIR 1929 Cal 524 (525) 57 Cal 122
(76) 1 All 355 (357 359)
(22) AIR 1922 Mad 176 (178) 45 Mad 84
(74) 21 Suth W R 435 (435)
(21) AIR 1921 Cal 101 (103 104)
(39) AIR 1939 Oudh 178 (179) 14 Luck 543
(Transfer is void under Section 64)
[**See however** (30) AIR 1930 Rang 217 (218) 8 Rang 491 (In the case of moveables fresh seizure is necessary)]
12 (15) AIR 1915 Mad 495 (497 498) 38 Mad 535 (545 547)
(09) 1 Ind Cas 951 (951) 31 All 367 (Alienation by judgment debtor after a decree in a claim suit by the decree holder)
(39) AIR 1939 Oudh 178 (179) 14 Luck 543 (Order releasing property from attachment in

purchaser's right in such a case is subject to be defeated by the claimant succeeding in the suit[13]

It has been seen in Note 23 to Rule 58 that where one of several decree holders obtains an order in his favour disallowing a claim it cannot be availed of by the other decree holders who are not parties to the claim But where the same property is attached by different decree holders in execution and on objection by a third party the attachments under all the decrees are raised it has been held that the success obtained by a single decree holder in a suit under this rule enures also to the benefit of the other decree holders who have not filed suits[14]

A suit contemplated by this rule is a suit under the Civil Procedure Code which commences by the filing of a plaint An application under Section 4 of the Provincial Insolvency Act is not a suit for purposes of this rule[15]

A decree is passed against a firm In execution of the decree a certain property is attached The attachment is raised on the objection of a person not coming within sub rule (1) of O 21 R 50 that it is his property Proceedings are then taken under sub rule (2) of O 21 R 50 and leave is granted for the execution of the decree against such person as being a partner in the firm The decree holder is entitled to attach the same property although he has not instituted a suit under this rule in respect of the previous order allowing the objection to the attachment under O 21 R 58 The reason is that the previous order was only a bar to the attachment of the property in execution of the decree as it stood and cannot stand in the way of the decree holder attaching *the property after he has obtained an order under O 21 R 50 sub rule (2)* permitting him to proceed against the person as being a partner in the firm[16]

See also Note 23 to Order 21 Rule 58

17 Property in respect of which the order is conclusive — The claim order is conclusive between the parties to the proceedings only as regards the *particular property* in dispute[1] Thus where a claim was allowed and the decree holder filed a suit under this rule and after the dismissal thereof applied for the *arrest* of the judgment debtor or for the attachment of *other properties of* the judgment debtor more than three years after his original application for attachment it was held that the application for arrest was barred by limitation as it could not be considered to be a continuance or revival of the previous proceedings for attachment[2] Where however the decree holder succeeds in the suit and applies thereafter for proceeding with the execution originally started by him *against the property* the application must be deemed to be a continuation of the previous proceedings and is not barred[3]

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claim proceeding under O 21 R 58— Transfer made after it and before disposal of suit under O 21 R 63 *to set aside that order is affected by lis pendens*)

16 (35) AIR 1935 Pat 409 (411) 14 Pat 657.

Note 17

1 ('17) AIR 1917 Cal 669 (670) 44 Cal 698
('90) 14 Bom 206 (209 213)
('86) 12 Cal 453 (457)
('39) AIR 1939 All 657 (659)
[*See also* ('09) 1 Ind Cas 742 (743) 1909 Pun Re No 42

2 ('83) 7 Bom 293 (296)
('90) 17 Cal 968 (971) (Other property)
('78) 3 C L R 716 (720) (Do)

3 ('96) 23 Cal 43 (440)
('34) AIR 1934 Pat 3 (533) (Subsequent application in respect of the same property is continuation of previous application and will not be barred under S 48)
('04) 28 Mad 50 (53) (F B) (10 Mad 22 Overruled)

O 21 R 63
Notes 18-19

18 Effect of decision in claim cases as to possession —The claim order is conclusive as to the successful party s *right to possession* [1] But the effect of the decision as to possession in other proceedings in which the question may again arise is not the matter to which the words shall be conclusive are directly addressed Thus if attachment is removed subsequent to the claim order and later another attachment is made the question of possession is a question of possession at a different date [2]

It has been held that where a claimant prefers a claim on the basis of his being in adverse possession of the property against the judgment debtor and the claim is dismissed on the ground of his not being in possession at all he will not be precluded in a suit for possession by the auction purchaser from pleading that he has been in possession from a time anterior to the order against him although he has not brought a suit under this rule [3] The reason given is that in such a case the suit under this rule would have been futile as it would have been dismissed on the ground that the title to the property was in the judgment debtor

See also Note 24 *infra*

19 Burden of proof in a suit under this Rule — In a suit brought under this rule the burden of establishing the right claimed is upon the plaintiff [1] In *Jamahar* v *Askaran*[2] it was observed by Sir Lawrence Jenkins C J that where the suit is by the defeated claimant he must show affirmatively that not only the ostensible but the real title also is in him The burden is not discharged by merely pointing to the innocent appearance of the instrument under which he claims He must show that they are as good as they look This principle has been accepted by the various High Courts and applied in a number of decisions [3] But in *V E A R M Firm* v *Maung*

Note 18

1

from auction purchaser)]

2 (24) AIR 1924 Cal 744 (748) 51 Cal 548

3 (39) AIR 1939 Mad 456 (461) ILR (1939) Mad 803 (S B) (Dissenting from 8 Mad 506—In such cases the finding as to possession in the claim proceeding can only be taken as *prima facie* proof of want of possession)

Note 19

1 (39) AIR 1939 Pat 391 (392) (Suit by defeated claimant)

(39) AIR 1939 Pat 81 (82) (Suit by decree holder —Onus to prove that sale in claimant s favour is colourable and without consideration is on decree holder)

(39) AIR 1939 Lah 438 (439) (Suit by decree holder—Onus is on him to prove that transfer

should not only prove that there is an ostensible deed

prove genuineness of gift even though defendant has not specifically pleaded that gift is collusive)

(33) AIR 1933 Lah 855 (855)

(34) AIR 1934 Nag 253 (254)

(33) AIR 1933 Rang 211 (212)

(33) AIR 1933 Rang 129 (130)

(08) 30 All 321 (323)

(96) 18 All 369 (370)

(08) 5 All L Jour 358 (360)

(87) 1887 All W N 71 (71)

(99) 1899 All W N 220 (221)

(75) 7 N W P H C R 85 (87)

(93) 17 Bom 94 (99)

(18) AIR 1918 Mad 274 (275) 41 Mad 502

(29) AIR 1929 Nag 121 (123)

(26) AIR 1926 Nag 293 (295)

(20) AIR 1920 Nag 83 (84)

Ba Kyin, A I. R 1927 Privy Council 237=I L R 5 Rangoon 852, their Lordships of the Judicial Committee made the following observation :

> "They (the defeated claimants plaintiffs) being the ostensible owners of the property under a duly registered deed and a deed of transfer, obviously the party claiming to attach the property for somebody else's debt, not their debt, but the debt of the original debtor, must show that the sale was a fraudulent one, and that could only be done in this case by showing utter inadequacy of consideration "

Their Lordships then proceeded to examine the various items of consideration and upheld the transaction in favour of the plaintiffs Does this observation change the law as regards the onus of proof? As pointed out by their Lordships of the High Courts of Madras,[4] Patna[5] and Rangoon[6] and the Judicial Commissioner's Court of Nagpur,[7] the Judicial Committee did not consider the question of the burden of proof as such in the above case and the observation should be understood as applying only to [illegible]

(12) 14 Ind Cas 813 (813) (Low Bur) (The plaintiff is entitled to prove his case out of the defendant's own mouth)
(08) 2 Low Bur Rul 152 (157)

sufficient to rebut or at least to considerably weaken the presumption that ostensible owner is the real purchaser)
('37) AIR 1937 Pat 76 (78) (Claim rejected on ground of claimant being benamidar of judgment-debtor—Suit by claimant under R 63 — Onus to prove that he is not benamidar but *bona fide* purchaser is upon claimant)
('38) 40 Pun L R 705 (707)
(39) AIR 1939 Cal 578 (579) (Onus is on claimant to show that he has right which was denied to him by adverse order against him in claim proceedings under O 21 R 58—He must prove that

order made adversely to the plaintiff in execution, which order must be presumed to be correct until set aside)
(36) AIR 1936 Mad 971 (973)
('37) AIR 1937 Nag 1 (2) ILR (1937) Nag 291.

decision does not proceed on its acceptance of the above view as to onus of proof)
(37) AIR 1937 Lah 847 (848)
[*See* (38) AIR 1938 Lah 760 (762) (*Held* that the above rule as to onus of proof does not apply to cases where the objection to attachment has [illegible]

appear to be correct—See Note 1 to O 21 R 62 above)]

4. [illegible]

owner)

O. 21 R. 63
Notes 19-20

observed that in cases under this rule the burden of proving the validity of the alienation is on the plaintiff

"The defendant however cannot escape the burden at some stage or other If the plaintiff produces his deed and swears that it is genuine and for full consideration, and the defendants have nothing to say to the contrary, the plaintiff will succeed, and where the burden of the plaintiff is so light, it is scarcely worth arguing whether it is more correct to say that the burden is originally upon the defendants or upon the plaintiff But where the defendant has something substantial to say to the contrary, the real burden must inevitably fall upon the plaintiff to establish the right which he claims"

See also the undermentioned decisions [9]

In *Mohammad Ismail* v *Hanuman Parshad*,[10] their Lordships of the Privy Council observed as follows

"Apparently it has been the settled practice of the Indian Courts, when objections to an attachment in execution have been disallowed, and a suit has been filed by the objector under O 21 R 63 of the Code, to put the onus of proving the *bona fides* of any transaction upon which the objector relies, upon him in his capacity of plaintiff This is a matter which may possibly require further consideration when the question of onus is really material"

In the case of a dismissal of a claim *without investigation* on the ground of delay, it has however, been held that the burden is upon the *defendant* to show that the registered deed of transfer in favour of the plaintiff (defeated claimant) is fraudulent [11]

Where a decree holder who has attached property in the possession of his judgment debtor is unsuccessful in the claim proceedings and therefore brings a declaratory suit under this rule, he can rely, in such suit, on the presumption drawn from possession that the property attached belongs to the judgment debtor and the burden of proving the contrary is on the defendant [12]

Where the facts are fully established and the inference from them is clear, the question of onus is not material [13]

20. Defence of fraudulent transfer by the judgment-debtor, if can be raised in the suit. — In a suit by a defeated claimant under this rule, the decree-holder defendant can set up in defence that the transfer in favour of the claimant is voidable under Section 53 of the Transfer of Property Act There is no bar to the setting up of such a plea in defence [1]

[*See also* ('33) AIR 1933 All 198 (200) 55 All 266
('33) AIR 1933 Rang 91 (92) (Sale executed for consideration one month before suit — Onus is on plaintiff to show that sale is fraudulent or collusive)
('33) AIR 1933 Rang 129 (131)]

9 ('37) AIR 1937 Nag 9 (10) (Objection by purchaser to attachment of property purchased dismissed—Regular suit—Initial onus is on plaintiff —But if he proves purchase by duly registered sale deed reciting passing of consideration onus is shifted on to defendant to prove that sale was fraudulent)
('37) AIR 1937 Nag 143 (146) ILR (1939) Nag 266 (Suit by defeated claimant — Claimant producing registered sale deed and proving execution and valuable consideration and possession also —Burden is shifted to creditor to prove that sale is bogus)

10. ('38) AIR 1938 P C 290 (291) I L R (1939) Kar 31 (P C)

11. ('31) AIR 1931 Mad 40 (41)
('28) AIR 1928 Pat 431 (436) 7 Pat 777

[illegible]

Kar 31 (P C)

Note 20

1. ('21) AIR 1921 All 298 (301)
('20) AIR 1920 Mad 748 (753) 43 Mad 760
('17) AIR 1917 Mad 519 (522)
('18) AIR 1918 Mad 401 (422) 41 Mad 612 (FB)
('12) 14 Ind Cas 715 (716) (Cal)
('14) AIR 1914 Cal 380 (382)
[illegible]

[illegible] R 3 (Suit under Rule 63 by transferee of decree—Transfer may be impugned as being sham transaction or as a transfer made with a view to defraud creditors of transferor)
('36) AIR 1936 Nag 166 (168) ILR (1936) Nag 69 (Objection to attachment by transferee—

21 Jurisdiction — In a suit brought under this rule where the sole question between the parties is whether the property attached is or is not liable to be attached and sold the value of the suit for purposes of jurisdiction is the *amount of the decree*, where the value of the property *exceeds* that amount If however the value of the property is *less* than the decree amount then the value for purposes of jurisdiction is the *value of the property* [1] It has been held that where the property has been sold in execution of the decree before the suit the value of the property will determine the value of the suit [2]

If the judgment debtor is added as a party and a declaration of title as against him also is prayed for then the suit should be valued as on the value of the property attached [3]

The rule says nothing of the nature of the suit or the Court in which the suit is to be brought this question therefore depends on the nature of the claim and the right sought to be enforced Article 20 Schedule II of the Provincial Small Cause Courts Act excludes a suit under this rule from the cognizance of the Court of Small Causes Under Article 23 of that Act suits under Article 11 of the Limitation Act are also excepted from the cognizance of the Courts of Small Causes Hence a suit under this rule cannot be filed in a Provincial Small Cause Court [4] An order passed in a claim

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Decree holder can rely on Section 53 T P Act without instituting suit to set aside transfer)]

Note 21

1 (07) 30 Mad 335 (338) (F B)
(33) AIR 1933 All 249 (250) 55 All 315
(34) AIR 1934 Rang 302 (303) 12 Rang 666 (But the suit involves avoidance of a transfer of property—Value of property is value of jurisdiction —Otherwise the lesser value)
(34) AIR 1934 Rang 332 (333) 12 Rang 670 (If a suit involves avoidance of transfer of property under S 53 of the T P Act then value of property is value of jurisdiction)
(05) 27 All 440 (442 443)
(09) 2 Ind Cas 621 (621) 5 Low Bur Rul 23
(15) AIR 1915 All 436 (437) 38 All 72
(18) AIR 1918 All 324 (325) 40 All 505
(87) 9 All 140 (141)
(78) 2 All 799 (800)
(74) 11 Bom H C R 186 (189)
(88) 15 Cal 104 (106)

value of land but value under S 7, cl 5 Court fees Act)]
[*See also* (37) AIR 1937 Rang 101 (102) (Suit *with reference to property attached under O 21 R 46* — Value of property attached is value of suit)]

2 (39) 43 Cal W N 609 (611) (The value of the suit to the plaintiff is the value of the property which he has lost by reason of the execution proceedings)
[But see (35) AIR 1935 Oudh 271 (272) 11 Luck 1 (Value of property more than decretal amount—Value of decree is value of suit)]

3 (95) 17 All 69 (74)
(32) AIR 1932 Rang 20 (21)
(16) AIR 1916 Mad 858 (859) 39 Mad 602
(13) 18 Ind Cas 820 (822) 1913 Pun Re No 82
(12) 17 Ind Cas 196 (197) 1913 Pun Re No 41

4 (81) 7 Cal 608 (611) (Whether a party is to sue in the Civil Court or in the Small Cause Court depends entirely upon the nature of the claim and the right which is sought to be enforced)
(71) 3 N W P H C R 156n (160n) (No jurisdiction to entertain a suit to establish the title of the judgment debtor)
(72) 18 Suth W R 337 (339) (Or the title of the claimant)
(70) 13 Suth W R 99 (100) (Do)
(68) 10 Suth W R 141 (142) (Do)
(90) 1890 Pun Re No 51 page 133 (Do)
(89) 1889 Pun Re No 63 page 204 (Do)
(05) 8 Oudh Cas 291 (292) (Do)
(02) 5 Oudh Cas 190 (19) ((Do)
(11) 9 Ind Cas 537 (538) (All) (Attachment of crops—Objection to attachment struck off—Suit by claimant for recovery of price of crops—Small Cause Court has no jurisdiction to entertain the suit)

O.21 R.63 Notes 19-20 observed that in cases under this rule the burden of proving the validity of the alienation is on the plaintiff

> The defendant however cannot escape the burden at some stage or other If the plaintiff produces his deed and swears that it is genuine and for full consideration and the defendants have nothing to say to the contrary the plaintiff will succeed, and where the burden of the plaintiff is so light it is scarcely worth arguing whether it is more correct to say that the burden is originally upon the defendants or upon the plaintiff But where the defendant has something substantial to say to the contrary, the real burden must inevitably fall upon the plaintiff to establish the right which he claims "

See also the undermentioned decisions [9]

In *Mohammad Ismail v Hanuman Parshad*,[10] their Lordships of the Privy Council observed as follows

> Apparently it has been the settled practice of the Indian Courts when objections to an attachment in execution have been disallowed, and a suit has been filed by the objector under O 21 R 63 of the Code to put the onus of proving the *bona fides* of any transaction upon which the objector relies, upon him in his capacity of plaintiff This is a matter which may possibly require further consideration when the question of onus is really material

In the case of a dismissal of a claim *without investigation* on the ground of delay it has however been held that the burden is upon the *defendant* to show that the registered deed of transfer in favour of the plaintiff (defeated claimant) is fraudulent [11]

Where a decree holder who has attached property in the possession of his judgment debtor is unsuccessful in the claim proceedings and therefore brings a declaratory suit under this rule, he can rely, in such suit, on the presumption drawn from possession that the property attached belongs to the judgment debtor and the burden of proving the contrary is on the defendant [12]

Where the facts are fully established and the inference from them is clear, the question of onus is not material [13]

20. Defence of fraudulent transfer by the judgment-debtor, if can be raised in the suit. — In a suit by a defeated claimant under this rule, the decree holder defendant can set up in defence that the transfer in favour of the claimant is voidable under Section 53 of the Transfer of Property Act There is no bar to the setting up of such a plea in defence [1]

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on plaintiff to show that sale is fraudulent or collusive)
(33) AIR 1933 Rang 129 (131)]

9 (37) AIR 1937 Nag 9 (10) (Objection by purchaser to attachment of property purchased dismissed—Regular suit—Initial onus is on plaintiff —But if he proves purchase by duly registered sale deed reciting passing of consideration onus is shifted on to defendant to prove that sale was fraudulent)
(37) AIR 1937 Nag 143 (146) ILR (1939) Nag 266 (Suit by defeated claimant — Claimant producing registered sale deed and proving execution and valuable consideration and possession also —Burden is shifted to creditor to prove that sale is bogus)

10 (38) AIR 1938 P C 290 (291) I L R (1939) Kar 31 (P C)

11 (31) AIR 1931 Mad 40 (41)
(28) AIR 1928 Pat 434 (436) 7 Pat 777

(10) AIR 1910 N ... 102 (123) ...

Kar 31 (P C)

may be impugned as being sham transaction or as a transfer made with a view to defraud creditors of transferor)
(36) AIR 1936 Nag 166 (168) ILR (1936) Nag 69 (Objection to attachment by transferee—

Note 20

1 ('21) AIR 1921 All 2?8 (301)
(20) AIR 1920 Mad 749 (753) 43 Mad 760
(17) AIR 1917 Mad 519 (522)
(18) AIR 1918 Mad 421 (422) 41 Mad 612 (FB)

O. 21 R. 63 Notes 26-27

rule is, however, appealable under Section 96

27. Revision. — See Note 25 to Rule 58, *ante*

Local Amendments

CALCUTTA

Add the following as Rule 63A

O 21 R 63A (Calcutta) "63A When an attachment of moveable property ceases, the Court may order the restoration of the attached property to the person in whose possession it was before the attachment "

LAHORE

Add the following Rule:

O. 21 R 63A (Lahore) "63A (1) Where the property attached is a debt, the Court executing the decree shall investigate the claims of the judgment debtor against the garnishee in respect thereto and may order the garnishee to pay the amount of the debt to the Court

(2) The garnishee shall be deemed to be a party to the suit in which the decree was passed within the meaning of Section 47, and subject to the provisions of that Section the orders passed by the Court as a result of such investigation shall be conclusive between the judgment debtor and the garnishee and no separate suit relating thereto shall lie "

Note The Court must investigate the claims of the judgment debtor against the garnishee even if he denies the debt [1]

The remedy of a party aggrieved by an order under Rule 63A is to appeal against the order and a separate suit to set it aside is incompetent [3]

See also the undermentioned cases [4]

PATNA

Add the following heading and Rules 63A to 63H

GARNISHEE ORDERS

O. 21 R. 63A (Patna) "63A Where a debt (other than a debt secured by a mortgage or a debt recoverable only in a Revenue Court or a debt the amount of which exceeds the pecuniary jurisdiction of the Court) has been attached under Rule 46 and the debtor

[illegible]

O. 21 R 63B (Patna) 63B (1) If the garnishee does not pay into Court the amount of the debt due from him to the judgment debtor, and if he does not appear in answer to the notice issued under Rule 63A, or does not dispute his liability to pay such debt to the judgment debtor, then the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue against the garnishee as though such order were a decree against him

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[illegible]

gaging his property to plaintiff and part of consideration left with plaintiff to be paid to decree holder of defendant — On plaintiff failing to pay amount attached by decree holder — Objection of plaintiff rejected—Remedy is appeal —Separate suit is barred under O 21 R 63A)

4. (36) 17 Lah 467 (469) (Application by decr holder for adjudication under R 63A—Court [illegible] of Re 1 is payable and not *ad valorem* [illegible])
(37) AIR 1937 Lah 255 (256) (Attachment [illegible]

[illegible] does not apply)

insolvency of the judgment debtor does not require the leave of the Insolvency Court under Section 28 of the Provincial Insolvency Act [1]

24. Effect of attachment on adverse possession. — An attachment does not arrest the running of limitation in favour of a person holding adversely to the judgment debtor [1] It has been held that the fact that such person prefers a claim under Rule 58 before the expiry of the statutory period of twelve years does not prevent him from pleading successfully that on the *date of the suit* he has acquired a right by prescription [2] But the contrary view has been taken in the undermentioned decisions,[3] the reason given being that in such cases the rights of the parties should be determined as they were at the time of the *attachment*

See also Note 18, *supra*

25. Costs. — According to the High Courts of Calcutta[1] and Madras,[2] the Court cannot in a suit under this rule, order the payment of costs incurred in the claim proceedings, in favour of the successful party The High Court of Rangoon[3] has, on the other hand held that the successful party in the suit is entitled to the costs incurred in the claim proceedings The reason given is that the defeated party has no right of appeal against the order and the suit under this rule being in the nature of an appeal, success in the suit will entitle him also to the costs of the miscellaneous proceedings under Rule 58

It has been held that where a claim preferred under Rule 58 is rejected with costs and a suit by the defeated claimant under this rule is decreed, the prior order in the claim proceeding including the order as to costs, is superseded [4]

25a. Decree-holder's suit under this Rule, whether step-in-aid of execution. — See the Authors Commentaries on the Limitation Act, Article 182, Note 104 and the undermentioned cases [1]

26. Appeal. — No appeal lies from an order on a claim or an objection preferred under Rule 58 See Note 24 to Rule 58 A decree passed in a suit under this

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Note 23

1. (29) AIR 1929 Mad 323 (326 328)
[*See also* (28) AIR 1928 All 158 (159)]
[**But see** ('22) AIR 1922 Nag 108 (109) 19 Nag L R 126 (*Held* leave of Insolvency Court necessary)
(33) AIR 1933 Nag 217 (217)]

Note 24

1 (26) AIR 1926 Mad 42 (43)
(01) 11 Mad L Jour 344 (345)
(39) AIR 1939 Mad 456 (458) I L R (1939) Mad 803 (SB)

suit)
[*See also* (37) AIR 1937 Mad 44 (46) (Confirmed on Letters Patent Appeal in AIR 1939 Mad 456 (SB))]

3 (38) AIR 1938 Mad 857 (858) (Suit by defeated claimant—Title by adverse possession perfected after attachment and before suit cannot be relied upon by him)
(94) 18 Bom 260 (263)
('18) AIR 1918 Mad 572 (573)
('11) 35 Bom 79 (83)

Note 25

4. (38) AIR 1938 Nag 376 (377)

Note 25a

cannot be treated as an application within Article 182, clause 5)

O. 21 R. 63
Notes 26–27

rule is, however, appealable under Section 96.

27. Revision. — See Note 25 to Rule 58, *ante*

Local Amendments

CALCUTTA

Add the following as Rule 63A

O 21 R. 63A (Calcutta)

"63A When an attachment of moveable property ceases, the Court may order the restoration of the attached property to the person in whose possession it was before the attachment"

LAHORE

Add the following Rule·

O. 21 R. 63A (Lahore)

"63A (1) Where the property attached is a debt, the Court executing the decree shall investigate the claims of the judgment debtor against the garnishee in respect thereto and may order the garnishee to pay the amount of the debt to the Court

(2) The garnishee shall be deemed to be a party to the suit in which the decree was passed within the meaning of Section 47, and subject to the provisions of that Section the orders passed by the Court as a result of such investigation shall be conclusive between the judgment debtor and the garnishee and no separate suit relating thereto shall lie"

Note The Court must investigate the claims of the judgment debtor against the garnishee even if he denies the debt [1]

The remedy of a party aggrieved by an order under Rule 63A is to appeal against the order[2] and a separate suit to set it aside is incompetent [3]

See also the undermentioned cases [4]

PATNA

Add the following heading and Rules 63A to 63H

GARNISHEE ORDERS

O. 21 R. 63A (Patna)

"63A Where a debt (other than a debt secured by a mortgage or a debt recoverable only in a Revenue Court or a debt the amount of which exceeds the pecuniary jurisdiction of the Court) has been attached under Rule 46 and the debtor prohibited under clause (i) of sub rule (1) of Rule 46 (hereinafter called the garnishee) does not pay the amount of the debt into Court in accordance with Rule 46, sub rule (3), the Court on the application of the decree holder may order a notice to issue calling upon the garnishee to appear before the Court and show cause why he should not pay into Court the debt due from him to the judgment debtor A copy of such notice shall, unless otherwise ordered by the Court, be served on the judgment debtor

O. 21 R. 63B (Patna)

63B (1) If the garnishee does not pay into Court the amount of the debt due from him to the judgment debtor, and if he does not appear in answer to the notice issued under Rule 63A, or does not dispute his liability to pay such debt to the judgment debtor, then the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue against the garnishee as though

consideration left with plaintiff to be paid to decree holder of defendant — On plaintiff failing to pay, amount attached by decree holder — Objection of plaintiff rejected—Remedy is appeal —Separate suit is barred under O 21 R 63A)

does not apply)

(2) If the garnishee appears in answer to the notice issued under Rule 63A and disputes his liability to pay the debt attached, the Court instead of making an order as aforesaid, may order that any issue or question necessary for determining his liability be tried as though it were an issue in a suit and may proceed to determine such issue, and upon the determination of such issue shall pass such order upon the notice as shall be just O.21 R.63B (Patna)

63C Whenever in any proceedings under the foregoing rules it is alleged by the garnishee that the debt attached belongs to some third person, or that any third person has a lien or charge upon or interest in it, the Court may order such third person to appear and state the nature and particulars of his claim, if any, upon such debt, and prove the same if necessary O.21 R.63C (Patna)

63D After hearing such third person and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing as ordered the Court may pass such order as is provided in the foregoing rules, or make such other order as the Court shall think fit, upon such terms in all cases with respect to the lien, charge or interest, if any, of such third or other person as shall seem just and reasonable O.21 R.63D (Patna)

63E Payment made by, or levied by execution upon, the garnishee in accordance with any order made under these rules shall be a valid discharge to him as against the judgment debtor, and any other person ordered to appear under these rules, for the amount paid or levied, although such order or the judgment may be set aside or reversed O.21 R.63E (Patna)

63F The costs of any application for the attachment of a debt or under the foregoing rules and of any proceedings arising from or incidental to such application, shall be in the discretion of the Court Costs awarded to the decree holder shall, unless otherwise directed be retained out of the money recovered by him under the garnishee order and in priority to the amount of his decree O.21 R.63F (Patna)

63G Out of the amount recovered under the garnishee order the Court shall deduct a sum equal to the court-fee payable under the Indian Court fees Act on a plaint in a suit for recovery of the money and credit the same to the Government O.21 R.63G (Patna)

63H (1) Where the liability of any garnishee has been tried and determined under these rules the order shall have the same force and be subject to the same conditions as to appeals or otherwise as if it were a decree O.21 R.63H (Patna)

(2) Orders not covered by clause (1) shall be appealable as orders made in execution"

RANGOON

Add the following Rules 63A to 63G :

GARNISHEE ORDERS

63A Where a debt has been attached under Rule 46, the debtor prohibited under clause (i) of sub rule (1) of Rule 46 (hereinafter called the garnishee) may pay the amount of the debt due from him to the judgment debtor into Court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same O.21 R.63A (Rangoon)

Payment of debt into Court

63B Where a debt has been attached under Rule 46, and the garnishee does not pay the amount of the debt into Court in accordance with the foregoing rule, the Court, on the application of the decree holder, may order a notice to issue calling upon the why he so much xecution O.21 R.63B (Rangoon)

Notice calling on garnishee to show cause against payment into Court

A copy of such notice shall, unless otherwise ordered by the Court, be served on the judgment debtor

O. 21 R. 63C (Rangoon)

Procedure when the garnishee fails to make payment into Court or disputes liability

63C (1) If the garnishee does not pay into Court the amount of the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the decree and the costs of execution and *if he does not appear in answer to the notice issued under* Rule 63B, or does not dispute his liability to pay such debt to the judgment debtor, then the Court may order the garnishee to comply with the terms of such notice and on such order execution may issue against the garnishee as though such order were a decree against him

(2) If the garnishee appears in answer to the notice issued under Rule 63B and disputes his liability to pay the debt attached, the Court, instead of making an order as aforesaid, may order that any issue or question necessary for determining his liability be tried as though it were an issue in a suit, and may proceed to determine such issue, and upon the determination of such issue shall pass such order upon the notice as shall be just

Note See the undermentioned decision on the above rule of the Rangoon High Court [1]

O. 21 R. 63D (Rangoon)

Procedure when third person claims an interest in the attached debt

63D Whenever in th pe int... and state the nature and particulars of his claim, if any, upon such debt and prove the same if necessary

O 21 R 63E (Rangoon)

Order of Court after hearing all interested persons

63E After hearing such third person and any other person who may subsequently be ordered to appear or in the case of such third or other person not appearing as ordered, the Court may pass such order as is provided in the foregoing rules, or make such other order as the Court shall think fit, upon such terms in all cases with respect to the lien charge or interest, if any, of such third or other person as shall seem just and reasonable

O 21 R. 63F (Rangoon)

Payment by garnishee constitutes valid discharge

63F Payment made by or levied by execution upon the garnishee in accordance with any *order made under these rules* shall be a valid discharge to him as against the judgment debtor, and any other person ordered to appear under these rules, for the amount paid or levied although such order or the judgment may be set aside or reversed

O 21 R 63G (Rangoon)

Costs of garnishee proceedings

63G The costs of any application for the attachment of a debt or under the foregoing rules, and of any proceedings arising from or incidental to such application, shall be in the discretion of the Court Costs awarded to the decree holder shall, unless otherwise directed, be retained out of the money recovered by him under the garnishee order and in priority to the amount of his decree '

Sale generally

O. 21 R. 64

Power to order property attached to be sold and proceeds to be paid to person entitled.

R. 64. [S. 284.] Any Court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold,

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O. 21 R. 63C (Rangoon)

1. (35) AIR 1935 Rang 211 (212) (Person named in policy to whom payment due under policy is to be made has no right under policy merely by his name being mentioned — He should get administration or succession certificate — No certificate obtained — Such money in hands of insurance company cannot be attached as belonging to person mentioned in policy)

and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same. **O. 21 R. 64 Notes 1-3**

[*Cf.* R. S. C, O. 43 R. 2.]

Local Amendment

PATNA

For the words "attached by it" *substitute* the words "in respect of which it has made an order of attachment"

Insert the words "which is" between the words "and" and "liable"

Synopsis

1. "Any Court executing a decree"
2. "May order"
3. "Attached by it."
   4. Sale without attachment.
5. "Liable to sale."
6. Sale of property not belonging to the judgment-debtor
7. Such portion thereof as may be found necessary.
8. "Party entitled under the decree."

1. "Any Court executing a decree." — As to the power of an executing Court to order the sale of property situated outside the local limits of its jurisdiction, see Section 38, Note 6 and the undermentioned case[1]

Where the same property is under attachment in execution of decrees of several *Courts the sale thereof must be ordered by the Court of the highest grade* But a sale by a Court of inferior grade is not a nullity See Section 63 and the Notes thereunder

Rules 64 to 73 are applicable to the Chota Nagpur Tenancy Act See Section 210, sub section (3), clause (b) of that Act

2. "May order." — The term "may" in this rule does not confer a *discretion* on the Court to order or refuse to order a sale, it is obligatory on it to do so when a valid application for such order and a valid attachment have been made[1]

Where a sale in execution is set aside (for instance on the ground of fraud) and the purchaser who is not a party to the decree is dispossessed, he is entitled to compensation for the improvements made by him on the property It is not necessary in such a case to inquire whether the auction purchaser believed in good faith that he was entitled to the property, the order of the Court under which the sale was held being itself a sufficient protection At any rate, the "good faith" required does not go beyond an honest belief (though it may be negligent) on the purchaser's part in the validity of his title See General Clauses Act, Section 3 (20)[2]

As to the effect of a reversal, or the setting aside of a decree, on the title of the auction purchaser at a sale in execution of such decree, see Note 13 to Section 144

3. "Attached by it." — The rule contemplates that the property should be under attachment before its sale is ordered Where a property has been attached, the attachment cannot be said to have come to an end by the mere fact that an order is passed releasing the property from the attachment, so long as the order is liable to be

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Order 21 Rule 64 — Note 1

1. ('13) 18 Ind Cas 498 (499) (Mad) (Sale of properties outside jurisdiction — Judgment-debtor failing to take objection in time—Estoppel)

Note 2

1. (15) AIR 1915 Mad 855 (856)
('86) 12 Cal 317 (322)
2. (11) 12 I.C 444 (447, 448, 449)

O. 21 R. 64
Notes 3-5

set aside in appeal or otherwise See Section 64, Note 9 and the undermentioned cases [1]

Though the rule contains the words "attached *by it*" it has been held by the Madras High Court[2] that it does not forbid a sale where the attachment has been made by *another Court*

4. Sale without attachment. — A property must be *attached* before it can be ordered to be sold under this rule [1] If, however, it is sold in execution without there being a prior attachment, what is the effect? There is a conflict of decisions as to whether the sale in such a case is one without jurisdiction or whether the absence of attachment amounts only to an irregularity As to this, see Section 51, Note 4 and the undermentioned cases [2]

5. "Liable to sale." — A Court has no jurisdiction under this rule to order a sale unless the property is "liable to sale" The Court is therefore bound to hear objections to the saleability of a property before it orders its sale [1] A decree for money though capable of being attached is not liable to sale [2] (See O 21 R 53) But a *debt* can be sold under this rule [3] It has been held that a preliminary decree in a mortgage suit is attachable property of the judgment debtor and that the procedure for realizing such a decree is for the Court to *sell* it under this rule [4] (See Notes to O 21 R 53)

Suppose, in execution of a decree held by *A* against *B*, certain property belonging to *B* is sold and subsequently *C*, the holder of another money decree against *B*, seeks to attach and sell the same property *C* is not entitled to do so, because, when the property is sold under *A's* decree, the title to the property passes to the auction-purchaser and it ceases to be liable to sale under any other decree against *B* [5] Suppose in the above illustration *C* had already attached the property at the time of its sale

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[*See also* (75) 23 Suth W R 393 (394)]

Note 3

1 (18) AIR 1918 Oudh 275 (278) (Order raising attachment set aside by suit under O 21 R 63 —Attachment is revived)
[*See* (83) 6 Mad 93 (99) (Sale pending appeal from decision which set aside the order raising attachment is valid)]

2. (29) AIR 1929 Mad 852 (853 to 856)

Note 4

1. (30) AIR 1930 Mad 414 (417)
(1862) 1 Hyde 158 (158)

2. *Case of Calcutta High Court that want of attachment affects jurisdiction to sell*
('18) AIR 1918 Cal 39 (40) 45 Cal 780

Lahore view sale of property without attachment is not nullity
('37) AIR 1937 Lah 297 (298)

Nagpur view want of attachment is only irregularity
(22) AIR 1922 Nag 267 (271) 18 Nag L R 132
(37) AIR 1937 Nag 149 (149) I L R (1939) Nag 450

Madras view absence of attachment is only irregularity
('18) AIR 1918 Mad 1262 (1263)
(13) 18 Ind Cas 498 (499) (Mad)

Rangoon view absence of attachment is only irregularity
('34) AIR 1934 Rang 188 (189)
[*See also* (31) AIR 1931 Cal 35 (36) 57 Cal 1206
(91) 15 Bom 222 (228) 18 Ind App 22 (PC) (Property already under attachment — No second order for attachment necessary before sale)]

Note 5

1 (16) AIR 1916 Cal 253 (253)

3 [illegible]

under A's decree and that this attachment was even prior to that under A's decree, still C cannot sell the property but can only claim a rateable distribution of the sale proceeds under Section 73 of the Code[6] See also the undermentioned cases[7]

6. Sale of property not belonging to the judgment-debtor. — In England the execution of a decree for money is entrusted to the Sheriff, an officer who is bound to use his own discretion, and is directly responsible to those interested, for the illegal seizure of goods which do not belong to the judgment debtor But in India warrants for attachment are issued on the application of the creditor *who is bound to specify the property which he desires to attach* and its estimated value Hence, the English doctrine that a judgment creditor is not responsible for the consequences of a sale, under a judicial order, of goods illegally taken in execution in satisfaction of his debt,[1] does not apply in India Where the decree-holder is liable to pay damages to the third party whose *goods* he has illegally brought to sale in execution of his decree,[2] these damages will include not only the price realized at the sale but also the amount by which such price falls short of the market value of the property on the date of the attachment[3] Where on the application of a decree-holder and through his mistake his own property is sold in execution of his decree, as that of the judgment-debtor, it has been held by the High Court of Madras[4] that the decree holder will be estopped from claiming back the property from the auction purchaser unless it is found that the latter was not in fact misled by such mistake The High Court of Calcutta has held a contrary view[5]

7. Such portion thereof as may be found necessary. — It is permissible under this rule to order the sale of a *portion* of the attached property[1] Compare proviso to Rule 17, *ante*

8. "Party entitled under the decree." — Under this rule, the sale proceeds should be paid to the "party entitled under the decree to receive the same" The decree holder is such a person But the Court is not *bound* to order the payment of

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6. ('86) 12 Cal 317 (321)

to attachment by A because at time of attachment he had no interest but can object to sale by A under the prior attachment and Court has inherent power to recognize such objection)

(35) AIR 1935 Nag 171 (172) 31 Nag L R 301 (Attachment of property — Subsequent sale of property in execution of another decree—Execution purchaser though not entitled to object to prior attachment can object to sale and Court has inherent power to recognize such objection)]

7

(35) AIR 1935 Mad 872 (873) 59 Mad 1 (A attaching property of B in execution — Prior agreement by B to sell property to K — Subsequent conveyance to K is not affected—Property cannot be sold in execution of A's decree)

Note 6

C).

i2,

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loss—Measure of damages)

(78) 3 Cal 806 (816) 5 Ind App 116 (PC) (Sale by sheriff under writ of *fieri facias*—Liability

ld be given to the decree holder on ground of mistake)

See also Note 71 to Section 47, *ante*

Note 7

1. (09) 3 Ind Cas 81 (81) (Cal)

('75) 23 Suth W R 1 (4)

O. 21 R. 64 Note 8

the purchase money to the decree holder *before the confirmation of the sale*, though it may order such payment if it considers fit to do so [1]

Where the Government has a claim against the judgment debtor for court fees under a decree in a pauper suit it is entitled to be paid the amount of the court fee out of the sale proceeds in preference to the decree holder The reason is that the claim for the court fees is a Crown debt and is entitled to precedence over all other creditors The Government in such a case is "a party entitled under the decree to receive the money within the meaning of Rule 64, it need not attach the money before it can receive it [2] (*Cf* Order 33 Rule 10)

O. 21 R. 65

Sales by whom conducted and how made

R. 65. [S. 286] Save as otherwise prescribed, every sale in execution of a decree shall be conducted by an officer of the Court or by such other person as the Court may appoint in this behalf, and shall be made by public auction in manner prescribed.

[1877, S 286; 1859, S. 248 See Rule 76]

Local Amendments

NAGPUR

The following sentence shall be *added*

'Such officer or person shall be competent to declare the highest bidder as purchaser at the sale, provided that, where the sale is made in or within the precincts of the court house, no such declaration shall be made without the leave of the Court

RANGOON

Substitute the following rule

"R 65 (1) Sales shall be conducted by the Bailiff or Deputy Bailiff but the duty may be entrusted to a process server when the property is moveable property not exceeding Rs 50 in value, and when in the opinion of the Court, for reasons recorded in the diary of the case the Bailiff or Deputy Bailiff cannot personally conduct the sale

(2) Subject to the terms of the proviso to Rule 43 and of Rule 74, some one day in each week shall be set apart and regularly observed for holding sales in execution of decrees, and some well known place in the vicinity of the court house or the public bazaar shall be selected for the purpose

(3) Subject as aforesaid and unless the Court is of opinion that for any special reason a sale on the spot where the property is attached or situated will be more beneficial to the judgment debtor, all property whether moveable or immovable attached in execution of the decree, shall be sold at the time and place selected The day to be set apart, and the place selected for holding the sales, and any changes therein, shall be reported for the information of the High Court

(4) The following scale is laid down as to the amount which may be deducted from the proceeds of the sale of property sold in execution of the decree, as the expenses of sale, and paid to the officer conducting the sale under the orders of the Court as his authorized commission When the proceeds of sale do not exceed Rs 500 —5 per cent Where they exceed Rs 500 and do not exceed Rs 5,000—5 per cent on

Note 8

1 ('86) 12 Cal 252 (255)
2. ('06) 33 Cal 1040 (1044 to 1046)

the first Rs 500 and 2 per cent on the remainder Where they exceed Rs 5,000—at the above rate on the first Rs 5,000 and one per cent on the remainder **O. 21 R. 65 Notes 1-4**

The calculation of the commission shall be on the whole amount realized in pursuance of one application for execution

(5) Subject to the provisions of sub rule (13) of Rule 15B, no further sum beyond this authorized commission and the cost of conveyance of property to the place of sale shall be deducted from the sale proceeds

(6) When a sale of immovable property is set aside under the provisions of Rule 92 (2) below, no commission shall be paid to the Bailiff for selling the property

(7) No officer of a subordinate Court shall receive any larger commission or fee in respect of any sale of property (mortgaged or otherwise) held in execution or in pursuance of any decree or order of the Court directing or authorizing such sale than that allowed by sub rule (4) above

(8) The gross proceeds of sales shall be entered in Register II and in Bailiff's Register I, and shall be paid into the treasury "

Notes As regards the travelling allowance of Bailiffs going out to sell property on the spot, see Rule 43 of the Burma Travelling Allowance Rules

Synopsis

1. **"Save as otherwise prescribed"** See Rule 76
2. **Sales, by whom to be conducted**
3. **Sale to be by public auction.**
4. **Acceptance of bid.** See O 21 R 84

1. "Save as otherwise prescribed." — See Rule 76 *infra*

2. Sales by whom to be conducted. — Sales in execution are to be conducted by — (*a*) an officer of the Court, or

(*b*) any other person whom the Court may appoint

It is not, however, every officer that can conduct an execution sale, but only an officer who has been appointed for the purpose can do it [1] The rule enables the Court to appoint a person who is not an officer of the Court (*e g*, an auctioneer) to conduct an execution sale [2] Where the Court has directed a bailiff to hold a sale, the mere fact that the bids were recorded by another person does not show that the sale was not conducted by the bailiff [3]

3. Sale to be by public auction. — See Rule 76 *infra* It has been held by the Bombay High Court that the Court may, for good reason, order that the bidders shall be confined to a particular class or classes of persons [1]

4. Acceptance of bid. — See Order 21 Rule 84

R. 66. [S. 287.] (*1*) Where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court. **O. 21 R. 66**

Proclamation of sales by public auction

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1 [illegible] ...se ...ie ...r ...ent, viz any other person whom the Court may appoint ' — The words ' whom the Court may appoint ' were construed as applicable also to officers of the Court—It is conceived that the rule [illegible]

3 [illegible]

Note 3

1. (27) AIR 1927 Bom 143 (145)

O.21 R.66 *(2)* Such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sale, and specify as fairly and accurately as possible—

(a) the property to be sold;

(b) the revenue assessed upon the estate or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government;

(c) any incumbrance to which the property is liable;

(d) the amount for the recovery of which the sale is ordered; and

(e) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property.

(3) Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-rule *(2)* to be specified in the proclamation.

(4) For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto.

[1877, S. 287; 1859, S. 249.]

Local Amendments

CALCUTTA

After the word "property" in clause (e) in sub-rule (2) *add* the following proviso:

"Provided that it shall not be necessary for the Court itself to give its own estimate of the value of the property but the proclamation shall include the estimate, if any, given by either or both of the parties"

LAHORE

Add the following words to clause (e) of sub-rule (2):

"provided that it shall not be necessary for the Court itself to give its own estimate of the value of the property, but the proclamation shall include the estimate, if any, given by either or both of the parties"

After sub-rule (2) *add* the following as sub-rule (3) and *re number* the existing sub-rules (3) and (4) as (4) and (5), respectively:

"(3) Where the property to be sold is moveable property which has been made over to a custodian under sub-clauses (a) or (c) of clause (1) of Rule 43 of this *Order*, the Court shall also issue a process by way of notice to the custodian, directing *him* to

produce the property at the place of sale, at a time to be specified therein with a warning that if he fails to comply with the directions, he shall be liable to action under Section 115 of the Code of Civil Procedure **O. 21 R. 66**

MADRAS

Re number the existing clause (e) to sub rule (2) as (f) and *add* the following as clause (e)

'(e) the value of the property as stated (i) by the decree-holder and (ii) by the judgment debtor."

NAGPUR

In clause (e) of sub rule (2), *after* the word "property" *insert* the words

"including the decree holder s estimate of the approximate market price "

N.-W. F. P.

Add the following words to clause (e) of sub-rule (2)

"Provided that it shall not be necessary for the Court itself to give its own estimate of the value of the property, but the proclamation shall include the estimate, if any given by either or both of the parties [1]"

PATNA

Omit the words "shall be drawn up after notice to the decree holder and the judgment debtor and" from sub rule (2), and *add* the following proviso after sub-clause (e) of sub rule (2)

"Provided that no estimate of the value of the property, other than those, if any, made by the decree-holder and judgment-debtor respectively together with a statement that the Court does not vouch for the accuracy of either, shall be inserted in the sale proclamation "[2]

RANGOON

Add the following at the end of sub rule (2) ·

'Provided that no such notice shall be necessary in the case of moveable property not exceeding Rs 250 in value"

Synopsis

O 21 R. 66 (*Local Amendments*)

1. (N -W.F P). (39) AIR 1939 Pesh 9 (12) (Decree holder and judgment debtor giving separate estimate of value of property — Failure to give both estimates in proclamation is material irregularity)

O.21 R 66
Notes 1-3

Other Topics (miscellaneous)

1 Legislative changes —

1 The provision as to notice to the decree holder and judgment debtor in sub rule (2) is new

2 Sub rule (3) is new

2 Object of proclamation — A proclamation of sale is meant for the information of intending purchasers and not of the judgment debtor [1]

3 Nature of proceedings under this Rule — Are proceedings under this rule administrative or judicial in character? On this question there is a conflict of decisions Three views have been expressed on the matter —

(a) The proceedings under this rule are of an administrative and not of a judicial character The leading case which lays down this view is *Sivagami Achi* v *Subramania Ayyar* [1] a decision under the old Code The cases under the present Code which fall within this group have held that the view laid down in the above case is good law even under the present Code notwithstanding the changes made therein [2]

(b) The proceedings under this rule are of a judicial and not of an administrative character [3] These cases proceed on the view that the alterations in the rule under the new Code have the effect of making the action of the Court under the present rule a judicial one

(c) So far as Rule 66 requires a decision as to matters which are purely administrative in nature such as fixing the upset price and details of the sale proclamation the matter is administrative In other words where the order does not affect rights liabilities or

Order 21 Rule 66 —

1 (69) 12 Suth W R 488 (489
(72) 18 Suth W R 55 (56)

Note 3

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one of the terms of the sale proclamation viz the order in which the properties were to be sold)

tion in sale proclamation)
(2) AIR 19_7 All 208 (?09) (Estimate of the value)
(35) AIR 1935 Mad 714 (714) (Party cannot have as of right properties sold in any particular order)

3 (17) AIR 1917 Pat 331 (331) 2 Pat L Jour 130 (FB) (Order refusing to hold enquiry as to value but merely giving value given by the parties)

Appeal lies)
[*See also* (24) AIR 1924 Mad 234 (235) (*Obiter*)]

(11) 11 Ind Cas 759 (760) (Cal) (Order entering both valuations by decree-holder and judgment debtor—No enquiry as to correct valuation—Order does not determine any question judicially

questions merely related to procedure and do not in themselves affect rights or *liabilities* of parties)]

But where the order affects the rights liabilities or equities of the parties it is a judicial and not an administrative order[5]

Although apparently there is a conflict of decisions as set forth above if the *views* expressed in the various cases are taken into consideration, there does not seem to be any real conflict if the *actual decisions* are taken into account The great majority of them fall within the principles stated in paragraph *(c)* above Thus in all the cases cited as holding that proceedings under this rule are administrative and not judicial (paragraph *(a)* above) the orders in question did not affect the rights of the parties

It must also be noted that the opinion expressed in *Kaveri Bai Ammal* v *B Mehta and Sons*[6] suggesting that under the new Code proceedings under Rule 66 are judicial and not administrative was *obiter*

4. Delegation of the power to settle proclamation — It is the duty of the Court to settle the proclamation of sale itself It cannot depute a commissioner to do it and if it does so the sale will be invalid[1]

5. "Such proclamation shall be drawn up after notice" — The sale proclamation should be settled only after notice to the judgment debtor[1] It is the duty of the decree holder to apply for issue of notice under this rule and to take the necessary steps to have it served on the judgment debtor[2] But such notice is required only where a proclamation of sale has to be *drawn up* It need not be given where a fresh proclamation is ordered under Rule 69 (2) on an adjournment of sale[3]

The absence of a notice under this rule does not by itself vitiate an execution sale The defect is only an *irregularity* which may entitle the judgment debtor to have the sale set aside on satisfying the Court that he has sustained substantial injury by reason of the defect[4] But where the Court has fixed a certain date for hearing the

5 [*See* ('28) AIR 1928 Mad 1169 (1170)
('29) AIR 1929 Mad 506 (508)]
[*See also* ('26) AIR 1926 Mad 834 (835) (Order directing properties to be sold in a particular order)
('25) AIR 1925 Cal 318 (319) (Determination of question arising upon application under R 66 may also be ordered under S 47 — The test in

6 ('24) AIR 1924 Mad 234 (235)

Note 4

1 ('26) AIR 1926 Mad 755 (755) 49 Mad 333

Note 5

1 ('32) AIR 1932 All 55 (57) (Date fixed for appearance of judgment debtor should be date when all necessary materials are before Court so that judgment debtor could inspect them and

(of
ver
ver
has been ordered to be made a party to execution proceedings and been treated as a judgment debtor)

2 ('11) 9 Ind Cas 558 (560 561) 38 Cal 482

(His failure to do so amounts to default within R 57)

3 ('26) AIR 1926 Oudh 76 (76 77)
[*See also* ('21) AIR 1921 Oudh 222(223) 24 Oudh Cas 391 (Necessary particulars ascertained in previous execution proceedings — Fresh notice not absolutely necessary before preparing proclamation again)]

4 ('27) AIR 1927 Lah 84 (84)
('29) AIR 1929 Nag 130(131) 25 Nag L R 58 (Such defect is an irregularity within the meaning of O 21 R 90)
('23) AIR 1923 Lah 592 (593) 4 Lah 243

('38) AIR 1938 Lah 152 (154) (Auction price grossly inadequate — Substantial loss may be presumed)
('39) AIR 1939 Pesh 9 (11) (Judgment-debtors sued not as partners but as individuals—Failure to serve notice on any of them is material irre

O. 21 R. 66 Notes 5-6

parties as to the valuation to be entered in a sale proclamation but fixes the valuation before such date, the Court acts without jurisdiction [5]

It has been held by the Lahore High Court that where notice has been given under Rule 66 and the execution proceedings are thus brought to the knowledge of the judgment debtor, they are not vitiated by the absence of a notice under Rule 22 [6]

A notice under this rule is to be served in the same manner as a summons (Order 48 Rule 2) [7]

No notice is necessary before drawing up a sale proclamation in proceedings in execution of a rent decree under the Bengal Tenancy Act [8]

Where a judgment debtor applies to have the sale set aside on the ground that notice under this rule was not properly served upon him, the burden of proving it is on him [9]

6. "Such proclamation shall state the time and place of sale." — *Time of sale* — The omission to state in the proclamation the time of sale is a material irregularity within the meaning of Rule 90 [1] It is not enough merely to mention the *day* of sale, the *hour* of sale should also be stated [2] Where a sale has been advertised to take place at a particular hour, but is actually held at an *earlier* hour, though on the same day, it has been held by the High Courts of Allahabad and Calcutta that no sale could be deemed to have taken place at all within the meaning of the Code [3] According to the Chief Courts of the Punjab and Burma, however, such a sale is not a nullity but only an irregularity which, if material, would entitle the party interested to set aside the sale [4] Where a sale was advertised to take place between 11 A M and 5 P. M on a particular day, and actually took place at 3 P M, it was held by the High Court of Bombay that there was no irregularity inasmuch as once the sale had begun, the Court could not be expected to keep it on till 5 P M, even if the sale could be finished earlier [5] Where a sale is advertised to take place at a particular hour but is held a few hours *later*, it has been held by the High Court of Rangoon that the delay of a few hours is not a material irregularity within the meaning of Rule 90 [6] Where the judgment debtor agreed to an adjournment of the sale without fresh proclamation, the failure to mention the time of sale in the order ceases to be a material irregularity [7]

In the absence of any rules to the contrary, a sale held on a public holiday is not illegal or irregular [8]

Place of sal

Court — Omission
notices under O 21 I
thereafter does not amount to material irregularity)]
[*See also* (28) AIR 1928 All 74 (76) 49 All 830]
[**But see** (18) AIR 1918 Low Bur 114 (114)

judgment debtor cannot be taken advantage of for purposes of evading notice under R 22)]
7. [*See* (25) AIR 1925 Cal 552 (554) (Personal service not possible— affixture to house door or

1 ('19) AIR 1919 Nag 128 (128, 129) 15 Nag L R 125
(15) AIR 1915 Oudh 124 (126) 18 Oudh Cas 1.
('37) AIR 1937 All 407 (409)

8 (81) 3 All 333 (334)
[**But see** (1865) 3 Suth W R Misc 24 (24)]
9. (87) 9 All 511 (511, 512)

or the holding of a sale at a place different from that stated in the proclamation[10] is a material irregularity The Code intends that a sale should ordinarily be held at some place within the jurisdiction of the Court ordering the sale Good and sufficient reasons ought to be shown for directing otherwise [11] **O. 21 R. 66 Notes 6-9**

7 **"As fairly and accurately as possible."** — It is the duty of the Court to use all possible materials before it in drawing up a proclamation of sale which will give such information about the property to be sold as may be given and as fairly and as accurately as possible Where the presiding Judge has not availed himself of the materials before him they being such as would have enabled him to avoid the trouble afterwards occasioned the purchaser who has in fact been misled would have a remedy either for a proportionate refund of the purchase money or for a cancellation of the sale [1]

8 **Contents of sale proclamation.** — See Notes 9 to 14 below

Under the Bengal Tenancy Act (VIII of 1885) and the Orissa Tenancy Act *(II of 1913) a sale proclamation should contain certain particulars in addition to those* specified in this rule See Sections 163 and 217 of the said Acts respectively.

9. **Specification of property.** — The Court is under a duty to ascertain definitely the property to be sold before entering it in the sale proclamation [1] Where it erroneously directs the sale of the property of a stranger to the decree behind his back he is entitled to sue to have the sale set aside [2]

The rule requires that the property to be sold should be described in the sale proclamation as fairly and accurately as possible [3] The description should be sufficient to identify the property [4] Where two properties which have been amalgamated into

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(27) AIR 1927 Rang 84 (85)
[*See* (77) 1 All 400 (402) (Place of sale not stated with sufficient distinctness—Material irregularity)
(21) *AIR 1921 Mad 484 (485 486)* (Sale not to

1

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Note 7
1 (16) AIR 1916 Low Bur 3 (5) 8 Low Bur Rul 427
[*See also* (01) 1901 All W N 167 (167)]

1

is bound to satisfy itself under R 66 that the alleged debt exists before proceeding to its sale)

permits inquiry into the title of the judgment-

2

3

described in the proclamation with reasonable accuracy)]
4 (69) 12 Suth W R 488 (488)
Cases where description was held sufficient
(29) AIR 1929 Cal 409 (412) 55 Cal 902 (Mis

injury was caused by the failure to specify them)
(29) AIR 1929 Oudh 263 (264 265) (Property described as share of mortgagor in *bhaiyachara* village)
(76) 25 Suth W R 326 (327) (Wrong pargana mentioned — Property identified — Sale not vitiated)
Cases in which description was held insufficient
(05) 1905 Pun Re No 47, page 168 (Khasra

O. 21 R. 66 Note 9 one premises are stated as two premises the misdescription is not a material irregularity if the boundaries of the lots are given in the sale proclamation and no one has been misled [5] The proclamation should also specify the *judgment debtor s interest* in the property.[6] (See O 21 R 13) Where owing to the Court s failure to make use of the materials before it, the area actually sold is less than that mentioned in the sale proclamation, the auction purchaser is entitled to sue to have the sale set aside or to claim a refund of a proportionate part of the purchase money [7] Where, subsequent to the issue of a sale proclamation, a portion of the property is released from attachment and consequently, only a portion of the property mentioned in the sale proclamation is to be actually sold it is necessary to issue a fresh proclamation [8]

Where a question arises as to what was sold to the purchaser at a court sale the order of attachment, the sale proclamation and the sale certificate should be looked at [9] In a case of discrepancy between the sale proclamation and the certificate of sale the former will prevail [10] At the sale in execution of a mortgage decree, the mortgagee s interest also passes to the purchaser, though the sale proclamation may *expressly* refer only to the right title and interest of the mortgagor [11]

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numbers stated—No indication as to what the properties were—Material irregularity)
(05) 32 Cal 542 (546 547 548) (Non specification of share of the property to be sold—Material irregularity)
(87) 1887 All W N 50 (51) (Several shares in different pattis sold—Shares not specifically described—Material irregularity)

5 (33) AIR 1933 Cal 662 (663)

6 [*See* (10) 7 Ind Cas 60 (62) 34 Mad 143 (Fraudulent misrepresentation of judgment debtor s interest — Auction purchaser *held* entitled to sue for setting aside sale)]

7 (16) AIR 1916 Low Bur 3 (5) 8 Low Bur Rul 427

8 (78) 3 Cal 544 (545 546) (Omission to issue fresh proclamation is material irregularity)
[**But compare** (32) AIR 1932 All 664 (664) (In the case of zamindari property though the whole property has been proclaimed for sale a share in it may be sold without issuing a fresh proclamation)]

9 *Cases bearing on the purchaser s rights under Court sale*
(25) AIR 1925 Cal 1247 (1247) (Sale of estate with all moneys due from tenants in respect of arrears of rent—Arrears of rent include rent decrees)
(81) 6 Cal 243 (246) (PC) (Sale of decree partly executed only enables purchaser to execute the unexecuted portion)
(80) 5 Cal 144 (146) (Only in cases where it is manifest that judgment-debtor must have been sued as a representative a sale in terms of the interest of the judgment-debtor can be held to convey the interest of others apparently not parties to the suit)
(80) 6 Cal 213 (217, 218) (PC) (A obtaining a decree for possession and mesne profits of land comprised in a certain lease—*B* selling in execution of decree against *A*, *A* s interest in the lease—Purchaser does not get right to mesne profits)
(79) 4 Cal 814 (815) (Sale of under tenure for arrears of rent under S 66 of Landlords and Tenants Act of 1869—Growing crops pass to the purchaser except where it has been specifically excepted by sale notification)
Sale of property in hands of legal representative for decree debt due by judgment debtor — Latter s interest in the property passes to the purchaser
(73) 10 Beng L R 294 (300)
(1863) Marsh 614 (614)
(75) 24 Suth W R 383 (384)
(75) 24 Suth W R 109 (109)
(75) 24 Suth W R 3 (4)
(17) AIR 1917 P C 121 (123) 41 Mad 403 45 Ind App 54 (PC)
[*See* (85) 7 All 38 (40 41) (Property not mentioned ... body of the document) ... it as it is not sold to him)

10 (77) 1 Cal L Rep 460 (463)

11 (81) 5 Bom 5 (7) (Mortgagee is estopped from disputing that such is the effect of the sale)

10. Specification of revenue. — Where the property to be sold is an interest in an estate or part of an estate paying revenue to the Government, the revenue assessed upon the estate or part of the estate should be specified in the sale proclamation [1]

An omission to state it[2] or an incorrect statement thereof[3] in the proclamation is a material irregularity within the meaning of Rule 90

The term 'part of an estate' in the rule means an *aliquot* part of an estate [4]

11. Encumbrances to which property is liable. — The proclamation of sale should specify, as fairly and accurately as possible, the encumbrances to which the property to be sold is liable [1] The amount due on the encumbrances notified should also be mentioned [2] The fact that any of the alleged mortgages is admitted or disputed may also be stated [3] But the decree holder is not required to inspect and peruse all the mortgage documents mentioned in the encumbrance certificate and notify any specially onerous conditions that may be included therein such as that the property cannot be redeemed without paying off mortgages on *other* properties of the debtor [4]

It is competent to the encumbrancer himself to apply to the Court under this rule praying that his encumbrance should be notified in the sale proclamation [5] But he is not *bound* to do so and the mere fact that his incumbrance is not mentioned in the sale proclamation and that he is present at the time of the sale but does not warn intending bidders about his incumbrance will not debar him from enforcing his incumbrance [6] A prior mortgagee who has been impleaded as a party to the suit on the puisne mortgage in which the issue as to his priority was abandoned by him is not precluded from claiming under this rule that his mortgage should be notified in the sale proclamation [7]

The rule authorizes the Court to notify the alleged encumbrances on the property It does not empower it to order that the sale should be subject to the

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(81) 5 Bom 2 (5)
[*See also* (81) 5 Bom 614 (618) (Sale under money decree for mortgage debt)]

Note 10

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2
(98) 21 Mad 51 (53)
3 (76) 3 Ind App 230 (239) (PC)
(15) AIR 1915 Mad 989 (991) 21 Ind Cas 389
4 (73) 19 Suth W R 434 (436)

Note 11

1 (03) 30 Cal 599 (606 607) (FB)
(18) AIR 1918 Bom 59 (63) (Fact that property is to be sold subject to mortgage should be distinctly stated)
(32) AIR 1932 Nag 18 (20) 27 Nag L R 389 (Fact that the property is in possession of a Mahomedan widow for her dower right and is sold subject to it should be mentioned in the

two charges over property while in fact there was one charge—Material irregularity)
(36) 63 Cal 621 (624) 164 Ind Cas 461 (462) (Arrears of rates are under the Calcutta Municipal Act a statutory charge on the property and therefore must be stated in the sale proclamation)
(16) AIR 1916 Oudh 169 (172 173)
[*See also* (05) 9 Cal W N 300n (300n) (Clause (c) of this Section covers cases of puisne as well as

to

ale subject to mortgage—Amount to be carefully stated)
(87) 10 Mad 57 (62) (Incorrect statement of amount due is material irregularity)]
[**See however** (34) AIR 1934 Mad 260 (262) (Reasonable particulars of encumbrances given —Exact amount need not be given)]
3 (19) AIR 1919 Upp Bur 18 (19) 3 Upp Bur

O. 21 R. 66
Notes 11-13

An *attachment is not an incumbrance within the meaning of this rule* and hence need not be notified in the sale proclamation [28]

12. Amount to be recovered. — The amount for the recovery of which the sale is ordered should be entered in the proclamation of sale The amount so entered should not be one exceeding that granted by the decree Thus, where the decree does not grant interest, the proclamation of sale should not include it [1] Where the decree awards future interest, the interest should be calculated up to the date fixed for the sale [2] The fact that in the application for execution under O 21 R 11 (2) *ante* interest is calculated only up to the date of *application* is no bar to the interest being calculated in the sale proclamation up to the date fixed for sale [3]

Where, at an execution sale, the decree holder himself purchases the property and is placed in possession, and the sale is subsequently set aside and a fresh proclamation of sale ordered, it has been held that the mesne profits which the judgment debtor is entitled to recover from the decree holder for the period of his *possession may be deducted from the decretal amount entered in the sale proclamation* and that the matter is one to be decided in execution proceedings [4] (*Vide* Section 144 Note 34 *ante*)

When a sale is adjourned under Rule 69 *infra*, and a fresh proclamation of sale is waived by the judgment debtor, the sale on the adjourned date for the amount entered in the original proclamation is not irregular, although the decree was partly satisfied when the adjournment was obtained The reason is that where a sale is adjourned and the judgment debtor waives a fresh proclamation, the amount due on the date to which the sale is adjourned is never shown in the proclamation [5]

An incorrect statement in the sale proclamation as to the amount due under the decree does not affect the *jurisdiction* of the Court to sell the property and the sale held under a proclamation containing such incorrect statement is not *illegal* [6]

But when objection is taken to the correctness of the amount entered in the sale proclamation, the sale should not be held before the objection is disposed of [7]

***13 Everything which the Court considers material, etc.* — Clause (e)** — This clause does not mean that the Court is to give a detailed account of *all* matters connected with the property [1] Thus, it has been held that it is not necessary to specify the income from the property ordered to be sold [2] But it is a material circumstance for the bidders to know that the property to be sold is the subject matter of a pending suit by a *defeated claimant* [3] For other instances, see the undermentioned cases [4]

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subsequently deny it)
28 (37) AIR 1937 Pat 50 (51 52)

Note 12

1 (78) 3 Cal 602 (610) 5 Ind App 78 (P C)
2. (32) AIR 1932 Cal 555 (557) (If the sale is adjourned further interest upto the date fixed again can also be realized at the time of the sale)
3 (32) AIR 1932 Cal 555 (557)
4 (14) AIR 1914 Low Bur 178 (179)
5 (28) AIR 1928 Pat 615 (621) 8 Pat 122
6 (22) AIR 1922 Cal 321 (327) 49 Cal 45
[*See also* (28) AIR 1928 Pat 615 (621) 8 Pat 122)
(11) 12 Ind Cas 97 (97) (Mad) (Such incorrect statement creates no estoppel against the judgment-creditor unless the judgment-debtor is prejudiced)]
7 (23) AIR 1923 All 503 (504)

Note 13

1 (99) *1899 Pun Re No 30 p 153*
2 (28) AIR 1928 Lah 918 (918)
perty is held by occupancy tenure)
(32) AIR 1932 Nag 18 (20) 27 Nag L R 353

Where a landlord brings to sale the holding of his tenant in execution of his decree against the tenant, his failure to specify the *ordinary* incidents of the tenure will not estop him from claiming to enforce them against the auction-purchaser, but he will be estopped from enforcing any *unusual incidents* of the tenure, unless he has notified them in the sale proclamation[5] The reason is that, in the former case the auction-purchaser may be presumed to have notice of the incidents, while in the latter case he cannot be held to have such notice. See Note 11 above

14. Value of the property. — There is a conflict of decisions as to whether under this rule a Court is under a duty to state its own estimate of the value of the property to be sold in the sale proclamation The High Courts of Madras[1] and Allahabad[2] have held that the Court is under no such obligation. On the other hand, it has been held by the High Courts of Patna,[3] Calcutta[4] and Rangoon[5] and the Chief Court of Lower Burma[6] that it is the duty of the Court to enter in the sale

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(Widow s right to possession of property for dower debt to be stated)

(1900) 5 Cal W N 497 (502) (Sale of tenure — Arrears of rent should be stated)

('29) A
(Sale
father
minor
may be notified)

('69) 12 Suth W R 79 (79) (The fact that the property is under another attachment and is liable to be sold in satisfaction of another decree may be mentioned)

('38) 42 Cal W N 661 (663) (Sale of mining rights —Boundaries of the area stated but not the extent of the area and the nature of coal deposits—No sufficient description)

('37) AIR 1937 Nag 140 (143) (Decree-holder should specify claim of third party in possession of the property to be sold)

('38) AIR 1938 Mad 720 (720) (It is incumbent on the Court to see that all the particulars required under O 21 R 66 are given properly, so that an intending bidder may know exactly what he is going in for)

('32) AIR 1932 Bom 210 (212) (Undivided share of a member of a joint family attached during partition proceedings and ordered to be sold — Subsequently final decree for partition passed — Court must take notice of partition and proclaim for sale ascertained share of the member)

('80) 4 Bom 323 (326) (Attachment of debt due to judgment debtor—Court receiving notice that the debt is discharged — Court should hold inquiry as to existence of debt)

Unnecessary particulars

('25) AIR 1925 Oudh 150 (150) (Plan of property not necessary)

(1865) 2 Suth W R 60 (61) (Sale of decree — Omission to mention amount decreed)

5. ('03) 30 Cal 213 (215, 217).

Note 14

1. ('28) AIR 1928 Mad 503 (504) 51 Mad 655
('27) AIR 1927 Mad 1009 (1009)
[*See also* ('27) AIR 1927 Mad 943 (943) (Court considering report of certain persons as sufficient commits no error)]

2. ('32) AIR 1932 All 664 (664)

3. ('17) AIR 1917 Pat 381 (382) . 2 Pat L Jour 130 (F B)
('19) AIR 1919 Pat 373 (374) . 4 Pat L Jour 37. (No valuation other than that fixed by Court should be inserted in proclamation)
('23) AIR 1923 Pat 445 (446) (Do)
[*See also* ('18) AIR 1918 Pat 536 (536) 3 Pat L Jour 580 (Direction that value be put at twenty times the revenue is not proper)]

4. ('32) AIR 1932 Cal 141 (142)
('33) AIR 1933 Cal 511 (513) 60 Cal 581
('34) AIR 1934 Cal 205 (207) (Court should settle value of property sought to be sold as accurately as possible from materials available on

[But see ('04) 31 Cal 922 (926) (Court is not required to make an investigation into the question of the value of the property, to record evidence and to come to a decision on the

material irregularity in the publication of the sale)

6. ('14) AIR 1914 Low Bur 178 (179) (Omission to state value is sufficient reason to stay sale)

O. 21 R. 66
Note 14

proclamation its own estimate of the value of the property The Bombay High Court[7] has held in a recent decision that it is not necessary in every case to value the property to be sold and to state the value in the sale proclamation but the Court may, if it thinks fit do so But in the undermentioned case[8] it was held by the same High Court that the Court is bound to hold an inquiry as to the value of the property and state the value in the sale proclamation Opinion in the Nagpur Judicial Commissioner s Court is divided [9] Though as seen above, the Calcutta High Court holds that it is the duty of the Court to enter in the sale proclamation its own valuation of the property to be sold, it has also been held by that Court that in *exceptional cases* the Court will be justified in not attempting to give a valuation of its own and in confining itself to stating the values given by the parties [10] In any view, the omission of the Court to give an estimate of value is a mere irregularity and does not by itself vitiate the sale [11]

Under the rule as amended by the High Courts of Calcutta, Lahore, Madras Nagpur N W F Province and Patna the Court is not bound to give its own estimate of the value of the property, but is only required to state the value given by the parties (See Local Amendments) In view of this the decisions of the High Courts of Calcutta and Patna and the Judicial Commissioner s Court of Nagpur passed before the above amendments holding that the Court was under a duty to state its own estimate of the value of the property should be treated as no longer law

An undervaluation in a sale proclamation which is calculated to mislead possible bidders and prevent them from offering adequate prices or from bidding at all is a material irregularity within the meaning of Rule 90 *infra*,[12] but the judgment debtor may by his conduct be estopped from raising this objection [13]

The Court need not make an elaborate enquiry before fixing the value of the property [14] The fact that the highest bid offered at the auction is far below the value

7 (39) AIR 1939 Bom 182 (183) I L R (1939) Bom 3ə9

8 (35) AIR 1935 Bom 331 (332)

9 (30) AIR 1930 Nag 191 (192 193) (Court should state its valuation)
(28) AIR 1928 Nag 281 (282) (Court s valuation not necessary)

10 (32) AIR 1932 Cal 576 (578 5?9)
(33) AIR 1933 Cal 511 (513) 60 Cal 581 (Exceptional circumstances to be pointed out by Court in its order)
(31) AIR 1931 Cal 520 (520) 58 Cal 577
(24) AIR 1924 Cal 589 (59?)
[*See also* (26) AIR 19_6 Cal 610 (611)]

11 (31) AIR 1931 Cal 490 (491) 58 Cal 818 (But in a particular case omission may amount to material irregularity)
(30) AIR 19ə0 Lah 685 (6ə6 68?)
(?2) AIR 1922 Cal 93 (94) (If it has a material effect upon the number of bidders and upon price it may amount to material irregularity)

12 (98) 20 All 41?(417 418) 25Ind App146(PC)
(33) AIR 1933 All 546 (5ə0) 55 All 519
(29) AIR 19?9 Cal 818 (819) 57 Cal 67
(1?) AIR 1917 Pat 72 (3 74)
(19) AIR 1919 Cal 3ə0 (351)
(18) AIR 1918 Pat ?66 (267)
(17) AIR 1917 Cal 461 (46?)
(24) AIR 1924 Mad 767 (768)
(1900) 23 Mad 568 (ə70)
(13) 19 Mad Cas 296 (293) 40 Cal 635 40 Ind App 140 (PC)
(12) 13 Ind Cas 337 (341) (Cal)
(11) 10 Ind Cas 475 (4 6) (Cal)
(11) 9 Ind Cas 693 (701) (Cal)
(23) AIR 1923 Cal 328 (331) (But sale will not be set aside unless substantial loss is shown to have been caused by the undervaluation)
(_0) AIR 19 0 Cal 518 (519) (Do)
(38) AIR 1938 Mad 720 (720)
(34) AIR 1934 Pat 540 (541) (Mere inclusion of two valuations in sale proclamation does not vitiate sale unless substantial loss is proved)
(35) AIR 1935 Mad 4ə9 (462)

14 (32) AIR 1932 Cal 141 (14?) (But the value of the property must be stated as fairly and accurately as possible)

stated in the proclamation is no evidence of fraud or material irregularity in publishing or conducting the sale[15] Where the highest bid offered at the auction falls below the value stated in the proclamation, the Court has no power to dismiss the execution petition[16] In fixing the value of the property, *abuabs* (illegal cesses) should not be taken into consideration[17] A right to have a lease of a mill for 20 years should not be valued by capitalising the annual rent for 20 years[18] It is not a correct method of valuing heavily encumbered properties by taking their value in an unencumbered state and simply deducting from them the amount of the encumbrances[19]

It is the duty of the Court to group the lands (to be sold in execution) in small and convenient plots and offer them for sale so that it may be possible for men of ordinary means, especially the ryots in the locality, to purchase them at a fair value[20]

15. Effect of an order under this Rule. — There is a material difference between an order under Rule 63 and an order under the present rule In the former case, if the party affected does not sue within 12 months to set it aside, it becomes conclusive against the person against whom it is made In the latter case, it has no such effect[1]

Where property is sold to a *bona fide* third party purchaser in execution of a decree in force at the time, a subsequent reversal, variation or amendment of the decree does not affect the validity of the sale[2]

Where the property of a stranger is attached and sold, his failure to object thereto does not affect his rights inasmuch as, though the Code enables third parties to come in and object they are not *bound* to do so[3] See also Note 11 above

16 Non-compliance with the provisions of this Rule. — Non compliance with the provisions of this rule renders a court sale liable to be set aside on the ground of material irregularity[1] If objection is raised by the judgment debtor to anything stated in the sale proclamation, it is irregular for the Court to order the sale to be held

('17) AIR 1917 Pat 381 (382) 2 Pat L Jour 130 (FB)
[*See also* ('39) AIR 1939 Cal 369 (375) I L R (1939) 1 Cal 530 (Still value inserted in sale proclamation is an index of the value of such ... ") ... 1 Pat ... e made

15 ('22) AIR 1922 Pat 550 (551, 552) 1 Pat 214
16 ('26) AIR 1926 Pat 140 (141)
('26) AIR 1926 Pat 146 (146) (Auction purchaser cannot be compelled to bid higher than or up to the proclaimed price)
17 ('02) 7 Cal W N 439 (439 440)
18 ('34) AIR 1934 Lah 146 (146)
19 ('35) AIR 1935 Cal 614 (618)
20 ('38) AIR 1938 Mad 720 (720)

Note 15

... rule is not conclusive)
2. ('30) AIR 1930 All 578 (579)
3. ('85) 9 Bom 86 (91, 93)

Note 16

1 ('06) 3 Low Bur Rul 275 (277)
('32) AIR 1932 All 55 (57) (Want of verified statement, etc)
('23) AIR 1923 Lah 213 (216) (Omission to state time and place)
('02) 29 Cal 73 (99) (FB) (Misdescription of property is material irregularity)
('25) AIR 1925 All 459 (462, 464) 47 All 479 (Do)
('37) AIR 1937 All 407 (409) (Omission to issue ... as to proper valuation See also Note 14 to O 21 R 90)

O 21 R 66 Note 16

pending disposal of the objection[2] But the irregularity due to the non compliance with the provisions of this rule can be waived and the person who has waived the irregularity is estopped from subsequently raising any objection in respect thereof[3] Thus a judgment debtor who in spite of a notice under this rule or in spite of knowledge of the contents of a sale proclamation does not object at the proper time cannot subsequently raise the objection[4] But the judgment debtor is not estopped where he was not aware of the facts to which he was bound to object and where his failure to do so was due to a mistake for which he could not be held to blame[5] A person may be held to waive irregularities in the sale proclamation by bidding at the sale[6] But where the objection is to the *want of jurisdiction* to sell there can be no estoppel by waiver[7] Thus a failure to object on the ground that notice under O 21

2 (23) AIR 1923 All 503 (504) (Objection to amount stated in proclamation)
(18) AIR 1918 Cal 490 (490) (The proclamation may be issued before disposing of objections filed by judgment debtor)
[*See* (38) AIR 1938 Lah 65 (68) (Objection of judgment debtor dismissed on ground that he

in

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(

4 (89) 12 Mad 19 (25) 15 Ind App 171 (PC) (Objection to description of property—Following

(28) AIR 1928 Cal 328 (331) (Objection as to valuation)
(25) AIR 1925 Cal 552 (555) (Do)
(24) AIR 1924 Pat 111 (112) 2 Pat 916 (Do)
(23) AIR 1923 Pat 134 (135) (Objection to notification of encumbrances)
(30) AIR 1930 Lah 685 (686) (Objection as to want of application under R 66 (3))
(12) 16 Ind Cas 235 (236) (Cal)
(29) AIR 1929 All 704 (704)
(35) AIR 1935 Cal 614 (618) (Object on after sale

not comprised in mortgage are included is not maintainable)
(36) AIR 1936 Pat 568 (570) 15 Pat 345 (Sale of personal properties of mortgagor judgment-debtor—Judgment debtor getting adjournment of sale waiving fresh proclamation—He cannot afterwards raise objection that there was no personal decree under which property could be sold)
(36) AIR 1936 Bom 315 (317)
[*See also* (76) 3 Ind App 220 (240) (PC) (Petition for postponement of sale with a statement that the order of attachment and sale proclamation may be maintained is waiver)
(81) 7 Cal 613 (615) (Merely applying for postponement of sale is no waiver)
(34) AIR 1934 Mad 260 (261) (Properties described as undivided share—Subsequent division among judgment debtor and his brothers — Judgment-debtor not applying for amendment of sale proclamation cannot object)

any irregularities in the attachment)
(39) AIR 1939 Bom 526 (528) (Failure of judgment debtor to object that he was an agriculturist and that proceedings should be transferred to Collector — Judgment debtor cannot subsequently raise objection)]
[But see (27) AIR 1927 Rang 84 (85) (No estoppel in case of omission to state place and time of sale)

obedience to the notice served upon him under R 66 for settling the terms of the proclamation)]

5 (15) AIR 1915 Mad 989 (992 993) 38 Mad 387
[*See also* (03) 8 Cal W N 257 (263) (Case under

7 (31) AIR 1931 Oudh 398 (400) (Ancestral property—Sale of —Civil Court has no jurisdiction — Want of objection cannot operate as estoppel)
[See however (06) 28 All 273 (276) (Court deciding that property is not ancestral — Decision cannot be questioned subsequently)]

Rule 22 was not given does not estop the judgment debtor from questioning the sale under Rule 90 *infra* [8] **O. 21 R. 66 Notes 16-20**

17. Verified statement to accompany application for order for sale — Sub-rule (3). — An application for an order for sale should be accompanied by a verified statement as required by this sub rule [1] Omission to file a verified statement amounts only to an irregularity and does not by itself vitiate the sale [2] The verification need not be made by the decree holder himself but may be made by a person acquainted with the facts of the case [3] (See also Order 6 Rule 15)

18. "Court may summon any person," etc. — Sub-rule (4). — A claim preferred in the course of an investigation under Rule 66 in relation to immovable property *ordered by the decree to be sold* cannot be treated as a claim under Rule 58, because the latter rule applies only in cases where the property is attached [1]

19. Form of proclamation of sale. — See Appendix E, Form No 29

20. Appeal. — An order under this rule is not one of the appealable orders under Section 104 or O 43 R 1 [1] Hence, the question arises whether orders under this rule are appealable as decrees under Section 47 read with Section 2 This question depends on two further questions, *viz* —

(a) whether proceedings under this rule are of an administrative or a judicial character, and

(b) whether orders under this rule amount to a determination of a question within Section 47

The answer to these questions must depend on the particular order in question in each case Thus where an order under this rule does not affect the rights, liabilities or equities of the parties to the decree it is not a *judicial* order, nor does it amount to the determination of a question within Section 47 and hence no appeal lies from such an order [2] On this principle *no* appeal lies from the following orders under this rule —

(a) An order about the value of the property to be entered in the sale *proclamation* [3]

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8 ('33) AIR 1933 Lah 71 (72)

Note 17

1 ('32) AIR 1932 All 62 (63)

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3 ification by karpardaz of decree holder sufficient)

Note 18

1 ('90) 14 Bom 369 (370)

Note 20

1. ('20) AIR 1920 Pat 636 (638)

2. ('28) AIR 1928 Mad 1169 (1170)
('29) AIR 1929 Mad 506 (508)
('29) AIR 1929 Lah 815 (816)
('11) 10 Ind Cas 371 (371 372) (Cal)
('14) AIR 1914 Cal 488 (489)
('17) AIR 1917 Low Bur 121 (122) 8 Low Bur Rul 350 (No appeal against order under

value of property is not a judicial adjudication of a question under Section 47)
See also the cases cited in foot notes (3) to (9), below
[*See also* ('04) 27 Mad 259 (261) (F B) (None of the proceedings under S 287, old Code, is an order within S 244 and as such appealable

O. 21 R. 66
Note 20

(b) An order as to the sale of the properties in particular lots[4]

(c) An order as to service of notice prescribed by the rule[5]

(d) An order for the entry of certain encumbrances in the sale proclamation[6]

(e) An order fixing the place of sale[7]

(f) An order fixing the upset price[8]

For other instances, see the undermentioned cases[9]

But where the Court in addition to deciding matters which are purely administrative in nature such as fixing the upset price and the details of the sale proclamation decides questions affecting the *rights of the parties* the order will be a judicial order and will also amount to a determination of a question within Section 47 and an appeal with lie from that order[10] Thus where there are several judgment debtors under a mortgage decree an order that the properties of some of them should be sold first and the properties of the others should be sold only in the case of a deficiency occurring on such a sale may be appealable as a decree as it determines the rights of the co judgment debtors *inter se*[11] Similarly, an order relating to the boundaries or the area of the property to be sold comes within Section 47 and is appealable as a decree[12] It has been held that an order as to whether a sale is to be held by the Court itself or by the Collector on the ground of the judgment debtor

(28) AIR 1928 Bom 245 (246 247) 52 Bom 444
(26) AIR 1926 Cal 610 (611)
(19) AIR 1919 Cal 1094 (1095)
(14) AIR 1914 Cal 488 (489) (Order accepting valuation of property)
(11) 10 Ind Cas 371 (371 372) (Cal)
(11) 11 Ind Cas 759 (760) (Cal)
(12) 17 Ind Cas 88 (89) (Cal)
(04) 27 Mad 259 (261) (F B)
(29) AIR 1929 Mad 506 (508)
(24) AIR 1924 Mad 767 (768)
(18) AIR 1918 Mad 1264 (1264) (Order fixing re open valuation)
(30) AIR 1930 Oudh 81 (81 82) 5 Luck 481 (Order rejecting objection to mis statement of value of property)
(34) AIR 1934 Cal 761 (762) (Order disallowing objection that valuation was too low)
(39) AIR 1939 F C 74 (80) (FC)
(39) AIR 1939 Bom 182 (183) ILR (1939) Bom 389
(37) AIR 1937 Rang 157 (158)

The following decisions to the contrary are not good law

(16) AIR 1916 All 287 (289)
(10) 6 Ind Cas 180 (181) (Cal)
(03) 8 Cal W N 257 (262)
(03) 30 Cal 617 (618)
(19) AIR 1919 Lah 233 (234)
[*See* (25) AIR 1925 Cal 318 (319)]

4 (04) 27 Mad 259 (261) (F B)
(32) AIR 1932 All 136 (137)
(29) AIR 1929 Mad 506 (508)
(24) AIR 1924 Mad 527 (529)
(29) AIR 1929 Lah 815 (816)

5 (26) AIR 1926 Cal 1184 (1184)
(34) AIR 1934 Cal 761 (762)

6 (94) 1894 Bom P J 48
[**Contra** (86) 1886 All W N 167 (168)]

7 (04) 27 Mad 259 (261) (F B)

8 (23) AIR 1923 Mad 619 (620 621)
(28) AIR 1928 Mad 1169 (1170)
(18) AIR 1918 Mad 1264 (1264)
(29) AIR 1929 Mad 506 (508)

9 (04) 27 Mad 259 (261) (F B) (Order fixing the amount for which the sale is to be held—No appeal lies)
(21) AIR 1921 Cal 629 (630 631) (Order directing proclamation to issue pending enquiry into judgment debtor s objections — No appeal lies)
(18) AIR 1918 Cal 601 (601) (Refusal to enter that the judgment debtor had acquired the [illegible]

1
([illegible]

(33) AIR 1933 Lah 383 (384) (Area)

being an agriculturist is a *judicial* order which is open to appeal[13] It has been held in some cases that irregularities in *drawing up* the sale proclamation are not irregularities in *publishing or conducting* the sale within O 21 R 90 and hence, an application by a judgment debtor to set aside an execution sale on the ground of such irregularities comes within Section 47 and not under O 21 R 90, and that therefore an order determining such an application is one under Section 47 and appealable as a decree[14]

A question of waiver of irregularities in the sale proclamation by the judgment debtor on which the trial Court had found against him but which was not raised before the High Court on appeal cannot be raised by him before the Privy Council[15] (See Notes to Order 41 Rules 1 and 2)

21. **Revision** — It has been held by the High Court of Patna[1] that the action of the Court under this rule is a *judicial* one and hence subject to the revisional jurisdiction of the High Court It was further held by that Court that the High Court could interfere under Section 107 of the Government of India Act of 1915 even if the action of the lower Court in such cases be held to be *administrative*[2] But the High Court will not ordinarily interfere in revision in a discretionary matter[3] or where the applicant for revision has not been in any way damnified by the order complained against[4]

22 **Applicability of the rule of res judicata to proceedings under this Rule** — The principle of *res judicata* applies to execution proceedings[1] (See Section 11, Note 23) The question whether the principle applies to proceedings under this rule depends on whether the proceedings are administrative or judicial for unless they are held to be judicial the principle of *res judicata* cannot apply to them (See Section 11, Note 100) The answer to this question depends on the particular order in question in each case In so far as an order merely settles the details to be entered in a sale proclamation the proceeding is only administrative or ministerial and such an order cannot operate as *res judicata*[2] nor is such an order a *final* order so as to operate as *res judicata*[3] But if in proceedings under the rule a final order affecting the rights of the parties is passed such an order will be a final order of a judicial character and as such will operate as *res judicata*[4]

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13 (39) AIR 1939 Bom 526 (528)

appeal lies)]

15 (07) 34 Cal 709 (710) 34 Ind App 164 (PC) (Question being one of fact)

Note 21

1 (17) AIR 1917 Pat 381 (381 382) 2 Pat L Jour 130 (FB)

[*See also* (23) AIR 1923 Pat 102 (102) (Fixing valuation before day fixed for hearing parties on the question is revi able)]

[**Compare** (16) AIR 1916 Mad 632 (632) (Under valuation is not material irregularity within Section 115)]

2 (17) AIR 1917 Pat 381 (382) 2 Pat L Jour 130 (FB)

3 (32) AIR 1932 Cal 576 (578 579)

4 (06) 3 Low Bur Rul 275 (278)

Note 22

1 (22) AIR 1922 All 27 (28) 44 All 350

2 (24) AIR 1924 All 480 (480) (Order merely

3 (25) AIR 1925 Pat 500 (502) 4 Pat 731 (FB) (Order refusing to notify a lease — No *res judicata*)

[*See also* (39) AIR 1939 All 657 (659) (Mort

4 (24) AIR 1924 Pat 628 (628 629) (Decision that applicant was *pro forma* defendant and as such was not entitled to notice under Rule 66 operates as *res judicata*)

(33) AIR 1933 All 192 (195) (Property of judgment debtor stated by decree-holder to be ancestral and so found by Collector — Execution transferred to Collector—Contention by decree holder that property not ancestral—*Res judicata*)

O. 21 R. 66
Note 22

The principle of *constructive res judicata* (Section 11, Explanation 4) also applies to execution proceedings [5] (See Section 11 Note 23) But it must be shown that the party sought to be barred has had clear notice of the nature of the claim made against him (See Section 11 Note 23) Thus, it has been held by a Full Bench of the Madras High Court[6] that where a notice is for the settlement of the terms of a sale proclamation, the judgment debtor's legal representative cannot be deemed, by absenting himself to have attended and raised the question as to whether the property was that of the judgment debtor or belonged to himself Further, where the last execution case was dismissed for default, the judgment debtor cannot be held to be barred by constructive *res judicata* from raising a contention which he failed to raise in such execution case [7]

The principle of *res judicata* will not apply if the Court had *no jurisdiction* to pass the order in question, as, for instance, where the order was by a Civil Court for the sale of ancestral property of the judgment debtor, which, under the law, could be sold only by the Collector [8] But, where in such a case the judgment debtor to whom a notice is sent under this rule fails to appear and the Court upon the materials before it *decides that the property is non ancestral* and orders its sale, the judgment debtor cannot subsequently raise the objection as to jurisdiction,[9] for a decision as to jurisdiction is as much *res judicata* as a decision on any other point (See Section 11 Note 73)

A decision in the course of execution proceedings operates as *res judicata* even in a subsequent *suit* between the parties [10]

The principle of Section 11, Explanation 5 does not apply so as to preclude a Court executing a mortgage decree from directing that the properties should be sold in a particular order, merely because the Court trying the suit was asked to embody an order to this effect in its decree but did not do so [11] The reason is it is conceived, that in such a case, the decree does not decide that the properties should be sold in any particular order and the executing Court has in the exercise of its power to sell the mortgaged property or a sufficient portion thereof," (see O 34 Rr 4 and 5) a discretion to direct the sale of the properties in any order it thinks fit (*Cf* also Section 11, Note 125)

A decree holder ought not to be allowed to take up inconsistent positions to the prejudice of the judgment debtor Thus, where in execution of a mortgage decree the decree holder has caused to be sold properties not comprised in the mortgage and has all along been acting on the basis that the properties sold were comprised in the mortgage, he cannot be allowed to contend that they were *not* comprised in the mortgage and to bring to sale the properties that were comprised in the mortgage [12]

5. (22) AIR 1922 All 27 (28) 44 All 350

(35) AIR 1935 All 1016 (1018) 58 All 360 (Objection by judgment debtor that he was agriculturist and that the property (house) was not liable to attachment and sale can be raised even after sale)]
[But see (25) AIR 1925 Nag 320 (320) 21 Nag L R 23)]

7. (25) AIR 1925 Pat 588 (590)
8. ('31) AIR 1931 Oudh 393 (400)
9 (06) 28 All 273 (276)
10. Section 11, Note 23

clamation)]
12. (09) 3 Ind Cas 22 (23) (All)

23. Judgment-debtor dying pending execution. — Where a decree-holder attaches the undivided interest of his judgment-debtor in (Hindu) joint family property, the latter's death before sale does not affect the decree-holder's right to proceed against his interest in the property in the hands of the surviving coparceners [1] (See also Section 64 Note 10) Where a judgment debtor dies before the proclamation of sale is drawn up and the proclamation is drawn up without notice to his legal representatives, the sale held on the basis of such proclamation is void [2] (See Notes under O 21 R 22) But when a sale proclamation has been legally drawn up after notice to the judgment debtors, and one of the judgment-debtors dies thereafter, it is not necessary that a fresh proclamation should be drawn up after notice to the legal representatives of the deceased judgment debtor [3] O.21 R.66 Notes 23-24

24. Limitation—Step-in-aid of execution.—An application for a proclamation of sale in respect of property under attachment is an application to take a step-in-aid of execution [1] See also the undermentioned cases [2]

R. 67. [S. 289.] *(1)* Every proclamation shall be made and published, as nearly as may be, in the manner prescribed by rule 54, sub-rule *(2)*. O.21 R.67

Mode of making proclamation.

(2) Where the Court so directs, such proclamation shall also be published in the [a]*Official Gazette* or in a local newspaper, or in both, and the costs of such publication shall be deemed to be costs of the sale.

(3) Where property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot unless proper notice of the sale cannot, in the opinion of the Court, otherwise be given.

[1877, S. 289; 1859, S. 249.]

a Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "local official Gazette"

Note 23

1. ('85) 7 All 731 (732) (Following 5 Cal 148 (PC))
2. ('28) AIR 1928 All 74 (76) 49 All 830
3. ('33) AIR 1933 All 654 (655)

Note 24

execution)
('90) 17 Cal 53 (57) (Application for sale is application to take step in aid of execution)
('91) 15 Bom 405 (407) (Do)
('96) 23 Cal 374 (387) (Application paying process fees for service of a sale proclamation is

plication is time barred)

O. 21 R. 67
Notes 1a–4

Local Amendments

MADRAS

Add the following as sub rule (4)

"(4) Unless the Court so directs it shall not be necessary to send a copy of the proclamation to the judgment debtor

PATNA

Add the following words at the end of sub rule (1) after deleting the full stop at the end of the sub rule

"and may, if the Court so directs on the application of the decree holder, be proclaimed and published simultaneously with the order of attachment"

Synopsis

1a Object of the Rule.—The provisions of Rules 67 and 68 have been designed for the protection of judgment debtors and for the purpose of ensuring that the properties of such persons shall not be put to sale unless due publicity is given to the fact that a sale is to be held and a proper opportunity is afforded to bidders to attend the sale after proper notice has been given [1]

1. Mode of making the proclamation. — The proclamation of sale should be made and published in the manner provided for by sub rule (2) of Rule 54 See Notes to Rule 54 and the undermentioned cases [1]

This rule applies to proceedings under the Orissa Tenancy Act, II of 1913 (see Sections 217 and 219) but not to proceedings under the Bengal Tenancy Act (VIII of 1885), (see Section 163, sub section (3) as amended by Act IV of 1928 Section 102 clause (c)

2. Publication in the gazette or newspaper. — The Court has a *discretion* under this rule to direct the publication either in the gazette or in a local newspaper or in both [1] The want of correspondence between the advertisement in the gazette, and the schedule of the attached property in the sale proclamation, constitutes an *irregularity* which might be cured if the sale was regular in other respects [2]

3. Division of property into lots—Sub rule (3).—Sub rule (3) is new and dispenses with the necessity of making separate proclamations for each separate lot where the property is divided into separate lots for being sold [1] If, however, the Court thinks that proper notice cannot otherwise be given, as for instance, where the lots are situate at such a distance from each other that there is no certainty of communication to persons interested in one of such lots of what is publicly done in the other, the Court can direct the issue of a separate proclamation for each lot [2]

4. Non-compliance with the Rule. — As already noticed under Rule 54 and Notes thereunder an omission to comply with the requirements of sub rule (2) thereof

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Order 21 Rule 67 — Note 1a

1. (33) AIR 1933 Cal 699 (700)

Note 1

1. (81) 7 Cal 466 (469) (Proclamation to be affixed in some conspicuous part of the property)
(81) 7 Cal 34 (41) (Do)

Note 2

1. (19) AIR 1919 Lah 260 (261)
(97) 1 Cal W N clv (clvi)
(68) 10 Suth W R 354 (354) (Case under the old Code)
[
2
App 33 (PC)

Note 3

1. (30) AIR 1930 Lah 685 (687)
(88) 12 Bom 368 (370)
2 (88) 12 Bom 368 (370)

constitutes a *material irregularity* which would be a ground for setting aside the sale under Rule 90 provided substantial injury is also proved[1] The High Court of Madras has held in the undermentioned case[3] that where the proclamation of sale was not published in the village where the lands were situate and the process server intimated at the village that the sale would be held at a place and by an officer different from those fixed in the proclamation the procedure was not merely irregular but *illegal* See also Rule 90 *infra* O 21 R 67 Note 4

R. 68. [S 290] Save in the case of property of the kind described in the proviso to rule 43, no sale hereunder shall, without the consent in writing of the judgment-debtor, take place until after the expiration of at least thirty days in the case of immoveable property, and of at least fifteen days in the case of moveable property, calculated from the date on which the copy of the proclamation has been affixed on the court house of the Judge ordering the sale O 21 R 68

Time of sale

[1877, S 290]

Local Amendments

ALLAHABAD

For the words fifteen days *read* the words seven days

LAHORE

For the word thirty *read* fifteen and *for* the word fifteen *read* one week

N W F P

For the word thirty *read* fifteen and *for* the word fifteen *read* seven

OUDH

For the words fifteen days *read* the words seven days

Synopsis

1 Time of sale | 2 Non compliance with the Rule

1 Time of sale — The rule provides that there should be an interval of thirty days in the case of immovable property and fifteen days in the case of moveable property between the date of sale and the date of affixing the copy of the proclamation in the court house The fifteen days rule does not however apply to a sale of moveables subject to speedy and natural decay (see proviso to Rule 43) It is also open to the judgment debtor to consent to have the sale before the prescribed time But such consent should be express and in *writing*[1]

(08) 12 Cal W N 757 (760)
(11) 9 Ind Cas 698 (701) (Cal)

(01) 6 Cal W N 44 (46) (Publication of proclamation half a mile away from the property)

(23) AIR 1923 Lah 6 1 (671) (Failure to affix

nullity)
[*See also* (23) AIR 1923 Lah 213 (216) (Direct evidence to connect omission with the loss neces-

(69) 12 Suth W R 488 (489)

O. 21 R. 68
Notes 1-2

Suppose a sale takes place after thirty days from the date on which a copy of the sale proclamation was affixed on the court house but before thirty days from the date on which a copy was affixed on the property to be sold (It will be noted that under Rule 67 read with Rule 54 *ante*, affixing on both the places is necessary) The question arises whether such a sale is in accordance with law On this question there was a conflict of decisions under the old Code[2] But, under the present Code, Rule 54 has been amended and it has been made clear that the affixing on the court house is to be *after* a copy of the sale proclamation has been affixed on the property to be sold Hence under the present Code, the sale must be held after thirty days not only from the affixing of a copy of the proclamation of sale on the court house but also from its being affixed on the property

See Sections 68 and 69 of the Rangoon Small Cause Courts Act VII of 1920, and Section 163 sub section (4) of the Bengal Tenancy Act for special provisions as to time of sale under the said Acts

2. Non-compliance with the Rule — Omission to comply with the requirement of this rule is a material irregularity[1] But this alone will not render the execution sale a nullity It will not be set aside unless substantial injury is proved to have resulted therefrom[2]

O. 21 R. 69

R. 69. [S 291] *(1)* The Court[2] may, in its discretion, adjourn[3] any sale hereunder to a specified day and hour,[7] and the officer conducting any such sale may in his discretion adjourn the sale, recording his reasons for such adjournment:

Adjournment or stoppage of sale

Provided that, where the sale is made in, or within the precincts of, the court-house, no such adjournment shall be made without the leave of the Court.

(2) Where a sale is adjourned under sub-rule *(1)* for a longer period than seven days, a fresh proclamation[8] under rule 67 shall be made, unless the judgment-debtor consents to waive[9] it

(80) 5 Cal 259 (263) (Application by judgment debtor that a portion of the property may be sold is not consent)
2 (81) 7 Cal 34 (39 40) (Sale must be after thirty days from affixing notice on property)
(82) 4 All 300 (301) (Sale within thirty days from proclamation of sale on property — No material irregularity)

Note 2

1 (33) AIR 1933 Lah 186 (186) (Sale within thirty days)
2 (94) 21 Cal 66 (69 70) 20 Ind App 176 (PC)
(33) AIR 1933 Lah 186 (186) (Substantial injury proved—Sale set aside)
(38) AIR 1938 Cal 699 (701)
(23) AIR 1923 Pat 45 (48) 2 Pat 207
(24) AIR 1924 Nag 293 (294)
(82) 8 Cal 932 (933)
(81) 7 Cal 34 (40)
The following cases before the decision of the Privy Council in 21 Cal 66 cannot be considered good law
(85) 11 Cal 200 (209) (FB)
(87) 14 Cal 1 (8)
(90) 17 Cal 769 (782)

for setting

to a sale)
(89) 11 All 333 (338) (Brodhurst, J dissenting —See page 345)
(80) 5 Cal 878 (881) (FB)

(3) Every sale shall be stopped[10] if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered[11] to the officer conducting the sale, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court which ordered the sale. O. 21 R. 69

[*Cf.* Rules 55 and 89.]

Local Amendments

ALLAHABAD

For sub rule (2) substitute the following

"Where a sale has been once adjourned under sub rule (1), a fresh proclamation under Rule 67 shall be made, unless the judgment-debtor consents to waive it

Provided that where the adjournment is for a period not longer than 14 days from the date originally fixed for sale, no fresh proclamation shall be necessary

Provided also that the Court may dispense with the consent of any judgment-debtor who has *failed to attend in answer to a notice issued under Rule 66.*"

BOMBAY

In sub-rule (2) "thirty days" shall be substituted for "seven days"

CALCUTTA

Substitute the words "one calendar month" for the words "seven days" in sub rule (2)

LAHORE

In sub-rule (2) "thirty days" shall be substituted for "seven days."

MADRAS

In sub rule (2) *for* the words "seven days" *substitute* the words "thirty days."

NAGPUR

In sub rule (2) for the words "seven days" substitute the words "fifteen days."

N.-W. F. P.

In sub-rule (2) *for* the word "seven" *substitute* the word "thirty" and *add* the following proviso·

"Provided that the Court may dispense with the consent of any judgment debtor who has failed to attend in answer to a notice issued under Rule 66"

OUDH

In sub-rule (2) *for* the word "seven" read the word "fourteen", and *add* the following proviso :

"Provided that the Court may dispense with the consent of any judgment-debtor who has failed to attend in answer to a notice issued under Rule 66."

PATNA

In sub rule (2) for the word "seven" *read* "fourteen" and *add* the following proviso :

"Provided that the Court may dispense with the consent of any judgment-debtor who has not appeared in the proceedings."

RANGOON

In sub rule (2) for the words "seven days" the words "thirty days" shall be substituted.

Synopsis

1. Legislative changes.
2. Court, meaning of.
3. "May, in its discretion, adjourn any sale."
   - 3a. Who can apply for adjournment.
   - 3b. Imposition of terms on adjournment.
4. Any sale
5. Adjournment of sale of mortgaged property. See Notes 4 and 11
6. Adjournment after partial sale.
7. Omission to adjourn the sale to a specified day and hour.

O. 21 R. 68 Notes 1-2

Suppose a sale takes place after thirty days from the date on which a copy of the sale proclamation was affixed on the court house but before thirty days from the date on which a copy was affixed on the property to be sold (It will be noted that under Rule 67 read with Rule 54 *ante*, affixing on both the places is necessary) The question arises whether such a sale is in accordance with law. On this question there was a conflict of decisions under the old Code[2] But, under the present Code, Rule 54 has been amended and it has been made clear that the affixing on the court house is to be *after* a copy of the sale proclamation has been affixed on the property to be sold Hence, under the present Code, the sale must be held after thirty days not only from the affixing of a copy of the proclamation of sale on the court-house but also from its being affixed on the property

See Sections 68 and 69 of the Rangoon Small Cause Courts Act, VII of 1920, and Section 163, sub section (4) of the Bengal Tenancy Act for special provisions as to time of sale under the said Acts.

2. Non-compliance with the Rule. — Omission to comply with the requirement of this rule is a material irregularity.[1] But this alone will not render the execution sale a nullity It will not be set aside unless substantial injury is proved to have resulted therefrom [2]

O. 21 R. 69

R. 69. [S. 291.] *(1)* The Court[2] may, in its discretion, adjourn[3] any sale hereunder to a specified day and hour,[7] and the officer conducting any such sale may in his discretion adjourn the sale, recording his reasons for such adjournment :

Adjournment or stoppage of sale

Provided that, where the sale is made in, or within the precincts of, the court-house, no such adjournment shall be made without the leave of the Court.

(2) Where a sale is adjourned under sub-rule *(1)* for a longer period than seven days, a fresh proclamation[8] under rule 67 shall be made, unless the judgment-debtor consents to waive[9] it.

('80) 5 Cal 259 (263) (Application by judgment-debtor that a portion of the property may be sold is not consent)
2. ('81) 7 Cal 34 (39, 40) (Sale must be after thirty days from affixing notice on property)
('82) 4 All 300 (301) (Sale within thirty days from proclamation of sale on property — No material irregularity)

Note 2

1. ('33) AIR 1933 Lah 186 (186) (Sale within thirty days)
2. ('94) 21 Cal 66 (69 70) 20 Ind App 176 (PC)
('33) AIR 1933 Lah 186 (186) (Substantial injury proved—Sale set aside)

for setting

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The following cases before the decision of the Privy Council in 21 Cal 66 cannot be considered good law
('85) 11 Cal 200 (209) (FB)
('87) 14 Cal 1 (8)
('90) 17 Cal 769 (782)

to a sale)
('89) 11 All 333 (338) (Brodhurst, J dissenting —See page 345)
('80) 5 Cal 878 (881) (FB)

(3) Every sale shall be stopped[10] if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered[11] to the officer conducting the sale, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court which ordered the sale. O. 21 R. 69

[*Cf.* Rules 55 and 89.]

Local Amendments

ALLAHABAD

For sub rule (2) substitute the following

"Where a sale has been once adjourned under sub-rule (1), a fresh proclamation under Rule 67 shall be made, unless the judgment debtor consents to waive it :

Provided that where the adjournment is for a period not longer than 14 days from the date originally fixed for sale, no fresh proclamation shall be necessary ;

Provided also that the Court may dispense with the consent of any judgment-debtor who has failed to attend in answer to a notice issued under Rule 66."

BOMBAY

In sub-rule (2) "thirty days" shall be substituted for "seven days "

CALCUTTA

Substitute the words "one calendar month" for the words "seven days" in sub-rule (2)

LAHORE

In sub rule (2) "thirty days" shall be substituted for "seven days "

MADRAS

In sub rule (2) *for* the words "seven days" *substitute* the words "thirty days "

NAGPUR

In sub rule (2) *for* the words "seven days" *substitute* the words "fifteen days "

N.-W. F. P.

In sub-rule (2) *for* the word "seven" *substitute* the word "thirty" and *add* the following proviso ;

"Provided that the Court may dispense with the consent of any judgment debtor who has failed to attend in answer to a notice issued under Rule 66 "

OUDH

In sub-rule (2) *for* the word "seven" read the word "fourteen", and *add* the following proviso :

"Provided that the Court may dispense with the consent of any judgment-debtor who has failed to attend in answer to a notice issued under Rule 66."

PATNA

In sub rule (2) for the word "seven" *read* "fourteen" and *add* the following proviso :

"Provided that the Court may dispense with the consent of any judgment-debtor who has not appeared in the proceedings."

RANGOON

In sub rule (2) for the words "seven days" the words "thirty days" shall be substituted.

Synopsis

O. 21 R. 69
Notes 1-3

Other Topics (miscellaneous)

1. Legislative changes. —

(1) The words "under this Chapter' have been omitted under the present rule The effect of the omission is to make the rule applicable also to sales under mortgage decrees See Note 4

(2) The words "other than a sale by the Collector' have also been omitted as a separate provision has been made in Rule 70, *infra*

2. Court, meaning of. — The "Court" means the Court executing the decree and not a Court to which such Court is subordinate [1]

3. "May, in its discretion, adjourn any sale."—Under this rule the Court may, in its discretion, adjourn a sale to a specified day [1] No hard and fast rule can be laid down as to when the Court should grant an adjournment It depends upon the circumstances of each case See the undermentioned cases [2]

The High Courts of Allahabad[3] (dissenting from earlier decisions[4]) and Madras[5] have held that an execution sale after it has been stayed by the Appellate Court and before the order of stay is communicated to the officer holding the sale is not a nullity and that it would, at the worst, be an irregularity which will not *per se* invalidate the sale without proof of substantial injury The Calcutta High Court has held a contrary view in the undermentioned case,[6] dissenting from an earlier decision of the same Court[7] According to the Lahore High Court, where an executing Court makes an order postponing the sale but the sale is effected before the order reaches the officer

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Order 21 Rule 69 — Note 2

1 (16) AIR 1916 Pat 397 (398)
(09) 4 Ind Cas 373 (373) (Cal)
(73) 5 N W P H C R 177 (177)
(78) 1 Cal L Rep 534 (535)

Note 3

1 (24) AIR 1924 Mad 234 (235)
(70) 5 Mad H C R 410 (412)
(88) 1888 All W N 71 (72) (Not appealable)
(85) 11 Cal 244 (248) 12 Ind App 7 (P C)
(29) AIR 1929 All 948 (949) 52 All 115 (R 69 deals with adjournment on date of sale — Per P llan J)

to have a better sale)
(73) 20 Suth W R 130 (131) (Or if it will benefit the judgment-debtor by enabling him to satisfy the decree)
( )
(
)
(
by consent)
(54) 8 Bom 532 (533) (Stranger in possession impeaching the decree — No ground for staying sale)
(81) 7 Cal 733 (735) (Pendency of administration suit—No ground)

cient)
(70) 2 N W P H C R 1 (2) (Sale postponed under

been issued)

3 ('27) AIR 1927 All 401 (404, 405) 50 All 41 (F B) (But a stay order will operate against a decree-holder purchaser)

4. (21) AIR 1921 All 102 (103)

7. (97) 1 Cal W N 226 (227, 228)

conducting the sale, the sale is illegal and not merely irregular[8]

The officer conducting the sale is also empowered under this rule to adjourn the sale except where the sale is held within the precincts of the court-house in which case leave of Court is necessary[9]

3a. Who can apply for adjournment. — The rule does not specifically provide that a party to the proceeding alone can apply for adjournment under this rule The rule being general in terms, there is nothing to prevent the Court from *adjourning the sale on information from a third party or even on the application of* such third party[1]

3b. Imposition of terms on adjournment. — The Court granting an adjournment of the sale has power to impose terms on the applicant as a condition of the adjournment[1]

4. Any sale. — This rule applies to the adjournment of any sale including a sale under a mortgage decree[1]

5. Adjournment of sale of mortgaged property. — See Notes 4 and 11

6. Adjournment after partial sale. — The provisions of this rule do not *apply to a continuous* sale *Thus, it does not apply* where *the sale is ordered to* be continued from day to day and the property is kept on hammer in the hope of getting higher bids than those offered on the first day, no fresh proclamation is necessary in such a case even though the sale is adjourned and continued for more than seven days[1] Similarly, where a sale was included in the sale list for a particular day and as the sales could not be finished on that day the nazir in charge continued them on the following day in accordance with the procedure prescribed by the Rules and Circular Orders of the High Court, it was held that there was no adjournment of the sale within the meaning of this rule[2]

7. Omission to adjourn the sale to a specified day and hour. — Where an execution sale is adjourned, the Court must specify the *day* and the *hour* to which it is adjourned[1] Omission to do so may amount to a material irregularity[2] It was held

8. (35) AIR 1935 Lah 694 (695, 696)

Madras Rent Act — Officer not entitled to adjourn)]

Note 3a

1 (35) AIR 1935 Mad 295 (296)

Note 3b

1. (35) AIR 1935 Mad 295 (296)

Note 6

1. (27) AIR 1927 Pat 312 (313) 6 Pat 432
(10) 8 Ind Cas 564 (565) (Mad)
(90) 17 Cal 152 (154)

Note 7

on the prior date)
[*See* (76) 25 Suth W R 328 (329)]
2. (04) 31 Cal 815 (818)
(12) 13 Ind Cas 337 (343) (Cal)
(01) 6 Cal W N 48 (50 51)
(97) 24 Cal 291 (292 293)

O 21 R 69
Notes 7-9

in the undermentioned case[3] that the failure to mention the exact hour ceased to be a material irregularity where the judgment debtor had agreed that there should be no fresh proclamation of sale

See also the undermentioned case [4]

It has been held by the High Court of Allahabad[5] that the specification of the day and hour is only necessary where the *Court* adjourns the sale and not when the *officer* conducting the sale adjourns it

8 **Fresh proclamation, when necessary.** — Fresh proclamation is necessary when the sale is adjourned for a longer period than seven days [1] It is however open to the judgment debtor to *waive* a fresh proclamation See Note 9 below

The omission to issue a fresh proclamation as required by the rule amounts to a mere *irregularity* and the sale will not be set aside in the absence of proof of substantial injury [3]

9. **Waiver of proclamation.** — The judgment debtor can waive the benefit of a fresh proclamation under this rule and if he does so he cannot, later on object to the sale being irregular on that ground [1] Such waiver does not however estop him from objecting to *other irregularities* [2] as for instance the omission to specify the day and the hour of the sale [3] or the omission to proclaim properly [4] The waiver of a fresh proclamation implies a waiver of objection to any defect appearing on the face of the

(37) 1937 Mad W N 1223 (1223) (Failure to specify ho r)

3 (33) AIR 1933 A [illegible]
4 (34) AIR 1934 Nag 250 (251)
5 (35) AIR 1935 All 182 (182)

Note 8

1 (07) 29 All 196 (202) 34 Ind App 37 (P C)
(76) 25 Suth W R 328 (329)
(1865) 3 Suth W R Misc 11 (11 12) (*In cases of indefinite postponement fresh proclamation*

—Cc
by co
(34) 8
impeaching

Court)]

sary if portion of property is released after issue

Cal 96 (PC)
(72) 17 Suth W R 339 (339)
(28) AIR 1928 Pat 615 (621) 8 Pat 122
(85) 11 Cal 658 (660 661)
(29) AIR 1929 Mad 624 (624)
[But see (86) 1886 Pun Re No 45 p 45]

Note 9

1 (73) 19 Suth W R 227 (229)
(75) 23 Suth W R 256 (257)
(76) 25 Suth W R 34 (34)
(18) AIR 1918 Cal 293 (293 294)
(05) 2 Cal L Jour 584 (583 589)
(29) AIR 1929 Mad 517 (520) (Waiver by judgment debtor s pleader)
(30) AIR 1930 Mad 414 (417)
[illegible] 577 (577 578)
[

of objection to sale)
[illegible] (Do)]

(Ob[illegible] and the [illegible]dulently

suppressed at decree holder s instance)]

O. 21 R. 69
Notes 9-13

sale proclamation but does not imply a waiver of the right to object to any irregularities in the attachment[5]

A waiver of proclamation by *one* of several judgment debtors does not bind the other judgment debtors[6] Nor does the waiver of a fresh proclamation by the judgment debtor prevent an attaching decree holder from objecting to the sale on the ground of want of a fresh proclamation[7]

The guardian *ad litem* of a minor judgment debtor can waive a fresh proclamation on behalf of the minor under this rule[8]

10. Stoppage of sale on deposit of debt and costs. — Any sale including a sale under a mortgage decree can be stopped by the deposit of the decretal amount and the costs before the property is *actually knocked down* to the bidder[1] But the words 'debt and costs' mean the *entire amount* and not the balance of the decree debt and costs which would remain if by a legal fiction the sale of previous lots (not yet completed by the payment of the whole of the purchase money) were taken as completed by treating the whole of the purchase money as being actually paid up[2]

Under sub rule (3) it is the officer conducting the sale who has to be satisfied that the requisite amount has been paid into Court[3]

11 Who can tender the amount. — The judgment debtor or a transferee of the property from the judgment debtor is entitled to tender the amount under this rule[1] Where the sale is in execution of a mortgage decree any person holding the *equity of redemption*[2] *such as a purchaser in execution of a decree on a puisne* mortgage[3] can tender the amount and have the sale stopped

A payment made to prevent a sale in execution of a decree is not a *voluntary* payment whether made by the debtor or by a third person claiming the property[4]

12. Sale on a date other than the one to which it is adjourned. — The High Court of Calcutta has held in the undermentioned case[1] that if the execution sale does not take place on the adjourned date but is held on a subsequent date to which the sale has not been adjourned it amounts to a material *irregularity* But in a later decision[2] the same High Court has held that if the sale takes place on a day never fixed for it and of which the judgment debtor has no notice the sale is a *nullity*

13 Withdrawal of bid. — A bid may be withdrawn before the property is

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7. (01) 24 Mad 311 (3 3)
8 (10) 6 Ind Cas 813 (815) 37 Cal 897
(34) AIR 1934 Mad 260 (262)
(01) 28 Cal 73 (76 77)

Note 10

3 (35) AIR 1935 Lah 694 (695) (Collector s sale—Sale conducted by Revenue Assistant—Notice to the Collector s clerk as to payment into Court is not sufficient)

Note 11

1 (88) 10 All 1 (4)

N 12

1 ... held on date fixed for it—No adjournment order passed —Subsequent sale is not nullity but merely irregular)]
(39) AIR 1939 Cal 369 (374) ILR (1939) 1 Cal 530 (Order of Court directing property to be sold at monthly sale commencing from 5th August — Sale held by Nazir on 12th after postponing it from day to day—Sale is valid)]
2 (25) AIR 1925 Cal 201 (202)

Note 13

ad 776

O. 21 R. 69
Notes 14-15

14. Rateable distribution. — Moneys paid into Court to stop a sale are assets available for rateable distribution[1] See Section 73 Note 4, *ante*

15. Limitation — Acknowledgment. — A petition for adjournment of sale asking for time to pay the decretal amount signed by the judgment debtor's pleader constitutes an acknowledgment of the decree debt within the meaning of Section 19 of the Limitation Act[1]

O. 21 R. 70

R. 70. [S. 287, last para.] Nothing in rules 66 to 69 shall be deemed to apply to any case in which the execution of a decree has been transferred to the Collector.

Saving of certain sales.

[1877, S. 287, last para. See Ss. 54, 68 to 72 and Third Schedule.]

1. Execution of decrees by the Collector. — The execution of decrees by the Collector is provided for by Sections 68 to 72 and Schedule III This rule makes the provisions of Rules 66 to 69 inapplicable to a sale held by the Collector to whom the execution of a decree has been transferred[1]

O. 21 R. 71

R. 71. [S. 293.] Any deficiency of price which may happen on a re-sale[3] by reason of the purchaser's default,[7] and all expenses attending such re-sale, shall be certified[4] to the Court[10] or to the Collector or subordinate of the Collector, as the case may be, by the officer or other person holding the sale, and shall, at the instance of either the decree-holder or the judgment-debtor,[6] be recoverable from the defaulting purchaser[8] under the provisions[5] relating to the execution of a decree for the payment of money.

Defaulting purchaser answerable for loss on re-sale.

[1877, S. 293; 1859, S 254, last para. See Rr. 77, 84 and 86 and Ss. 68 to 71.]

Synopsis

1. Application of the Rule.
2. Failure of execution sale due to auction-purchaser's default — Rights of decree-holder and judgment debtor.
3. Re-sale.
4. Power to order recovery of deficiency.
5. Procedure under the Rule.
6. Who may apply under this Rule.
7. By reason of the purchaser's default.
8. Where defaulting purchaser is merely an agent.
9. Liability for interest on deficiency
10. Certificate.
11. Rateable distribution.

Note 14

1. (82) 6 Bom 588 (589) (Decision under the Code of 1882)

(98) 22 Bom 723 (727)

(82) 8 Cal 716 (718)

Note 15

1 (96) 23 Cal 374 (357)

Order 21 Rule 70 — Note 1

1. (29) AIR 1929 Oudh 235 (237, 238) 4 Luck 635.

1. Application of the Rule — The rule extends to all auction sales in execution whether of moveable or immovable property[1] It is a salutary provision intended to minimise the hardship resulting from the purchaser s default and Courts should give effect to it unless the defaulting purchaser would be substantially prejudiced[2] The rule applied to sales by the Collector under the Bengal Public Demands Recovery Act I of 1895[3] (see Section 8 of the Act) and applies to sales under the Agra Tenancy Act III of 1926 (see Section 169 thereof) and to sales of immovables under the Chota Nagpur Tenancy Act VI of 1920 (see Rule 54 Notes)

2 Failure of execution sale due to auction purchaser's default — Rights of decree-holder and judgment-debtor.— Where an execution sale fails owing to the auction purchaser s default the decree holder is entitled to a re sale of the property[1] See O 21 Rr 77 84 and 86 Where the price bid at the second sale is less than that bid at the first sale the purchaser at the first sale is liable to make good the difference and the present rule entitles the decree holder or the judgment debtor to apply to the Court to enforce such liability But the decree holder is not *bound* to proceed against the defaulting purchaser He may recover from the *judgment debtor* the judgment debt or the balance of it that may be due and leave him to pursue his remedies against the auction purchaser under this rule[2] The judgment debtor may also instead of proceeding against the auction purchaser to recover the deficiency in price apply under Rule 90 to set aside the second sale if he can make out a case under that rule[3] See also Note 13 *infra*

3 Re-sale — The rule applies to all re sales made in consequence of the default of the auction purchaser not only in the payment of the 25 per cent of the purchase money under Rule 84 or in the payment of the balance under Rule 85[1] but also in the payment of the poundage fee[2] But the re sale must be of the *same property*[3] and under the *same decree*[4] The property must also be sold under the *same description* and any substantial difference of description will disentitle the decree holder or the judgment debtor to recover the deficiency under this rule[5] Thus no

Order 21 Rule 71 — Note 1

1 (81) 7 Cal 337 (339)
2 (19) AIR 1919 Mad 1014 (1020) 41 Mad 474 (FB) (Per Wallis C J)
(25) AIR 1925 Mad 631 (633) (Compare observations in 14 Ind Cas 777 (779) (Bom) and of Walsh J in A I R 1922 All 200)
3 (19) AIR 1919 Pat 102 (105) (Act I of 1895 has been repealed by Act III of 1913 (Bengal) and Act IV of 1914 Bihar & Orissa)

Note 2

1 (09) 3 Ind Cas 286 (287) (Cal) (Decree-holder auction purchaser s default in paying poundage fee)
2 (74) 13 Beng L R 114 (118) (Distinguishing 7 Suth W R 110)
(78) 2 Bom 562 (563 564)
[*See also* (82) 8 Cal 291 (294)
(81) 8 Cal L Rep 41 (42)]
3 (83) 9 Cal 98 (99)

Note 3

1 (22) AIR 1922 All 200 (201) 44 All 266 (FB)
(81) 5 Bom 575 (577)
(66) 6 Suth W R Misc 126 (126 127) (Re sale on refusal to pay purchase-money)
(98) 2 Cal W N 411 (412)
(81) 7 Cal 337 (339)
(83) 9 Cal 98 (99) (Default in payment of 25 per cent)
(89) 12 Mad 454 (458) (Do)
(19) AIR 1919 Pat 102 (105) (Default in proper Code)]
2 (09) 3 Ind Cas 286 (287) (Cal)
3 (89) 16 Cal 535 (538)
(98) 25 Cal 99 (102)
4 (71) 16 Suth W R 14 (15)
5 (89) 16 Cal 535 (538)

O.21 R.69
Notes 14-15

14. Rateable distribution. — Moneys paid into Court to stop a sale are assets available for rateable distribution[1] See Section 73 Note 4, *ante*

15. Limitation — Acknowledgment. — A petition for adjournment of sale asking for time to pay the decretal amount signed by the judgment-debtor's pleader constitutes an acknowledgment of the decree-debt within the meaning of Section 19 of the Limitation Act[1]

O.21 R.70

Saving of certain sales.

R. 70. [S. 287, last para.] Nothing in rules 66 to 69 shall be deemed to apply to any case in which the execution of a decree has been transferred to the Collector.

[1877, S. 287, last para. See Ss. 54, 68 to 72 and Third Schedule.]

1. Execution of decrees by the Collector. — The execution of decrees by the Collector is provided for by Sections 68 to 72 and Schedule III. This rule makes the provisions of Rules 66 to 69 inapplicable to a sale held by the Collector to whom the execution of a decree has been transferred.[1]

O.21 R.71

Defaulting purchaser answerable for loss on re-sale.

R. 71. [S. 293.] Any deficiency of price which may happen on a re-sale[3] by reason of the purchaser's default,[7] and all expenses attending such re-sale, shall be certified[4] to the Court[10] or to the Collector or subordinate of the Collector, as the case may be, by the officer or other person holding the sale, and shall, at the instance of either the decree-holder or the judgment-debtor,[6] be recoverable from the defaulting purchaser[8] under the provisions[5] *relating to the execution* of a decree for the payment of money.

[1877, S. 293; 1859, S. 254, last para. See Rr. 77, 84 and 86 and Ss. 68 to 71.]

Synopsis

1. Application of the Rule.
2. Failure of execution sale due to auction-purchaser's default — Rights of decree-holder and judgment-debtor.
[illegible]sale.
[illegible]er to order recovery of deficiency.
[illegible]dure under the Rule.
[illegible] an agent.
9. Liability for interest on deficiency.
10. Certificate.
11. Rateable distribution.

Note 14

[illegible] Bom 588 (589) (Decision under the [illegible]32)

Note 15

[illegible]96) 23 Cal 374 (387)

(93) 22 Bom 723 (727)
(82) 8 Cal 716 (718).

Order 21 Rule 70 — Note 1

1. (29) AIR 1929 Oudh 235 (237, 238) 4 Luck 635.

held that there is no re sale of property if it is not knocked down to any bidder at the second sale and that Rule 71 cannot apply to such a case[16] O 21 R 71 Notes 3-7

4 Power to order recovery of deficiency — The power of ordering the recovery of deficiency is vested in the Court The officer conducting the sale has no power to order the recovery of the deficiency[1] Even in cases where the execution of a decree has been transferred to a Collector and the property has been sold by him the Civil Court has jurisdiction to order the recovery of deficiency under this rule[2] See Section 70 Note 2

5 Procedure under the Rule — The Court may pass an order that the defaulting purchaser is liable for the deficiency but there is nothing in the rule which compels the decree holder or the judgment debtor to obtain such an order before asking for execution against the auction purchaser The opinion expressed in the undermentioned case[1] that without such an order execution cannot issue against the auction purchaser seems to be not warranted by the terms of the rule The rule does not expressly provide for *notice* to the defaulting purchaser but it is the duty of the Court under general principles of law to give him notice and hear and decide on his objections before it orders execution to issue against him[2]

The proceedings under the rule are not more summary than proceedings to set aside an execution sale[3]

An order against the auction purchaser under this rule can be passed only when re sale *has taken place* The Court has no power to order that a property should be re sold and that the defaulting purchaser should pay the deficiency in price which may occur[4] An order under this rule to the effect that the defaulting purchaser is liable for the deficiency passed in favour of the decree holder can be executed by the judgment debtor because the rule enables either of them to apply under it[5]

6 Who may apply under this Rule — This rule entitles either the judgment debtor or the decree holder to apply for the recovery of deficiency from the auction purchaser[1] By the term decree holder is meant the decree holder by whom the property was brought to sale Other decree holders are not included in the term although they may be entitled to rateable distribution under Section 73[2] The decree holder is entitled to enforce the defaulting purchaser s liability for the *whole* amount of the deficiency and is not bound to confine his application to the decretal amount that may remain outstanding[3] Where an order has been passed in favour of the decree holder to the effect that the auction purchaser was liable for the deficiency but the decree holder realizes the balance of the decretal amount from the judgment debtor and does not enforce the order passed in his favour the judgment debtor can execute the same against the auction purchaser[4] See also Note 10 below

7 By reason of the purchaser s default — The default referred to in this rule includes default in paying the purchase money the deposit required by

16 ('86) 1886 Bom P J 263

Note 4

1 ('31) AIR 1931 Bom 367 (368)

2 ('31) AIR 1931 Bom 367 (368)

Note 5

(Per Kumaraswami Sastri J)

4 ('29) AIR 1929 Lah 744 (745)

5 ('31) AIR 1931 All 667 (668)

Note 6

1 ('39) AIR 1939 Nag 269 (273)

2 ('26) AIR 19 6 Mad 872 (874) 49 Mad 5 0 ('36) AIR 1936 Oudh 277 (2 8 279) 12 Luck 720

3 (6) AIR 19 6 Mad 8 2 (8 3) 49 Mad 5 0

4 ('31) AIR 1931 All 667 (668)

O. 21 R. 71
Notes 7–10

Rule 84[1] or the poundage fee (see Note 3) The default must be that of a *purchaser.* Thus, a bid lapses on a higher bid being made and where the highest bidder dies before the acceptance of his bid, the next highest bidder cannot be treated as the highest bidder for the purposes of this rule[2] Similarly, a bid can be withdrawn at any time before the property is knocked down to the bidder[3] So also, it has been held that a bid lapses by too much delay in the acceptance thereof[4] But a bid cannot be withdrawn after the property is knocked down to the bidder[5] As to whether the Court's acceptance of the highest bid is necessary to complete the sale, see Notes to Rule 84

In an application under this rule, it is open to the auction-purchaser to raise any objections to the first sale which can be urged in an application to set aside a sale under Order 21,[6] because in such a case it is conceived his failure to complete the sale would be justified

Irregularities in connection with the re sale which are not shown to have been responsible for the comparative lowness of the price realized at the re sale, cannot be pleaded in defence to an application under this rule[7]

8. Where defaulting purchaser is merely an agent. — A person who bids at a sale merely as an agent of another person is not liable under this rule[1] See Contract Act, Section 230 But he will be liable if he bids without informing the officer conducting the sale that he is acting as agent of another See Contract Act, Section 230 In such a case the mere fact that the *judgment-debtor* knows that the bidder is acting as agent of another will not absolve him from liability The reason is *that in court sales, the contract is between the bidder and the Court,* which acts by virtue of a statutory authority and not as the agent of either the decree holder or of the judgment debtor[2] Where a person professes to bid as agent of another without the latter's authority, the latter is not liable under this rule,[3] while the alleged agent is liable for damages[4] See Section 235 of the Contract Act

9. Liability for interest on deficiency. — The defaulting purchaser is not liable to pay interest on the deficiency in price[1]

10. Certificate. — *A certificate* issued under this rule has the force and effect of a decree[1] But the deficiency may be recovered even though the certificate referred to in the rule has not been issued[2] An order passed to the effect that the auction purchaser is liable for the deficiency has the effect of a decree and can be attached as such, under O 21 R 53[3] See also

Note 7

('29) AIR 1929 Oudh 294 (295) 4 Luck 684 (Fraudulent suppression of encumbrances at both the sales—Purchaser not liable under R 71)
[*See also* ('31) AIR 1931 Bom 367 (368)]

7. ('25) AIR 1925 Mad 631 (633)

Note 8

1. ('73) 20 Suth W R 397 (398) (Confirming

3. ('67) 7 Suth W R 110 (111)

4. ('73) 20 Suth W R 397 (398)

Note 9

1. ('68) 9 Suth W R 500 (501)

Note 10

3. ('26) AIR 1926 All 379 (381, 382)

11. Rateable distribution. — Money realized from the defaulting purchaser under this rule amounts to "assets" within the meaning of Section 73, and is liable to rateable distribution [1]

12. Nature of defaulting purchaser's liability for deficiency. — See Note 13 below

13. Suit for deficiency on re-sale — Whether maintainable. — It has been seen in Note 62 to Section 9 *ante* that where two remedies are available under the law, one must not be taken as operating in derogation of the other, but that this general rule is subject to the qualification that where a right is *created by statute* and a method of enforcing the right, or of redressing the grievance caused in the exercise or enforcement of the right is pointed by the statute creating such right, the general remedy of suit will be impliedly barred The question, therefore, whether the right to claim deficiency from a defaulting purchaser can be enforced by suit depends upon the question whether such right is a *common law right* or a right *created by the statute.* It was held in the undermentioned case[1] of the Bombay High Court that the right to recover the deficiency under this rule is one *created by the statute* relating to the procedure, but the question in that case did not arise as to the maintainability of a separate suit to recover such deficiency In a later case,[2] however, the same High Court has expressed the opinion that but for this rule a suit would have to be filed to recover such deficiency and that this rule enables the party aggrieved to make an *application* for that purpose It would seem to follow from this that the remedy under this rule is only an alternative remedy which does not bar a separate suit In *Amir Baksh* v *Venkatachala*,[3] an opinion was expressed by the Madras High Court that a suit will not be maintainable in such a case There was no discussion, however, of the principles and the question that actually arose in the case was not whether a suit would lie But in the undermentioned case[4] Wallis, C J, observed as follows "By his failure to complete his purchase the purchaser commits a breach of *contract* and is answerable in damages to the Court or the persons on whose behalf it sells, *viz*, the decree holder and the judgment debtor " In *Sitaram* v *Janaki Ram*,[5] Mr Justice Walsh of the Allahabad High Court expressed the view that the liability of the defaulting purchaser is *not a contractual liability* and that no suit would lie to enforce it The Patna[6] and the Calcutta[7] High Courts have held that right to claim the deficiency is a common law right to recover the damages for a legal wrong done by the purchaser, that Rule 71 provides only a summary remedy for enforcing that right but that it does not bar the general remedy of suit It is submitted that this last view is correct

14. Insolvency proceedings. — The provisions of this rule apply to sales by the *Court* under the Provincial Insolvency Act, so that where a re sale is held owing to the first purchaser's default and a deficiency occurs on such re sale, the deficiency is recoverable in execution [1] But the rule does not apply to sales by the *receiver* under that Act [2]

Note 11

1 (26) AIR 1926 Mad 872 (873) 49 Mad 570

7. (05) [illegible] Cal W N 111 (112) (Sale under Bengal Patni Regulation VIII of 1819)
[*See also* (89) 16 Cal 535 (538, 539) (Case not falling under R 71 as property had undergone changes due to natural causes — Suit maintainable — *Obiter*)]

of a suit — Per Walsh, J)

O. 21 R. 71
Notes 15-16

15. Suit, if lies to set aside order under this Rule. — It has been seen that the position under this rule is, as if a decree has been passed against the defaulting purchaser for the amount of the deficiency which the decree holder or judgment debtor is entitled to execute under the provisions of the Code relating to the execution of money decrees Hence, it follows that the remedy of a party aggrieved by an order under this rule is by way of appeal (see Note 16), and not by means of a separate suit to set aside the order [1]

16. Appeal. — It is settled law that an appeal lies against an order deciding an application by a decree holder or judgment-debtor under this rule against a defaulting auction purchaser for the recovery of deficiency in price [1] The reason is that inasmuch as this rule declares that the deficiency in price shall be recoverable from the defaulting purchaser under the provisions relating to the execution of decrees for the payment of money, the rule relating to appeals must be applied *mutatis mutandis* equally with any other of those rules [2]

It has been held by the High Court of Bombay[3] that no second appeal lies from an order determining an application under this rule, where the amount of deficiency does not exceed Rs 500 The reason given is that no second appeal would have been maintainable if a decree had been actually passed for the deficiency in such a case and an order had been made determining an application for the execution of such decree But the Calcutta High Court[4] has taken a contrary view It is submitted that the Bombay view is correct

As to the *forum* of appeal, see the undermentioned case [5]

O. 21 R. 72

Decree holder not to bid for or buy property without permission

R. 72. [S. 294] *(1)* No holder of a decree in execution of which property is sold shall, without the express permission[2] of the Court, bid for or purchase the property.

No

1. (27) AIR 1927 Nag
(Dissenting from 12 I
(22) AIR 1922 All 200 (203) 44 All 266 (FB)
(Walsh J , *semble*)
('25) AIR 1925 Oudh 360 (361) 29 Oudh Cas 18
[**Compare** (97) 19 All 22 (24) (This case should be deemed as overruled by AIR 1922 All 200)]

Note 16

1 (22) AIR 1922 All 200 (202) 44 All 266 (FB)
(75 78) 1 All 181 (190) (FB)
('12) 14 Ind Cas 777 (779) 36 Bom 329
(95) 2 Cal W N 411 (412)
(98) 25 Cal 99 (100)
(89) 16 Cal 535 (535)
(67) 7 Suth W R 110 (111)
(66) 6 Suth W R Misc 126 (127)
(1865) 3 Suth W R 3 (3)
(28) AIR 1928 Lah 249 (249)
(95) 18 Mad 439 (443)
('27) AIR 1927 Nag 112 (112) 23 Nag L R 14
(25) AIR 1925 Oudh 307 (307) 28 Oudh Cas 3_7
(89) 12 Mad 454 (457)

purchased the property at the [illegible]

3. (21) AIR 1921 Bom 229 (230) 45 Bom 223
4 [illegible]
5

(2) Where a decree-holder purchases with such permission,[3] the purchase-money and the amount due on the decree[6] may, subject to the provisions of section 73, be set off[5] against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly. O. 21 R. 72

Where decree-holder purchases, amount of decree may be taken as payment

(3) Where a decree-holder purchases, by himself or through another person,[8] without such permission,[7] the Court may, if it thinks fit, on the application of the judgment-debtor or any other person whose interests are affected by the sale, by order set aside the sale;[9] and the costs of such application and order, and any deficiency of price which may happen on the re-sale and all expenses attending it, shall be paid by the decree-holder.

[1877, S. 294. *Cf.* O. 21 R. 84.]

Local Amendments

ALLAHABAD

In sub rule (2) *for* the words "with such permission" *read* the words "the property sold," and re number this sub rule "72," and delete sub rules (1) and (3)

N.-W. F. P.

(1) *For* sub rule (1), *substitute* the following

"72 (1) The holder of a decree, in execution of which property is sold, shall be competent to bid for or purchase the property without express permission of the Court, provided that the Court may on application of the judgment debtor and for sufficient cause debar him from so bidding or purchasing"

(2) In sub rule (2) for the words "with such permission" *substitute* the words "the property"

(3) *Cancel* sub rule (3)

OUDH

(1) *For* sub rule (1) *substitute* the following

"72 (1) The holder of a decree, in execution of which property is sold, shall be competent to bid for, or purchase the property, provided that the judgment debtor may, by application, supported by an affidavit, apply to the Court to debar the decree-holder from purchasing the property, and the Court may, on such application, either debar the decree holder from purchasing the property, or grant permission to do so on such terms as may seem just"

(2) In sub rule (2) *for* the words "with such permission" *read* the words "the property sold"

(3) *Delete* sub rule (3)

PATNA

(1) *Substitute* the following *for* sub rule (1)

of which property is sold [illegible]
perty unless an express order [illegible]

(2) In sub rule (2) *for* the words "with such permission" *substitute* [illegible]
"the property"

(3) *Substitute* the following *for* sub rule (3)

"(3) Where notwithstanding an order made under sub rule (1) [illegible]

O. 21 R. 72
Notes 1–2

purchases the property by himself or through another person the Court shall on the application of the judgment debtor or any other person whose interests are affected by the sale by order set aside the sale and the cost of such application and order and any deficiency of price which may happen on the re sale and all expenses attending it shall be in the discretion of the Court

RANGOON

(1) In sub rule (2) *for* the words 'with such permission' the words the property shall be substituted

(2) Sub rules (1) and (3) shall be cancelled and the figure and brackets (2)' occurring at the beginning of sub rule (2) shall be deleted

Synopsis

1. Legislative changes. —

(1) The words ' subject to the provisions of section 73 in sub rule (2) did not appear in the corresponding Section of the old Code See Note 5 below

(2) The words if he so desires which occurred in the old Code have now been omitted

1a Applicability of the Rule.—The holder of a decree for rent under the Bengal Tenancy Act VIII of 1885,[1] or the Orissa Tenancy Act II of 1913,[2] need not obtain permission of the Court under this rule As to proceedings under the Chota Nagpur Tenancy Act, see Notes under Rule 54 *ante*

2. Permission to bid — *A decree holder cannot under this rule* purchase property sold in execution of his own decree without the express permission of the executing Court [1] But the prohibition under this rule applies only to the *decree holder* and not to the judgment debtor,[2] or to a holder of a decree other than that under which the sale is to take place [3] An assignee of the decree under an oral assignment has no *locus standi* to apply for execution and he is not the holder of a decree within the meaning of Rule 72, hence he need not obtain the permission of the Court under this rule [4] The decree holder cannot get round the condition imposed by this rule by

Order 21 Rule 72 — Note 1a

1 See S 173 (1) of the Bengal Tenancy Act
2 See S 227 (1) of the Orissa Tenancy Act

Note 2

1 (60) 3 Beng L R A C 390 (322)
(80) 5 Cal 303 (310) (A sale without permission is invalid)
(26) 165 Ind Cas 534 (534) (Pesh) (Rule as amended by N W F P Court allows decree-holder to bid unless debarred by the Court)
[*See also* (27) AIR 1927 All 681 (681 682) 50 All 173 (Suit by liquidator of company—Decree in favour of liquidator—Execution—Permission [illegible] executing C[illegible]
2 [illegible]
3 [illegible]
4 (1900) 4 Cal W N 474 (475)

O 21 R. 72 Note 2

bidding jointly with a stranger,[5] or by availing himself of the bid of another [6]

Leave to bid should be very cautiously granted [7] In granting such leave the Court can impose any fit and proper conditions for the purpose of safeguarding the interests of the judgment debtor [8] But the conditions imposed should not be too stringent [9] and should not be construed too narrowly [10] The main question for the Court to consider is whether it is to the advantage of every one concerned in order to obtain the highest price that the plaintiff should be allowed to bid or not [11] The executing Court can refuse to accept the bid when the condition attached to the permission to bid is not fulfilled but it cannot for that reason dismiss the execution application [12]

The principle of this rule governs also sales held by the Collector under the Code [13] But where the Collector is empowered under rules to grant only permission to bid but not to order a set off the decree holder desiring a set off should apply to the Court under this rule [14]

Leave granted under this rule is binding on a superior Court acting under Section 63 of the Code [15] Consequently sale proceeds validly set off against the decretal amount cannot be ordered to be refunded and sent to the superior Court See Note 8 to Section 63 *ante*

Where a decree holder filed a petition asking for permission to bid and no order

5 (12) 15 Ind Cas 888 (889) 16 Oudh Cas 86 (Permission to bid granted on condition that the decree holder not to bid less than the decretal amount—Decree holder cannot evade the condition by joining with stranger)

6 [*See* (18) AIR 1918 Oudh 439 (440) 21 Oudh

7 (89) 16 Cal 132 (137) (The Court must be satisfied that no purchaser at an adequate price can be found and that the sale proclamation has been duly published)

(81) 7 Cal 346 (347) (Where a decree holder was joint in family with the manager of an infant defendant whose property was to be sold the decree-holder should not be granted leave)

[*See also* (25) AIR 1925 Cal 1139 (1144) (Decree holder a trustee of property of judgment debtor —His purchase of it in auction set aside in a suit as invalid)]

8 (12) 15 Ind Cas 888 (889) 16 Oudh Cas 86 (*E g* that his lowest bid should be the amount of the decree)

(33) AIR 1933 Rang 151 (152) (Decree holder allowed to bid up to decretal amount—Condition must be read to mean exactly what it says—Decree-holder need not offer decretal amount and

such
dding
aking

(37) 168 Ind Cas 258 (259) 63 Cal 84 (The power to impose a condition follows from the power to refuse permission)

[**But see** (29) AIR 1929 All 85 (85) (Court has no power to impose a condition as to minimum bid — A case after Allahabad High

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5000)

(26) AIR 1926 Pat 140 (141) (Court cannot fix a too heavy upset price when the highest bid is far below)

10 (29) AIR 1929 Oudh 26 (28) 4 Luck 93 (Sale in several lots — Leave to bid for not less

1

that in a previous auction the property was valued at a high figure and that there was no dispute about title of judgment debtor held not to affect the question of leave to bid)

12 (37) 168 Ind Cas 258 (259) 63 Cal 84

O. 21 R. 72 Notes 2–5

was passed thereon, but the decree holder was allowed to bid throughout the course of the sale, it was held by the High Court of Patna[16] that it can be taken that the Court gave the required permission inasmuch as the failure to pass an order in writing was a mistake of the Court

Where the decree holder is the receiver of the property sold in execution, permission obtained under O 21 R 72 without informing the Court that he is such receiver is not enough A sale in his favour under such circumstances is liable to be set aside[17] Where permission was given to a decree holder to bid under this rule but subsequently he was appointed receiver of the property, it was held that the permission would not entitle him to buy the property when he had thus been appointed receiver of the property and that the sale in his favour should be set aside[18]

Where permission to bid is granted but the decree holder did not bid up to amount of upset price fixed by the Court, the Court cannot dismiss the execution on that ground inasmuch as the decree holder cannot be compelled to bid for any particular amount[19]

3. "Where decree-holder purchases with such permission." — Leave to bid puts a decree holder in the same position as an independent purchaser and the judgment debtor is not entitled to demand a higher standard of fairness from the former than from the latter[1] A decree holder purchaser accordingly is not bound to disclose circumstances within his knowledge and bearing on the sale any more than an independent purchaser[2] The principle is the same with regard to the decree holder-purchaser in a mortgage suit also He does not stand in any fiduciary position to the mortgagor[3] He is entitled to credit the judgment debtor only with the purchase money at the auction and not the real market value of the property and may proceed to execute for the balance, if any, of the decree amount[4]

4. Leave obtained by misrepresentation. — The Court has an inherent power to refuse to allow a sale to be confirmed if it is satisfied that the Court has been misled in granting leave to the decree holder to bid[1] But allegations of fraud of this character must be specific and the issue must be decided on a trial[2]

5. Setting off decretal amount against purchase-money and rateable distribution. — For the sake of convenience, sub rule (2) allows the decree holder, ordinarily, to set off the purchase [illegible]

16 ('27) AIR 1927 Pat 312 (312) 6 Pat 4
17. ('32) AIR 1932 Cal 672 (673, 674) 5[illegible] 956 (Following Nugent v Nugent, (1908, [illegible] 546)
18 ('35) AIR 1935 Mad 421 (422) (Receiver being in fiduciary position should not be permitted to buy as his interest as buyer would conflict with his duties as receiver)
19 ('34) AIR 1934 Pat 345 (346)
[*See also* ('37) 168 Ind Cas 258 (259) 63 Cal 84]

Note 3

1. (1900) 23 Mad 227 (233) 27 Ind App 17 (P C)
('33) AIR 1933 Oudh 124 (126) 8 Luck 233
(1900) 4 Cal W N 474 (476)
[**But see** ('81) 7 Cal 346 (347) (The observation in this case that a decree holder purchaser is bound to exercise the most scrupulous fairness has been held by the Privy Council in 23 Mad 227 to be too sweeping in its terms)]
2. (1900) 23 Mad 227 (237) 27 Ind App 17 (P C)
[illegible] ment to dissuade bidders *held* not fraud under O 21 R 90)
('09) 1 Ind Cas 158 (160) 36 Cal 226 (Do)
3. ('89) 16 Cal 682 (692) 16 Ind App 107 (P C)
('89) 16 Cal 132 (136)
('92) 19 Cal 4 (7)
[*See also* ('99) 26 Bom 88 (102)]
4. ('96) 18 All 31 (33)
('89) 16 Cal 132 (135)
('92) 19 Cal 4 (7) (11 Cal 781, Dissented from)
[**But see** ('85) 11 Cal 718 (730)]

Note 4

1. ('22) AIR 1922 Pat 511 (514) 1 Pat [illegible] (Leave obtained on mis-statement of a material fact)
('23) AIR 1923 Mad 635 (636) 46 Mad 553
2. (1900) 23 Mad 227 (235) 27 Ind App 17 (P C)

money into Court and drawing it out again.[1] But this fact does not alter the substantial nature of the transaction, and the nominal receipt of the sale-proceeds, in cases where set-off is allowed, must be held to amount to the holding of assets by the Court, where the rights of rival decree-holders to share in such proceeds are concerned.[2] Sub-rule (2) accordingly provides that the right to set off is subject to any claims for rateable distribution under Section 73 of the Code [3] The claims for rateable distribution in such cases must, however, have been made before the conclusion of the sale inasmuch as on the date of the sale, the assets would be deemed to have been realized by the Court [4] If, however, the amount of the bid exceeds the decree-amount, the claims under Section 73 may be made before the realization of the excess amount by the Court [5] The existence of other decree-holders who are entitled to rateable distribution does not oblige the decree-holder-purchaser to bring into Court the entire purchase-money He is only bound to pay into Court the proportionate amounts due to the other decree-holders [6] In the undermentioned case[7] it was held that it was irregular for a Court to allow a decree holder purchaser to set off the decretal amount for the purchase-money when the property had been attached by another decree-holder also This view does not seem to be sound Where the decree-holder-purchaser who is liable to share rateably with rival decree-holders in the sale proceeds fails to furnish the proportionate amount to the Court for distribution, a refund may be enforced by a

Note 5

1 ('38) 40 Pun L R 544 (544)
('35) AIR 1935 Mad 893 (894) 59 Mad 342 (The decree holder who has been permitted to pur

466
[*See also* ('36) AIR 1936 Mad 797 (799) 59 Mad 1028 (Set off allowed to decree holder purchaser—Application for rateable distribution by another decree holder — Former may have re sale or deposit so much price as is due to rival decree-holder on rateable distribution)]

('82) 5 Mad 123 (124)
('36) AIR 1936 Mad 437 (438).
('36) AIR 1936 Mad 797 (798) 59 Mad 1028

4. ('25) AIR 1925 Oudh 287 (288) (Assets deemed to be realized on date of sale though order to set off made later)
('33) AIR 1933 Mad 804 (805): 57 Mad 38. (Dissenting from A I R 1920 Mad 731.)
('31) AIR 1931 Mad 103 (105) (Where the amount of bid is equivalent to or less than decretal amount assets deemed to be realized on date of sale though set-off ordered before sale)
('31) AIR 1931 Bom 252 (254, 255). (Assets deemed to be realised on date of sale though set off ordered before sale — Per Broomfield, J. —Order for a set off can be properly made only after sale — An order before sale is futile and misleading)
('37) AIR 1937 Cal 55 (56)
('35) AIR 1935 Mad 893 (894, 895) 59 Mad 342
[*See also* ('30) AIR 1930 Cal 761 (762) (Application under S 73 may be in a Court of a higher grade)
('35) AIR 1935 Lah 690 (691) (Decretal amount must be deemed to have been realized on date of sale)]
[**See however** (36) AIR 1936 Pesh 164 (166). (Assets must be deemed as received by Court on date of confirmation of sale)
('36) AIR 1936 Mad 437 (439) (There can be no set off except subject to the right of rateable distribution and in such cases the assets cannot be deemed to have been realized by the Court till the amount has actually been deposited under orders of the Court)]

5. [*See* ('31) AIR 1931 Mad 103 (105)]

6. ('35) AIR 1935 Mad 893 (895) . 59 Mad 342 (Decree holder purchaser need pay only amounts due to such of the other decree holders as have

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off is granted when there are rival decree-holders proceeding simultaneously against the same judgment debtor in execution)]

O.21 R.72 Notes 5-8

summary process in execution instead of in a separate suit [8] *A* and *B* two creditors of *C* had both applied for execution and *A* was allowed to purchase and set off his decree amount towards the purchase money. The Court subsequently discovered the fact that *B* had applied for execution even before the sale, but found that *A* was unable or unwilling to pay the purchase money into Court It was held that the proper order to be passed in such a case was to set aside the sale or order re-sale [9]

Under this rule, no order of Court is necessary prior to sale granting permission to set off [10] An application for set off may be made even after fifteen days of sale [11] Where permission has been given to the decree-holder to bid and set off, the set-off takes place automatically on the sale being held and the decree-holder purchasing at such sale An order of the Court setting off the two amounts is not necessary [12]

Where permission to bid has been granted on condition that there should be no set off, the Court cannot subsequently allow a set off [13] Similarly, where the Court has granted permission to set off and the decree holder has bid at the sale relying on such permission, the Court cannot go back upon its previous order and call on the decree holder to pay the purchase money [14]

As to the exemption from making the deposit into Court of purchase-money by a decree holder-purchaser, see Order 21 Rules 84 and 85 and Notes thereon

6. Amount due on the decree. — Where a decree holder is allowed to purchase the property ordered to be sold on condition that he would purchase it in full satisfaction of the decree, he is not entitled to recover from the judgment-debtor any money that he, as a decree holder, has to pay by way of poundage [1]

7. Purchase without permission. — Although the leave of the Court is a condition precedent to the decree holder bidding for, or purchasing the property, a purchase by him without such permission is not *ipso facto* void It is valid until set aside in the manner provided by sub rule (3) [1] A stranger or a person other than such as is specified in sub rule (3) has no right to apply to have such a sale set aside [2]

8. By himself or through another person. — A purchase by the decree-holder through another person on his behalf is not void, but is only voidable at the

8. (18) AIR 1918 Cal 400 (401)
('88) 11 Mad 356 (359)
(31) AIR 1931 Pat 359 (361), 10 Pat 830
('31) AIR 1931 Pat 405 (407, 408) (32 Mad 334, 6 Bom 570, Followed)
('37) AIR 1937 Nag 383 (384) I L R (1937) Nag 466
9. (33) AIR 1933 All 337 (338, 339)
10. (29) AIR 1929 Lah 492 (493)
('35) AIR 1935 Lah 690 (691) (The decretal amount is set off against the purchase price automatically by operation of law—The Court executing the decree has only to enter up satisfaction of the decree in whole or in part after

1 [illegible]

14. (35) AIR 1935 Mad 907 (908) (Decree holder [illegible] should be ordered to pay to him the purchase money — *Held* that this could not be done — *Held also* that the sale in favour of the decree-holder was a nullity)

Note 6

1. ('29) AIR 1929 All 266 (266)

Note 7

1 [illegible] (Sale with- [illegible]

instance of the judgment debtor or any other person interested in the sale[1] But where a decree holder was *refused* permission to bid, a purchase by him *benami* in the name of another was held to be an *abuse of process of Court*, and the sale was held invalid[2] Similarly, a purchase by the decree holder in the name of another for a price lower than that at which the decree holder was allowed permission to bid, was held liable to be set aside for fraud[3] A purchase by the decree holder's undivided son[4] or undivided brother[5] is presumably with joint funds and as such the purchase is for the decree-holder A purchase by the decree holder s pleader for himself is not invalid[6]

9. The Court may, if it thinks fit, set aside the sale.— A purchase by the decree holder in contravention of this rule being only voidable, it is within the discretion of the Court to set aside the sale on an application under sub rule (3)[1] Where the conduct of the decree holder in purchasing the property amounts to fraud,[2] or to an abuse of the process of the Court,[3] the sale will be set aside Where the purchase has been *benami* and for an inadequate price, the burden of proving that the sale is to be upheld is clearly on the decree holder and it will not be a valid ground of objection that the judgment debtor did not plead fraud or substantial injury[4] In order that a sale may be set aside under this rule on account of the decree holder's failure to obtain permission to bid, it is not necessary to find that the judgment debtor sustained substantial loss by the sale[5]

An application to set aside a sale, under sub rule (3), can only be made by the judgment debtor or any other person whose interests are affected by the sale A decree holder entitled to rateable distribution is a person whose interests are so affected but the sons of a judgment debtor who were not parties to the suit and on whom the decree would not be binding are not persons interested in the sale[6] The fact of the confirmation of the sale is no bar for setting it aside under sub rule (3)[7]

See also Note 8 above

10. Separate suit, if lies, to set aside sale without permission. — See Note 62 to Section 47 *supra* and the cases cited thereunder

11. Judgment-debtor, if can raise the question of no permission in suit for possession by decree-holder. — It has been held by the High Court of Madras[1] that in a suit for possession by the decree-holder purchaser who has taken the property in auction in contravention of the provisions of this rule, the judgment debtor may raise the question of want of leave by way of answer to the plaintiff s claim under

Note 8

1. ('20) AIR 1920 Bom 90 (92) . 44 Bom 352
('98) 22 Bom 624 (628)
('88) 1888 Bom P J 205, Re No 110 (110)
[*See* ('23) AIR 1923 Cal 302 (302)
('09) 1 Ind Cas 221 (224, 225) 32 Mad 242]
2 ('84) 10 Cal 757 (760) (Suit by decree holder-purchaser for possession successfully resisted on ground of the abuse of the process of the Court)
4. ('80) 5 Bom 130 (131)
5. ('84) 1884 Bom P J 74, Re No 32 (32)
6. ('29) AIR 1929 Oudh 235 (237) 4 Luck 635
(Semble Pleader so purchasing may be guilty of misconduct under rules)

Note 9

1. ('85) 11 Cal 731 (732).
[*See* ('03) 13 Mad L Jour 231 (235) (*Bona fide* purchaser from the decree holder purchaser — Restitution impracticable — Sale cannot be set aside)]
2. ('09) 32 Mad 242 (253) 1 Ind Cas 221 (227)
3. ('84) 10 Cal 757 (760).
4. ('09) 1 Ind Cas 221 (227) 32 Mad 242.
5 ('21) AIR 1921 Mad 403 (402)
6 ('03) 13 Mad L Jour 231 (234)
7. ('09) 1 Ind Cas 221 (226) 32 Mad 242

Note 11

1. ('09) 32 Mad 242 (244, 245, 252) (Abdur Rahim, J , dissenting)

O. 21 R. 72 Notes 11–14 the sale, neither Section 47 nor the want of an application under sub rule (3) being a bar thereto

12. Interest. — A decree is not satisfied until the sale in execution of it is confirmed,[1] and the decree holder is entitled to claim interest, if the decree awards it, between the date of sale and the date of its confirmation [2]

13. Appeal. — Under O 43 R 1 (j), an appeal lies from an order setting aside or refusing to set aside a sale under this rule [1] But there is no right of second appeal [2] But an order granting [3] or refusing [4] *leave to bid* to the decree holder is not appealable

14. Limitation and step-in-aid of execution. — The effect of a decree holder purchasing at an execution sale without the leave of the Court is to render the sale voidable and not void Consequently, a suit to set aside the sale under Article 12 (a) of the Limitation Act must be brought within one year of confirmation of sale [1]

On the question whether an application for leave to bid is a step in aid of execution see Article 182 clause (5) of the Limitation Act and the undermentioned cases [2]

Local Amendment

BOMBAY

After Rule 72 the following shall be *inserted*, namely

O. 21 R. 72A (Bombay) '72A If leave to bid is granted to the mortgagee of immovable property a reserve price as regards him shall be fixed (unless the Court shall otherwise think fit) at a sum not less than the amount then due for principal, interest and costs in case the property is sold in one lot, and not less in respect of each lot (in case the property is sold in lots) than such figure as shall appear to be properly attributable to it in relation to the amount aforesaid "

Note — Rule 72A framed by the Bom[illegible] mandatory provision for fixing in the case of a [illegible] reserve price of not less than the amount of the [illegible] was accordingly held[1] that an execution sale to the mortgagee decree holder without fixing the reserve price aforesaid and for less than the decree amount was vitiated by material irregularity The rule has since been amended giving power to the Court if it thinks fit, to dispense with the condition relating to the reserve price

It has been held that Rule 72A has no application to the original side of the High Court of Bombay and a mortgagee decree holder purchasing for less than his decree amount is entitled to recover the balance from the mortgagor or otherwise [2]

Note 12

1 ('09) 1 Ind Cas 106 (107) 33 Bom 311

2. ('19) AIR 1919 All 253 (254) 41 All 526

Note 13

1 ('15) AIR 1915 All 54 (55)
('83) 1883 All W N 104 (104)
('86) 13 Cal 174 (174)
[*See* ('84) 10 Cal 368 (371) *(Obiter)*]

2. ('94) 21 Cal 789 (791)
('15) AIR 1915 All 54 (55)

3 ('83) 1883 All W N 104 (104)
('29) AIR 1929 Mad 903 (905)

4. ('11) 11 Ind Cas 545 (545) 38 Cal 717 38 Ind App 126 (P C)
('86) 13 Cal 174 (174)

N[illegible] 14

R. 73. [S. 292.] No officer or other person having any duty to perform in connection with any sale shall, either directly or indirectly, bid for, acquire or attempt to acquire any interest in the property sold. **O. 21 R. 73**

Restriction on bidding or purchase by officers.

[1877, S. 292.]

Synopsis

1 Legislative changes.
2 "No officer or other person"
3 Transfer of Property Act, Section 136

1. Legislative changes. — The words "or other person" are new

2. "No officer or other person." — The introduction of the words "or other person" in the present rule extends the scope of the prohibition in the rule to all those, besides officers who have anything to do with the machinery of the sale or have, directly or indirectly, any interest in the result of the sale[1] A pleader engaged by a party to a suit[2] or the pleader's clerk[3] cannot be said to have a duty to perform in connexion with the sale and is not therefore within the prohibition, and the introduction of the words "or other person" in the present Code does not change the law in this respect[4] Judicial opinion has, however, been uniform that the conduct of a pleader engaged in the suit, in purchasing the property for himself, is open to grave censure, especially when the purchase is detrimental to the interests of his client[5] In fact, the pleader will be guilty of professional misconduct in such cases[6] A receiver appointed by the Court under O 40 R 1 cannot purchase at an auction sale, as a decree holder, property of which he is the receiver[7] See also Note 3 below

3. Transfer of Property Act, Section 136. — Under Section 136 of the Transfer of Property Act (IV of 1882), as it originally stood, "no Judge, pleader, muktar, clerk, bailiff or other officer connected with Courts of Justice can buy any *actionable claim falling under the jurisdiction of the Court in which he exercises his functions*[1] The Section as it now stands is wider in its scope and prohibits such a purchase, whether the claim is within the jurisdiction of the Court with which the Judge, pleader or other persons referred to is connected or of any other Court[2]

Order 21 Rule 73 — Note 2

1. ('27) AIR 1927 All 76 (77) 49 All 292
2. ('86) 10 Mad 111 (112)
('92) 15 Mad 389 (393) (But onus lies on a pleader to prove that the transaction is *bona fide*)
3. ('27) AIR 1927 All 76 (77) 49 All 292
4. ('29) AIR 1929 Oudh 235 (237) 4 Luck 635 [**But see** ('29) AIR 1929 Nag 305 (309, 310, 311)]
5. ('70) 2 N W P H C R 46 (47)
('70) 13 Suth W R 209 (214) (Judgment-debtor's pleader joining decree holder in purchasing at court sale)
('72) 17 Suth W R 460 (463) (Do)
('96) 23 Cal 805 (817)
('12) 17 Ind Cas 539 (540) (All) (FB)
See also cases in foot notes 3 and 4
6. ('12) 17 Ind Cas 539 (539, 540) (All) (FB) (R 25 of Chap 15, High Court Rules and R 37 of Chap 21 of Civil Courts Rules)
('70) 2 N W P H C R 46 (47) (Circular Orders of the N W F. P)
7. ('32) AIR 1932 Cal 672 (673) 59 Cal 956
('35) AIR 1935 Mad 421 (422) (Decree holder obtaining permission to bid subsequently appointed as receiver—Decree holder cannot bid)

Note 3

1. ('88) 11 Mad 498 (499)
('88) 11 Mad 56 (61)
2. [*See* ('13) 19 Ind Cas 129 (129, 137) 40 Cal 650 (FB)]

Sale of agricultural produce

R. 74. [New] *(1)* Where the property to be sold is agricultural produce, the sale shall be held,—

(a) if such produce is a growing crop, on or near the land on which such crop has grown, or,

(b) if such produce has been cut or gathered, at or near the threshing-floor or place for treading out grain or the like or fodder-stack on or in which it is deposited

Provided that the Court may direct the sale to be held at the nearest place of public resort, if it is of opinion that the produce is thereby likely to sell to greater advantage

(2) Where, on the produce being put up for sale,—

(a) a fair price, in the estimation of the person holding the sale, is not offered for it, and

(b) the owner of the produce or a person authorized to act in his behalf applies to have the sale postponed till the next day or, if a market is held at the place of sale, the next market-day,

the sale shall be postponed accordingly and shall be then completed, whatever price may be offered for the produce

[See Rule 75 and Section 61]

1. Place of sale. — This rule makes special provision for the sale of agricultural produce In other cases of moveable properties attached in execution sales should ordinarily be held in some place within the jurisdiction of the Court ordering the sale [1] Where certain ornaments were attached in Belgaum and the judgment debtor urged that they should be directed to be sold at Bombay on the ground that they would probably fetch a better price and it was found by the Court that a fair price could be had on the spot it was held that there was no good and sufficient reason to *depart from the usual practice* [2]

O. 21 R. 75

Special provisions relating to growing crops

R. 75. [New.] *(1)* Where the property to be sold is a growing crop and the crop from its nature admits of being stored but has not yet been stored, the day of the sale shall be so fixed as to admit of its being made ready for storing before the arrival of such day, and the sale shall not be held until the crop has been cut or gathered and is ready for storing

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Order 21 Rule 74 — Note 1

1 (89) 13 Bom 22 (25) 2 (89) 13 Bom 22 (25)

(2) Where the crop from its nature does not admit of being stored, it may be sold before it is cut and gathered, and the purchaser shall be entitled to enter on the land, and to do all that is necessary for the purpose of tending and cutting or gathering it. O. 21 R. 75

[See Rule 74.]

Local Amendments

CALCUTTA

In sub rule (2) after the words "where the crop from its nature does not admit of being stored," *insert*

"or can be sold to greater advantage in an unripe state (*e g*, as green wheat)"

In sub rule (2) *cancel* the word "and" between the words "tending" and cutting" and *substitute* the word "or"

LAHORE

In sub-rule (2) after the word "stored" the following words were inserted

"or can be sold to great advantage in an unripe state"

MADRAS

In sub rule (1), *after* the words "yet been stored" and *before* the words "the day of the sale," *add* the words "unless the Court decides to proceed under the provisions of sub-rule (2) hereunder"

In sub rule (2), *after* the words "being stored" and *before* the words "it may be sold *insert* the words "or can be sold to greater advantage in an unripe state," and *after* the words "and gathered" and *before* the words "and the purchaser," *insert* the words or in such unripe state"

NAGPUR

In sub rule (2) *after* the words 'being stored" *insert* the words "or, where it appears to the Court that the crop can be sold to greater advantage in an unripe state"

N.-W. F. P.

In sub rule (2) *after* the words "being stored" *add* the words "or can be sold to greater advantage in an unripe state"

OUDH

In sub rule (2) *after* the words "being stored" *insert* the words "or where it appears to the Court that the crop can be sold to greater advantage in an unripe state"

PATNA

Substitute the following *for* Rule 75:

"Where the property to be sold is a growing crop which can be sold to greater advantage in an unripe or unreaped state, it may be sold unreaped, and the purchaser shall be entitled to enter on the land to do all that is necessary for the purpose of tending and reaping it In all other cases the day of sale shall be so fixed as to admit of the crop ripening and being reaped before the sale"

R. 76. [S. 296.] Where the property to be sold is a negotiable instrument or a share in a corporation, the Court may, instead of directing the sale to be made by public auction, authorize the sale of such instrument or share through a broker. O. 21 R. 76

Negotiable instruments and shares in corporations.

[1877, S. 296; 1859, S. 248. See Rule 80.]

O. 21 R. 76 Note 1

1. "May." — The rule is only permissive. A Court is not *bound* to authorize the sale of negotiable instrument or a share in a corporation through a broker.[1]

O. 21 R. 77

R. 77. [S. 297.] *(1)* Where moveable property is sold by public auction the price of each lot shall be paid at the time of sale or as soon after as the officer or other person holding the sale directs, and in default of payment the property shall forthwith be re-sold.

Sale by public auction.

(2) On payment of the purchase-money, the officer or other person holding the sale shall grant a receipt for the same, and the sale shall become absolute.

(3) Where the moveable property to be sold is a share in goods belonging to the judgment-debtor and a co-owner, and two or more persons, of whom one is such co-owner, respectively bid the same sum for such property or for any lot, the bidding shall be deemed to be the bidding of the co-owner.

[1877, S. 297; 1859, S. 251. See Rules 71 and 88.]

Synopsis

1. Sale of moveable property.
2. Payment of price.
3. Re-sale and applicability of Rule 71.
4. Sub-rule (3).

1. Sale of moveable property. — A sale of arms by a nazir of the Court in execution of a decree is a sale by a public servant in the discharge of his duty and is therefore excluded from the operation of the Arms Act (XI of 1878) by Section 1, clause (b) of that Act.[1]

2. Payment of price. — Though sales should be conducted strictly according to this rule, still where, in execution of a decree for a large amount the decree holder purchased some moveable property of small value without the leave of the Court and filed into Court a receipt setting off the amount towards his decree it was held in the undermentioned case[1] that it might be treated as a cash payment.

This rule gives the officer conducting the sale a discretion to allow the purchase-
a to be ... ble time after the sale.[2]

the sale becomes absolute as soon as the purchase money is
holding the sale and no order of Court is necessary
property.[3]

of Rule 71. — A purchaser who has defaulted

4. Sub-Rule (3). — Sub-rule (3) is new and is framed on the analogy of Rule 88 which relates to sale of immoveable properties **O. 21 R. 77 Note 4**

R. 78. [S. 298.] No irregularity in publishing or conducting the sale of moveable property shall vitiate the sale; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation or (if such other person is the purchaser) for the recovery of the specific property and for compensation in default of such recovery. **O. 21 R. 78**

Irregularity not to vitiate sale, but any person injured may sue.

[1877, S. 298; 1859, S. 252. See R. 77. *Cf.* R. 90.]

Synopsis

1. **Irregularity in publishing and conducting sale of moveable property.**
2. **Person injured may, however, sue for compensation.**
3. **Money-decree is not moveable property.**

Other Topics (miscellaneous)

"At the hand of any other person" See Notes 1 and 2
Scope of the Rule See Note 1
What are not irregularities See Note 2

1. Irregularity in publishing and conducting sale of moveable property. — Rule 77, *ante*, provides that on payment of the purchase-money the sale of *moveable* property shall become absolute [1] This rule provides that a sale of *moveable* property in execution of a decree cannot be set aside on the ground of irregularity in publishing or conducting the sale [2] But it does not provide that a sale of moveable property shall in no case be set aside Thus, if there is an *express* assertion in the proclamation of sale that the goods sold are the property of the judgment debtor, then the purchaser, if he has not got that for which he paid the price, is entitled to have the sale set aside and to recover the purchase-money from the hands of the Sheriff or the execution creditor [3] Where a judgment debtor died after the issue of the sale proclamation and before sale and the sale was held without bringing on record his legal representatives, it was held that it was not a case of mere irregularity but that the sale was void and could be set aside under Section 47 [4] On this question, however, there is a conflict of decisions, for which see Note 12 to Section 50, *ante*

In a sale of moveable property in execution of a decree, there is no warranty of title and all that is sold is the right, title and interest of the judgment debtor The right, title and interest of the real owner remain unaffected and he is, therefore, entitled to recover the property or damages [5]

Order 21 Rule 78 — Note 1

1. ('30) AIR 1930 Lah 236 (236) (An order confirming a sale is not appealable as O 43 R 1

('19) AIR 1919 Lah 176 (176) 1919 Pun Re No 12

3. ('78) 2 Bom 258 (266) (Though there is no provision corresponding to R. 93 purchase-money in case of moveable property also can be recovered back under general principles of law) [*See* ('09) 3 Ind Cas 672 (677, 679) 5 Low Bur Rul 58 (FB) (In the absence of such assertion in

O. 21 R. 78
Notes 2-3

2. Person injured may, however, sue for compensation. — Any person sustaining any injury by reason of an irregularity in conducting or publishing the sale may sue the person by whom the injury was caused, for compensation [1]

Though this rule would enable a judgment debtor also to sue for compensation, it must be read with Section 47 which bars a separate suit regarding any question arising between the parties in execution.[3]

3. Money decree is not moveable property.—A money decree is not moveable property within the meaning of this rule and therefore where such a decree is sold contrary to the procedure laid down in Rule 53 *ante*, the sale can be set aside on the ground of irregularities in the conduct of the sale [1]

O. 21 R. 79

R. 79. [Ss. 299, 300, 301.] *(1)* Where the property sold is moveable property of which actual seizure has been made, it shall be delivered to the purchaser.

Delivery of moveable property, debts and shares

(2) Where the property sold is moveable property in the possession of some person other than the *judgment-debtor*, the delivery thereof to the purchaser shall be made by giving notice to the person in possession prohibiting him from delivering possession of the property to any person except the purchaser.

(3) Where the property sold is a debt not secured by a negotiable instrument, or is a share in a corporation, the delivery thereof shall be made by a written order of the Court prohibiting the creditor from receiving the debt or any interest thereon, and the debtor from making payment thereof to any person except the purchaser, or prohibiting the person in whose name the share may be standing from making any transfer of the share to any person except the purchaser, or receiving payment of any dividend or interest thereon, and the manager, secretary or other proper officer

Note 2

1. ('02-'03) 2 Upp Bur Rul Civ Pro 9 (Lien of a third party on the moveables destroyed by sale —Decree holder liable to him for loss)
('34) AIR 1934 Oudh 94 (95) (Sale officer dishonestly sending away decree-holder to prevent raising bid—Decree holder may sue for damages)
('20) AIR 1920 Nag 34 (35) (Goods sold not value is not irregularity)
('67) 8 Suth W R 415 (420) (Omission to mention number, value, etc, of Government Promissory Notes is not such irregularity as would affect sale)

Note 3

1. ('24) AIR 1924 Rang 21 (21) 1 Rang 360

of the corporation from permitting any such transfer or making any such payment to any person except the purchaser O. 21 R. 79 Notes 1–3

[1877, S 299; 1859, Ss 261, 266 See Rr 43, 51 and 80. *Cf.* Rules 95 and 56.]

Synopsis

1 Delivery of debts
2 Shares
3 Forms See appendix E, Form Nos 32 33 and 34

1. Delivery of debts. — Where a debt is sold the method of delivery is as provided in sub rule (3) by a *prohibitory order* of the Court resembling that made on attachment and the purchaser cannot apply for possession under Rule 95 *infra* [1]

2. Shares.— In the case of sale of shares in a company, when an order is issued under sub rule (3) there is nothing further to be done by the transferee or by the Court and the company cannot permit the transfer of the shares to anybody else [1]

What passes to the purchaser of shares at a court sale is the right to the property and not an absolute *right to have the transfers registered* Therefore the company has still a discretion to recognize such purchasers or not, as in the case of private purchasers [2]

3 **Forms** — See Appendix E Form Nos 32 33 and 34

R. 80. [S 302] *(1)* Where the execution of a document or the endorsement of the party in whose name a negotiable instrument or a share in a corporation is standing is required to transfer such negotiable instrument or share, the Judge or such officer as he may appoint in this behalf may execute such document or make such endorsement as may be necessary, and such execution or endorsement shall have the same effect as an execution or endorsement by the party. O. 21 R. 80

Transfer of negotiable instruments and shares.

(2) Such execution or endorsement may be in the following form, namely .—

A B. by C. D , Judge of the Court of *(or as the case may be)*, in a suit by E F. against A B

(3) Until the transfer of such negotiable instrument or share, the Court may, by order, appoint some person to receive any interest

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Order 21 Rule 79 — Note 1
1 (32) AIR 1932 Mad 283 (284)
[*See also* (17) AIR 1917 Low Bur 134 (135)]
Note 2
1 (23) AIR 1923 Mad 241 (244, 245) 45 Mad 537
2 (16) AIR 1916 Bom 147 (150) 41 Bom 76
(23) AIR 1923 Mad 241 (242) 45 Mad 537
[But see (66) 1 Ind Jur (N S) 258]

O.21 R.80 Note 1

or dividend due thereon and to sign a receipt for the same; and any receipt so signed shall be as valid and effectual for all purposes as if the same had been signed by the party himself.

[1877, S. 302; 1859, S. 267. See Rr. 34 and 51.]

1. Execution of deed of transfer.—This rule is only permissive and, therefore, in order to effectuate the transfer of ownership of a share or of a negotiable instrument a deed of transfer of the share or an endorsement of the negotiable instrument is not required by law [1]

This rule also empowers a Court to cancel a previous endorsement made by the judgment debtor in order to enable the auction purchaser of a promissory note to realize the amount due under it [2]

O.21 R.81

R. 81. [S. 303.] In the case of any moveable property not hereinbefore provided for, the Court may make an order vesting such property in the purchaser or as he may direct; and such property shall vest accordingly.

Vesting order in case of other property

[1877, S.303 See Rr.74 to 77,79 and 80. *Cf.* Rr. 92 and 94.]

1. Rights of mortgagee against purchaser. — A mortgagee of moveable property cannot follow the property in the hands of an auction purchaser [1]

Local Amendment

RANGOON

The following shall be *inserted* as Rule 81A

O 21 R.81A (Rangoon)

"81A Whenever guns or other arms in respect of which licenses have to be taken by purchasers under the Indian Arms Act, 1878, are sold by public auction in execution of decrees, the Court directing the sale shall give due notice to the Magistrate of the district of the names and addresses of the purchasers, and of the time and place of the intended delivery to the purchasers of such arms, so that proper steps may be taken by the police to enforce the requirements of the Indian Arms Act"

Sale of arms

SALE OF IMMOVEABLE PROPERTY

O.21 R.82

R. 82. [S. 304.] Sales of immoveable property in execution of decrees may be ordered by any Court other than a Court of Small Causes.

What Courts may order sales

[1877, S. 304. See Ss. 7 *(a) (iii)*, 8 and O. 50 R. 1 *(a) (ii)*, and O. 51 R. 1.]

Order 21 Rule 80 — Note 1
1. ('28) AIR 1928 Mad 571 (578)
('10) 8 Ind Cas 17 (17) (Mad)

1 What Courts may order sales — As to sale of immoveable property in execution of small cause decrees see Note 10 to Section 39 and the undermentioned cases [1] O 21 R 82 Note 1

As to execution against property outside a Court's jurisdiction see Note 8 to Section 17 Note 6 to Section 38 and Note 7 to Section 39

R. 83. [S 305] *(1)* Where an order for the sale of immoveable property has been made, if the judgment debtor can satisfy the Court that there is reason to believe that the amount of the decree may be raised by the mortgage or lease or private sale of such property, or some part thereof, or of any other immoveable property of the judgment debtor, the Court may, on his application, postpone the sale[2] of the property comprised in the order for sale on such terms and for such period as it thinks proper,[3] to enable him to raise the amount O 21 R.83

Postponement of sale to enable judgment debtor to raise amount of decree

(2) In such case the Court shall grant a certificate[4] to the judgment debtor authorizing him[2] within a period to be mentioned therein, and notwithstanding anything contained in section 64,[6] to make the proposed mortgage, lease or sale

Provided that all monies payable under such mortgage, lease or sale shall be paid, not to the judgment debtor, but, save in so far as a decree-holder is entitled to set off such money under the provisions of rule 72, into Court[5]

Provided also that no mortgage, lease or sale under this rule shall become absolute until it has been confirmed by the Court [7]

(3) Nothing in this rule shall be deemed to apply to a sale of property directed to be sold in execution of a decree for sale in enforcement of a mortgage[10] of, or charge on, such property

[1877, S 305, 1859, S 243]

Synopsis

1 Legislative changes	7 Confirmation of sale by Court
2 Postponement of sale	8 Permission under Section 29 of the Guardians and Wards Act
3 For such period as it thinks proper	9 Rateable distribution
4 Shall grant a certificate	10 Mortgage decrees — Sub rule (3)
5 Shall be paid into Court	11 Appeal and revision
6 Effect of private sale	

Order 21 Rule 82 — Note 1

1 ('72) 17 Suth W R 309 (311) (F B) (Purchaser of immovable property in execution of a small cause decree acquires no title) ('84) 7 Mad 592 (594 95)

O. 21 R. 83
Notes 1–5

Other Topics (miscellaneous)

"Authorizing him" See Notes 2 and 6
"Notwithstanding anything contained in S 64." See Note 6
Scope of rule See Note 2
"The amount of the decree may be raised" See Note 2

1. Legislative changes. —

(1) The words "save in so far as a decree-holder is entitled to set off such money under the provisions of rule 72" in the first proviso to sub-rule (2) have been newly added See also similar saving clauses in Rule 84, sub-rule (2) and Rule 85, *infra*

(2) Sub-rule (3) is new See Note 10, *infra*

2. Postponement of sale. — A Court has to exercise its discretion in making an order for postponement of the sale to enable the judgment debtor to raise money by private alienations [1] It will not be exercising its discretion properly in making an order for postponement, where the judgment debtor has had sufficient time to pay the decree amount,[2] or where there is no sufficient reason to believe that the amount due under the decree could be raised by any of the methods mentioned in the rule [3] Where the sale *has taken place* in execution of the decree, the executing Court has no power to grant an application under this rule and is bound to confirm the sale subject to the provisions of Rule 92, *infra* [4]

This rule only authorizes the Court to grant time to the judgment debtor and does not give any authority to the Court to grant a lease or mortgage.[5]

This rule and Rules 84 to 88 (inclusive) are applicable to proceedings under the Chota Nagpur Tenancy Act[6] but not to proceedings under the Acts noted below [7]

3. "For such period as it thinks proper." — The postponement of the sale should be for a reasonable period and not unreasonably long [1]

4. "Shall grant a certificate." — A mere order of the Court postponing the sale of the property and permitting the judgment-debtor to alienate the property privately is not sufficient to entitle the judgment-debtor to do so The issue of a certificate to him under sub rule (2) is an essential step in the procedure, and in the absence of such a certificate the transferee can get no title [1]

5. "Shall be paid into Court." — Payment to the decree-holder's pleader under the orders of the Court is payment into Court, the pleader in such a case becoming the agent of the Court [1] See also the undermentioned case [2]

Order 21 Rule 83 — Note 2

1. ('25) AIR 1925 Rang 271 (272) 3 Rang 132
(1864) 1 Suth W R Misc 15 (15)
2. (21) AIR 1921 Lah 384 (385)
3. (66) 1 Agra Misc App 11 (12)
(91) 14 Mad 277 (280, 284) (Cannot be postponed unless whole amount of decree can be raised)

[*See also* (10) 7 Ind Cas 718 (719) 1910 Pun Re No 72]
5. (1864) 1864 Suth W R Gap Misc 5 (5)
6. See S 210 (3)(b) of Bengal Act, VI of 1908, as amended by Bihar and Orissa Act, VI of 1920,

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Note 3

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('74) 21 Suth W R 146 (146)

Note 4

1. ('82) 1882 All W N 243 (244) (Transferee cannot maintain suit for possession)
(34) AIR 1934 Mad 727 (729) . 58 Mad 392

Note 5

1. ('13) 21 Ind Cas 210 (211) (Cal)
2. (35) AIR 1935 Lah 481 (481) (Part of purchase money paid to decree holder as per order

6. Effect of private sale. — This rule qualifies the prohibition in Section 64 and on compliance with the conditions of this rule a private alienation, notwithstanding Section 64, becomes absolute even against all claims enforceable under the attachment [1] Where, on 15th January 1911, a Court granted a certificate to a judgment debtor under this rule for private sale of his properties, and on 24th January 1911 the properties were attached in execution of another decree, and on the 31st of January the Court confirmed the sale, it was held that the purchaser got an absolute title and the subsequent attachment was of no avail [2] But the Madras High Court has held in the undermentioned case[3] that sub rule (2) refers only to attachments in existence at the date of the certificate and does not apply to *subsequent* attachments so that an alienation made after such an attachment will not be protected

In authorizing a sale under this rule, a Court cannot empower a judgment debtor to transfer any higher interest than he has and bind the interests of others in the property [4] A private alienation made after obtaining the sanction of the Court cannot affect a prior encumbrance already existing on the properties [5]

An alienation effected by a judgment debtor by virtue of a certificate granted under this rule is a private alienation, even though it does not become absolute unless it is confirmed by the Court and therefore it cannot be said that it is not liable to pre-emption under the provisions of the Punjab Pre emption Act (I of 1913) [6]

7. Confirmation of sale by Court.—A sale effected privately is not a completed transaction until it is sanctioned and confirmed by the Court [1] Until this is done, it would not be operative against claims enforceable under the attachment, but would be defeasible to that extent [2] Where the sanction for private sale has been granted by two Courts executing different decrees, it is enough if the sale is confirmed by one Court [3]

It is not necessary that any formal application should be made for the purpose of obtaining the Court s confirmation of a private transfer nor is there any provision under which a formal order declaring such confirmation should be recorded [4] It has been held in the undermentioned case[5] that it is extremely doubtful whether a private sale under this rule comes within the purview of Rule 92 *infra*, and that, even if Rule 92 governs this rule, there is no legal bar to the confirmation of a sale before the expiry of thirty days from the date of sale

Where the approval of the Court has been obtained by misrepresentation or by the withholding of the material information, the Court will treat such misrepresentation

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of Court and balance paid to judgment debtor— Purchaser cannot be ordered to pay over again the amount paid to the decree holder but may be required to pay the amount paid to the judgment debtor)

Note 6

1. ('06) 30 Bom 337 (340).
2. ('13) 21 Ind Cas 210 (211) (Cal)
3. ('34) AIR 1934 Mad 727 (728) 58 Mad 392 (Distinguishing 21 Ind Cas 210 on the ground that probably in that case the alienation had taken place before the subsequent attachment)
4. ('02) 26 Bom 379 (383 384)
('20) AIR 1920 Mad 231 (232)
5. ('24) AIR 1924 Lah 132 (135).
('14) 16 Ind Cas 102 (103) (All)
6. ('19) AIR 1919 Lah 368 (369)

Note 7

1. ('34) AIR 1934 Pesh 76 (76)
('82) 1882 All W N 243 (244)
('34) AIR 1934 Mad 727 (729) 58 Mad 392 (Property attached in execution of another decree against judgment debtor after issue of certificate — Alienation after such attachment into Court by the alienee)
2. ('06) 30 Bom 337 (340)
3. ('95) 19 Bom 539 (544) (In this case the certificate was given by a Court of higher grade — *Held* that it had concurrent jurisdiction to do so)
4. ('13) 21 Ind Cas 210 (211) (Cal)
5. ('13) 21 Ind Cas 210 (211) (Cal)

O.21 R.83
Notes 7-11

or withholding of information as a fraud and will refuse to give effect to the private transfer as against claims enforceable under the attachment [6]

8. Permission under Section 29 of the Guardians and Wards Act. — Where the judgment debtor is a minor for whom a guardian has been appointed under the Guardians and Wards Act 1890, the certificate of the executing Court is not sufficient to validate a transfer under this rule, it is also necessary that the guardian should obtain the sanction of the Court that appointed him as guardian [1] The reason is that the matter for inquiry under this rule is the protection of the execution creditor, while under Section 29 of the Guardians and Wards Act the matter to be considered is the benefit of the minor and therefore compliance with this rule should not render unnecessary the fulfilment of the requirements of Section 29 of the Guardians and Wards Act

9. Rateable distribution. — Money paid into Court under sub rule (2) is money paid under a pending execution application and is therefore liable to rateable distribution under Section 73 *ante* [1] Where property is attached at the instance of several decree holders, permission should not be granted under this rule to satisfy one of the decrees [2]

10. Mortgage decrees — Sub-Rule (3).—This rule does not apply to cases in which property is directed to be sold in execution of a decree on a mortgage [1] The reason is that the creditor s right of sale rests on the mortgage decree and not on the *attachment* in execution The undermentioned cases[2] under the old Code holding that Section 305 corresponding to this rule applied to mortgage decrees also are no longer law under this Code in view of the specific enactment of sub rule (3)

11. Appeal and revision — No appeal lies against an order under this rule postponing or refusing to postpone a sale [1] Such an order is however open to revision [2]

O.21 R.84

R. 84. [S. 306.] *(1)* On every sale of immoveable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent on the amount of his purchase-money to the officer or other person conducting the sale, and in default of such deposit, the property shall forthwith be re sold

Deposit by purchaser and re sale on default

6 (05) 29 Bom 615 (620 621) (Principle of (1884) 27 Ch D 424 followed)

Note 8

1 (09) 31 All 378 (378)
(99) 23 Bom 287 (290)
(22) AIR 1922 Cal 150 (151) 49 Cal 911

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ad 616

ad 616

Note 10

1 (04) 31 Cal 373 (3 8)
(78) 3 Cal 335 (336)
(21) AIR 1921 Lah 384 (385)
(24) AIR 1924 Mad 234 (235)
(96) 6 Mad L Jour 187 (188)
2 (01) 25 Bom 104 (106 107) (Provisions of Ss 304 to 319 (old) i e Rr 82 to 96 and S 66 applied to sales of immovable property subject to mortgage decrees)
(1900) 3 Oudh Cas 42 (47)
(05) 2 All L Jour 353 (355) (So assumed)

N 11

ng 132

(37) AIR 1937 Pesh 64 (64)
[*See* (1864) 1 Suth W R Misc 11 (11)]
[**But see** (1865) 2 Suth W R Misc 49 (50)
(1900) 3 Oudh Cas 42 (43 44) (Is a question under S 244 (now S 47) and therefore appealable)]
2 (25) AIR 1925 Rang 271 (273) 3 Rang 132
[**See however** (37) AIR 1937 Pesh 64 (64) (Order refusing to postpone sale is not decision of case within S 115 and no revision lies)]

(2) Where the decree-holder is the purchaser and is entitled to set-off the purchase-money under rule 72, the Court may dispense with the requirements of this rule. **O. 21 R. 84 Notes 1–2**

[1877, S. 306; 1859, S. 253. *Cf.* Rule 77. See Rr. 71, 85 and 86.]

Local Amendment

OUDH

To sub-rule (2), *add* the following

"The Court shall not dispense with the requirements of this rule in a case in which there is an application for rateable distribution of assets"

Synopsis

1. "Declared to be purchaser."— The person to be declared purchaser under this rule is the bidder whose bid has been accepted [1] There is no sale till the bid has been accepted by the competent authority [2]

A bidder can withdraw his bid at any time before the property is knocked down to him [3] A bid lapses by a higher bid being made[4] or by extraordinary delay in accepting it [5] As to whether the acceptance is to be by the Court or the officer conducting the sale, see Note 2 below

A person declared to be purchaser under this rule has, even before the confirmation of sale in his favour, sufficient interest in the property to prevent a forfeiture or preserve the title from destruction Thus, where the property sold is the right of the judgment debtor to obtain a re conveyance of certain properties on paying a certain sum by a certain date the person declared to be the purchaser under this rule can make a valid tender of such sum so as to prevent a forfeiture under the clause [6]

2 Acceptance by Court, if necessary for completion of sale — There is a conflict of opinion on this question and three different views have been expressed

(a) A court sale is not complete till the highest bid is accepted by the *Court*, though the officer conducting the sale may have knocked down the property in favour of a particular person as being the highest bidder [1]

Order 21 Rule 84 — Note 1

1 (18) AIR 1918 Oudh 439 (440) 21 Oudh Cas 212 (Bid of one cannot be treated as that of another and deposit received from latter — Sale to latter irregular and bad)

2 (12) 17 Ind Cas 783 (784) 35 All 65

5. (25) AIR 1925 Cal 557 (558)

6. (19) AIR 1919 Mad 1014 (1024) 41 Mad 474

Note 2

1. (25) AIR 1925 Mad 318 (319) (Court can refuse bid of highest bidder though accepted by sale officer)

return of 25 per cent)

O 21 R 85
Notes 2-4

(b) The sale is complete as soon as the property is knocked down to the highest bidder by the officer conducting the sale [2]

(c) The Court has a *quasi* revisional jurisdiction in the matter [3] According to this view the sale is complete *as against the purchaser* as soon as the property is knocked down to him, and he cannot withdraw his bid thereafter although the *Court* may in its discretion refuse to accept his bid and order a re sale

It has been held that in a Collector s sale the acceptance of the bid by the Collector is necessary for the completion of the sale [4]

3 **Deposit, payment of** — The payment of deposit under this rule cannot be insisted on before the property has been knocked down to the bidder [1] But the officer conducting the sale may, if the circumstances justify such a course and in order to satisfy himself that he is a *bona fide* bidder ask any bidder if he has the deposit money ready [2] The deposit under this rule should be paid though no demand is made for it [3]

4 **Non-payment of deposit — Effect of.** — The deposit under this rule must be made immediately after the purchaser is declared and must cover 25 per cent of the purchase money [1] The officer conducting the sale has no authority to extend the time for the payment of the deposit [2]

The failure to pay the deposit immediately as required by the rule does not render the sale void but only amounts to irregularity within O 21 R 90 [3] But a Court has no power to sell a property to a purchaser who does not pay for it Thus where a decree holder purchaser does not pay the balance of the purchase money after deduc i g

(23) AIR 1925 Cal 316 (316) (Court can refuse b d though san e has been accepted by sale officer)
(31) AIR 1931 Cal 583 (584) 58 Cal "8s (Do)
(1?) 13 Ind Cas 597 (597) (Cal) (Do)
(26) AIR 19 6 Cal S 7 (s s) (Do)
(?3) AIR 1923 Pat 525 (527) 2 Pat 548 (Court can refuse bid of highest bidder though the same has been accepted by officer conducting

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Court purchaser not bound to pay deposit)
(29) AIR 1929 Rang 12 (13) 6 Rang 609 (Bid can be withdrawn at any t me before acceptance by Court)
(35) AIR 1935 Oudh 131 (13) 10 Luck 5s7

soon as a property is knocked down to highest bidder)
(29) AIR 1929 Rang 311 (313) 7 Ra g 4 5 (B d cannot be withdrawn after sale officer has accepted the same)
(39) AIR 1939 Nag 269(1) (Officer conducting sale can declare h ghest bidder to be purchaser —He need not a k Judge to declare who is purchaser)
(36) AIR 1936 Lah 555 (557) (It is not open to the Court thereafter to offer the property to any person who may be prepared to purchase it f r higher amount)
[*See also* (32) AIR 1932 Lah 5?5 (5?6) (In the circun stances of the case *held* that date of

(

day of the auction)

to accept b d)
4 (38) 1938 Nag L Jour 10 (1)

se 3(3).

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[

(81) 5 Cal L Rep 181 (184 187) (irregu r ty may be waived)

the decretal amount, the sale to him is void even though it may be confirmed by the Court[4]

An auction purchaser who had not paid the deposit under the rule at all, professed to transfer the property to another and on the latter paying the purchase money the Court confirmed the sale in his favour It was held by the Judicial Commissioner s Court of Oudh[5] that the Court had no power to recognize the transferee from an auction purchaser who had not paid the deposit at all

It is submitted that the remark in the undermentioned case[6] that the date of sale is the *date of deposit* is not correct The date of sale is the date on which the bid is accepted by the proper authority[7] See Notes 1 and 2 above

5. Re-sale. — On the failure of a purchaser to deposit 25 per cent of the purchase money under this rule, the property should be re sold[1] The re sale should be held 'forthwith [2] otherwise the defaulting purchaser will not be liable under Rule 71 for the deficiency in price that may occur on such re sale[3] In the undermentioned Full Bench case,[4] the Madras High Court has held that ' forthwith in this rule means 'as expeditiously as circumstances permit The same view has also been held by the Nagpur High Court[5]

Rule 87 *infra* does not apply to a re sale under this rule and a fresh proclamation is not necessary for such a re sale[6] But, if in the circumstances of a particular case, the issue of a fresh sale proclamation is to the advantage of the defaulting purchaser the fact that such proclamation is issued does not make the re sale one not held forthwith within the meaning of this rule[7]

The officer conducting the re sale is not bound to commence it from the next highest bid below that made by the defaulter[8] As to the procedure to be followed when objection is taken to the re sale on the ground that the deposit was tendered but refused by the sale officer, see the undermentioned case[9]

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(29) AIR 1929 Lah 492 (493)
(28) 110 Ind Cas 773 (774) (Lah)
(91) 14 Mad 227 (228)
(24) AIR 1924 Rang 81 (82)
(03) 3 Low Bur Rul 225 (226 227)
(38) AIR 1938 Pesh 36 (37)
[*See also* (28) AIR 1928 Lah 699 (700)
(22) AIR 1922 All 200 (201) 44 All 266 (FB) (Order 21 R 71 applies to re sales for failure to pay deposit under R 84 — This case should be held to overrule 5 All 316 and 30 All 273)
(81) 5 Bom 575 (577) (Order 21 R 71 applies to re sales for failure to deposit under R 84)]

4 (11) 9 Ind Cas 66 (67) (Cal)
5 (15) AIR 1915 Oudh 140 (141)
6 (19) AIR 1919 Lah 309 (310)
7 [*See* (35) AIR 1935 Pesh 160 (161) (The fact that deposit was not made does not affect the date on which the sale took place for the purposes of Article 166)]

Note 5

1 (67) 7 Suth W R 110 (110)
2 (89) 16 Cal 33 (38)
3 (28) AIR 1928 Lah 249 (249)
(08) 30 All 273 (275)
(29) AIR 1929 Lah 744 (745)
(16) AIR 1916 Lah 445 (446)
(37) AIR 1937 Lah 924 (925) (Delay of more than 17 months)
[**But see** (37) AIR 1937 All 556 (558)]
4 (30) AIR 1930 Mad 761 (762) 53 Mad 900 (FB)
[*See also* (19) AIR 1919 Pat 102 (104) (Sale held on the next day owing to the late hour—*Held* sale was held forthwith within the meaning of the rule)]
5 (39) AIR 1939 Nag 269 (273) (Officer conducting sale can hold re sale the same day as the default in payment of deposit if circumstances permit and if it is proper to do so—He need not wait for the payment of the deposit)
6 (16) AIR 1916 Lah 445 (446)
(98) 2 Cal W N 411 (412)
(89) 12 Mad 454 (458)
7 (30) AIR 1930 Mad 761 (762) 53 Mad 900 (FB)
[*See also* (37) AIR 1937 All 556 (557 558) (Where a decree holder auction purchaser fails to pay the 25 per cent of the purchase money and the property is sold again such second sale is a re sale within the meaning of O 21 R 84 C P C even though held six months after the first sale and on issue of fresh proclamation)]
8 (1864) 1 Suth W R Misc 11 (12)
9 (83) 6 Mad 197 (199)

O. 21 R. 84
Notes 6-8

6. **Sub-rule (2).** — Sub rule (2) is new[1] It provides for the exemption of the decree holder purchaser with the Court's permission from making the deposit under this rule The decree holder-purchaser is not exempt in *every* case from making the deposit the rule only gives the *Court* the power to exempt him from making the deposit Hence, the deposit *must* be made[2] unless dispensed with by the Court[3] The dispensation may be express or implied[4]

An order dispensing with the deposit of 25 per cent of the purchase money may be made *after* the auction[5] Where the decree holder's application for being allowed to set off his decree amount towards the purchase money is pending, a failure to deposit the 25 per cent does not render the sale a nullity[6]

7. **Interest.** — Notwithstanding the deposit of 25 per cent of the purchase money under this rule, the decree holder is entitled to interest on the *entire* decretal amount till the confirmation of the sale, because the decree holder is not bound to withdraw the money before the sale is confirmed[1]

8. **Appeal.** — An order of the Court directing the property to be re sold on default of the auction purchaser to deposit the 25 per cent of the purchase money under this rule is not appealable[1] It has been held that in this respect it makes no difference that the auction purchaser is the decree holder[2]

O. 21 R. 85

R. 85. [S. 307.] The full amount of purchase-money payable shall be paid by the purchaser into Court before the Court closes on the fifteenth day from the sale of the property:

Time for payment in full of purchase money.

Provided that, in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set-off to which he may be entitled under rule 72.

[1877, S. 307; 1859, S. 254. See R. 84.]

Note 6

1 Under the old Code, even the decree-holder purchasing with the permission of the Court was not exempt from making the deposit — See the

strued in such a way as to be consistent with R 72 sub rule (2) and with the proviso to R 85

as regards the balance of the purchase money it has no such option and cannot compel him to bring it into Court)]

[But see ('31) AIR 1931 Lah 78 (78) (When permission is accorded under O 21 R 72 to a decree holder to bid for or purchase the property such permission impliedly dispenses with the deposit of the requisite 25 per cent)]

3 ('29) AIR 1929 Lah 492 (493)

4. ('29) AIR 1929 Lah 492 (493) (Dispensation was inferred from the circumstances under which the permission to bid was granted)

5

6

Note 7

1 ('14) AIR 1914 Cal 210 (212)

Note 8

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Local Amendments

MADRAS

Between the words "purchase-money payable" and "shall be paid" *add* the following words.

"and the amount required for the general stamp for the certificate under Rule 94"

NAGPUR

The following Explanation shall be *added*

"*Explanation.* — When an amount is tendered on any day after 1 P M but paid into Court on the next working day between 11 A M and 1 P M the payment shall be deemed to have been made on the day on which the tender is made"

PATNA

For the portion beginning with the words "the full amount" and ending with the words "sale of the property," *substitute* the following

"The purchaser shall pay into Court the full amount of the purchase money and shall also tender the stamp necessary for the certificate referred to in Rule 94 before the Court closes on the fifteenth day from the sale of the property"

Synopsis

1. Applicability of the Rule.
2. "On the fifteenth day from the sale."
3. Where Court or office is closed on the fifteenth day.
4. Proviso.
5. Extension of time for payment—Material irregularity.

1. Applicability of the Rule. — Where *on an execution sale being confirmed* in appeal the purchaser who had withdrawn the purchase money on the sale being set aside in the lower Court is ordered to re pay it, the time limit of fifteen days provided by this rule does not apply [1]

2. "On the fifteenth day from the sale." — In calculating the period of fifteen days, the day of sale should be excluded [1]

Payment into Government Treasury is equivalent to payment into Court for the purposes of this rule [2] But where the money is sent through the Post Office, it will not be sufficient compliance with this rule if it does not reach the Court in time, for the Post Office is not an agent of the Court [3]

Where a purchaser tendered the balance of the purchase money on the last day with the *chalan* to the officer of the Court for the signature of the Judge and the *chalan* was returned only the next day when the amount was duly paid, it was held that there was sufficient compliance with the provisions of this rule [4]

3. Where Court or office is closed on the fifteenth day. — If the Court and the office are closed on the fifteenth day from the sale on account of holiday, the purchaser can deposit the balance of purchase-money on the next re opening day [1]

4. Proviso. — Where a decree holder is given permission to bid at the sale and set off the amount towards his decree, then if the amount of the bid *minus* the

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withdrawn it on the sale being set aside)]

Note 2

1. ('68) 3 Agra 204 (205)
2. ('84) 7 Mad 211 (213)
3. ('95) 22 Bom 415 (416)
4. ('32) AIR 1932 Pat 342 (343) 13 Pat L Tim 559 (560)
('34) AIR 1934 All 817 (817)

done)

O. 21 R. 85
Notes 4-5

poundage is less than the decree amount, the whole of the amount must be deemed to have been received *eo instanti* the sale is made, and there is no necessity for the purchaser to pay into Court any amount[1] But if the amount of the bid is greater than the decree amount, he may be excused from depositing the twenty five per cent on the date of sale, but will have to deposit the balance within fifteen days from the sale[2] Where a decree holder is permitted to bid subject to certain conditions and those conditions are not fulfilled, the Court can, either under Rule 86, *infra* or under its inherent powers, refuse to confirm the sale and may order a re sale[3]

A brought the properties of X to sale in court auction B who had attached the same properties in execution of his decree for Rs 14,000 against X purchased the properties for Rs 31,000 and deposited 25 per cent under Rule 85 He also applied that his decree amount should be allowed to be set off against the balance of the purchase money He was allowed to do so, and he therefore deposited Rs 10,000 on the fifteenth day It was held that there was no failure to deposit the balance within the meaning of this rule[4]

5. Extension of time for payment — Material irregularity. — The time for the payment of the balance of the purchase money under this rule can be extended with the *consent* of all the parties concerned[1] In the absence of such consent, the Court ought not to extend the time or accept a deposit made beyond time[2] But where the Court does so extend the time, it is only an irregularity within the meaning of Rule 90, *infra* and does not render the sale a nullity[3] If in such a case the sale is confirmed and the money is drawn by the decree holder without objection, the judgment debtor must be taken to have waived the irregularity, and the sale cannot be set aside by reason of such irregularity[4]

Local Amendment

BOMBAY

The following shall be *added* as Rule 85A

O. 21 R. 85A (Bombay) "85A In cases where execution has been transferred to the Collector, for the purposes of Rules 84 and 85, the purchaser shall be deemed to be entitled to a set off under Rule 72 if he produces a certificate to that effect from the Court executing the decree"

O. 21 R. 86

R. 86. [S 308.] In default of payment within the period mentioned in the last preceding rule, the deposit may, if the Court thinks fit, after defraying the expenses of the sale, be forfeited to the Government, and the

Procedure in default of payment.

1 (31) AIR
(93) 16 Mad
in such case
(1900) 3 Oudh Cas 240 (241)
2 (31) AIR 1931 Mad 103 (105)
3 (22) AIR 1922 Pat 511 (514) 1 Pat 235
4 (33) AIR 1933 Rang 104 (105)

Note 5

1. (27) AIR 1927 Lah 337 (338)
2 [See (35) AIR 1935 All 243 (244) 57 All 658 (The Court has no jurisdiction to extend the time when default is made in depositing the
in view of objections to set aside sale)
(24) AIR 1924 Rang 81 (82) (No loss caused to
(23) AIR 1923 Mad 48 (49)

property shall be re-sold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold. O. 21 R. 86 Notes 1-2

[1877, S. 308; 1859, S. 254. See Rr. 71, 84 and 15. *Cf.* R. 77.]

Local Amendment

PATNA

Insert the words "or tender of stamp" between the words "payment" and "within"

Synopsis

1. Scope of the Rule.	**3. Deficiency in re-sale.**
2. Forfeiture of deposit.	**4. Appeal.**

1. Scope of the Rule. — Where the auction-purchaser fails to pay into Court the balance of purchase money as required by Rule 85, it is the imperative duty of the Court to have the property re sold[1] The discretion under this rule is confined to *forfeiture* and not to the *re sale* of the property[2] Anyone who is interested in having the property re sold may move the Court to do so, there is nothing to justify the view that the decree-holder alone can move the Court in the matter.[3]

The provisions of this rule do not apply to sales held in execution of decrees passed by the High Court of Calcutta in the exercise of its original jurisdiction, inasmuch as that Court has framed rules, under Section 129, regulating its own procedure[4]

2. Forfeiture of deposit. — Under Section 308 of the old Code, it was held that that Section was imperative and that on default by the purchaser at a court sale to deposit the purchase-money within fifteen days from the sale, the deposit made on the date of sale must be forfeited[1] The word "shall" in the old Section has been replaced by the words "may, if the Court thinks fit" Therefore, under this rule, the Court has got a discretion to forfeit the initial deposit or not[2] Where there is no question of re-sale, as where after the default by the purchaser the judgment debtor pays off the decree amount, it is not a proper case for ordering the forfeiture of the deposit[3]

Where an auction purchaser deposits a sum in excess of the twenty-five per cent on the date of sale, the Court has jurisdiction to forfeit only the twenty-five per cent[4]

Order 21 Rule 86 — Note 1

1. ('32) AIR 1932 All 392 (392 393)
('19) AIR 1919 Pat 369 (370, 371)
('38) AIR 1938 Lah 198 (199, 200) I L R (1938) Lah 97
('39) AIR 1939 Mad 57 (58)
[**But see** ('26) AIR 1926 All 509 (509) (Sub-

in time—Practice is to order interest on purchase money)]

Note 2

1. (1900) 2 Bom L R 901 (906) (Even though decree-holder purchaser and judgment debtor adjust the matter)
[*See also* ('02) 25 Mad 535 (537) (Even though decree holder and judgment debtor do not ask for re sale)]
2. ('10) 6 Ind Cas 564 (565) 32 All 380 (Purchaser did not pay on notice of judgment debtor s application to set aside sale — Sale set aside — Deposit not forfeited)
('21) AIR 1921 Nag 120 (121) 17 Nag L R 15
('38) AIR 1938 Mad 905 (905) (Failure to pay

O. 21 R. 86
Notes 3-4

3. Deficiency in re-sale. — Where there is any deficiency in the amount of purchase-money on a re sale, the loss is recoverable from the defaulting purchaser under the provisions of Rule 71, *ante* [1]

4. Appeal. — No appeal lies against an order of forfeiture of the deposit of twenty-five per cent.[1] or against an order directing a re sale.[2]

O. 21 R. 87

Notification on re-sale.

R. 87. [S. 309.] Every re-sale of immoveable property, in default of payment of the purchase-money within the period allowed for such payment, shall be made after the issue of a fresh proclamation in the manner and for the period hereinbefore prescribed for the sale.

[1877, S. 309; 1859, S. 255. See Rr. 66 to 68 and 86.]

Local Amendment

MADRAS

For the words "of the purchase-money" *substitute* the words "of the amounts mentioned in Rule 85"

1. Notification on re-sale.—This rule applies only to a re-sale under Rule 86 and does not apply to a case where property is re-sold under Rule 84, *ante* [1]

Omission to mention the date of re-sale in its proper place in the sale proclamation is a material irregularity vitiating the sale [2]

O. 21 R. 88

Bid of co-sharer to have preference

R. 88. [S. 310.] Where the property sold is a share of undivided immoveable property and two or more persons, of whom one is a co-sharer, respectively bid the same sum for such property or for any lot, the bid shall be deemed to be the bid of the co-sharer.

[1877, S. 310; 1861, S. 14. *Cf.* R. 77 (3).]

Synopsis

1. Scope and object of the Rule.
2. Co-sharer.
3. "Bid the same sum."
4. Duty of officer conducting the sale.
5. Suit for pre-emption.
6. Appeal.

Other Topics (miscellaneous)

Actual bid — Necessity of. See Note 3.
"Share of undivided immovable property" See Note 1

Note 3

1. ('22) AIR 1922 All 200 (201) 44 All 266 (FB)
('81) 5 Bom 575 (577)
('81) 7 Cal 337 (339)
('19) AIR 1919 Pat 102 (106)
[*See also* ('25) AIR 1925 P C 61 (63) (P C) (Decree-holder's application to attach deposit must be tried according to law)]

O. 21 R. 88
Notes 1–5

1. Scope and object of the Rule. — The object of this rule is to enable co sharers in undivided immovable property to keep out strangers if they so desire [1] The rule provides, in substance, that a co sharer of the immovable property of which a share is sold, is entitled to pre empt that share when the highest bid is made by a *person who is not a co sharer* [2]

This rule does not apply when the property sold is not a share of undivided immovable property, but the right and interest of a mortgagee in such a share [3] Nor does it apply to land sold in execution of the decree of a Revenue Court [4]

This rule is applicable to sales under the Chota Nagpur Tenancy Act (see Rule 83 Notes), and is unaffected by the Agra Pre emption Act, II of 1922 (see Section 6), or by the Punjab Pre emption Act, I of 1913 [see Section 2 (2)]

2. Co-sharer. — There is no right of pre emption in the case of involuntary sales except as provided in this rule and therefore a usufructuary mortgagee, not being a co sharer, is not entitled to claim the benefit of this rule [1] A defeasible title to a share in immovable property acquired by a person does not give him the right to pre empt another share in the same property as a co sharer [2]

Where several properties are sold in *one lot*, and a person who is a co sharer in *one* of such properties only makes a bid, this rule does not apply [3]

3. "Bid the same sum." — In order to enable a co sharer to claim the benefit of this rule, it is not enough if he merely asserts his claim and offers to pay, at the time the sale is knocked down, the sum equal to that bid by the stranger purchaser, *but he must make a distinct bid in the ordinary manner of offering bids* [1]

4. Duty of officer conducting the sale. — It is the duty of the officer conducting the sale to take notice of a claim of pre emption made by a co sharer under this rule and to receive the purchase money, subject of course to any question which may be raised by any party interested in the sale as to the claimant s title to advance the claim [1] In the undermentioned case[2] where *several* properties had been ordered to be sold in one lot and a person claimed pre emption in respect of *one* of such properties only, it was held that the sale officer had no jurisdiction to determine such claim and that if he did so the proceedings could be questioned by the Civil Court

Where the claimant has deposited the purchase money and fulfilled the conditions of sale so far as he is concerned, the sale is not defeasible by reason of the failure of the bidder to complete the deposit of the purchase money [3]

5 Suit for pre-emption. — Where a claim to preference is made under this rule by a co sharer as against a stranger and the Court declares one of them to be the

Order 21 Rule 88 — Note 1

1 (14) AIR 1914 All 426 (427)
2 (14) AIR 1914 All 426 (427) (Cannot pre empt as against another co sharer)
(16) AIR 1916 Oudh 123 (124)
('74) 6 N W P H C R 243 (245 246)
(70) 2 N W P H C R 200 (202) (Where a co sharer purchases in the name of a benamidar another co sharer is entitled to pre empt the benamidar)
3 (81) 3 All 15 (17)
4 (76) 1 All 277 (279)

Note 2

1. (19) AIR 1919 Mad 1173 (1175) 41 Mad 557 (F B)
(75) 7 N W P H C R 281 (283)
2. (13) 18 Ind Cas 959 (960) 35 All 296.
[See also (09) 3 Ind Cas 782 (784) 32 All 45]
3. (33) AIR 1933 Oudh 401 (402 403) 9 Luck 77

Note 3

1 (88) 1888 All W N 208 (209)
(81) 3 All 827 (828)
(80) 2 All 850 (851)
(98) 1898 All W N 115 (115)
(1863) Marsh 555
[See also (81) 1881 Bom P J 50 (51)
(68) 10 Suth W R 165 (166)]

Note 4

1 (74) 6 N W P H C R 272 (275)
2 (33) AIR 1933 Oudh 401 (402, 403) 9 Luck 77
3 (74) 6 N W P H C R 272 (275, 276)
(74) 6 N W P H C R 259 (260)

O. 21 R. 88
Notes 5-6

purchaser and confirms the sale, a suit by the person against whom the order is made to set it aside will, it is conceived, be barred by general principles of *res judicata* The High Court of Allahabad seems to be of the opinion that a confirmation of an execution sale can be made only under Rule 92, that therefore, a confirmation of the sale under this rule is also one under Rule 92, and that a suit would consequently be barred by sub rule (3) of that rule[1]

6. Appeal. — No appeal lies against an order under this rule confirming the sale in favour of a co sharer[1]

O. 21 R. 89

Application to set aside sale on deposit.

R. 89. [S. 310A.] *(1)* Where immoveable property has been sold in execution of a decree,[3] any person,[10] either owning such property or holding an interest therein[12] by virtue of a title acquired before such sale,[11] may apply[17] to have the sale set aside on his depositing[16] in Court,[9]—

(a) for payment to the purchaser, a sum equal to five per cent.[21] of the purchase-money, and

(b) for payment to the decree-holder,[23] the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount[22] which may, since the date of such proclamation of sale, have been received by the decree-holder.

(2) Where a person applies under rule 90 to set aside the sale of his immoveable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.[24]

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale.

Local Amendments

ALLAHABAD

In sub rule (1) of this rule *for* the words "any person . before such sale," *read* the words "the judgment-debtor, or any person deriving title through the judgment debtor, or any person holding an interest in the property "

CALCUTTA

In sub rule (1) *cancel* the words "either owning such property or holding an interest therein by virtue of a title acquired before such a sale" and *substitute* the words "whose interest is affected by such sale, (provided that such interest has not been voluntarily acquired by him after such sale) "

Note 5

1 ('23) AIR 1923 All 186 (187) 45 All 203 (FB) (Sale held by Collector under rules framed under S 70, exactly corresponding to R 92 of O 21) [*See also* ('76) 1 All 272 (273, 274). (But he should sue for a declaration that the claimant has no right to pre-empt)] [**But see** ('75) 7 N W P H C R 97 (99)]

Note 6

1. ('81) 3 All 674 (675)

LAHORE

In sub rule (1) of this rule *for* the words "any person acquired before such sale," *substitute* the words "any person claiming any interest in the property sold at the time of the sale or at the time of making the application under this rule or acting for or in the interest of such a person"

MADRAS

In sub rule (1), *for* the words "any person, either owning before such sale, *substitute* the words "the judgment debtor, or any person deriving title from the judgment debtor, or any person holding an interest in the property

At the end of sub rule (1), *insert* the following proviso

"Provided that where the immovable property sold is liable to discharge a portion of the decree debt, the payment under clause (b) of this sub rule need not exceed such amount as under the decree the owner of the property sold is liable to pay

NAGPUR

In sub rule (1), *for* the words "any person either owning such property or holding an interest therein by virtue of a title acquired before such sale," *substitute* the words "any person claiming any interest in the property sold at the time of the sale or at the time of the petition, or acting for, or in the interest of, such person"

N.-W. F. P.

In sub rule (1), *for* the words "either owning . before such sale," *substitute* the following words

"either claiming any interest in such property at the time of sale or at the time of application, or acting for or in the interest of such person"

OUDH

In sub rule (1), *for* the words "any person before such sale," *read* the words "the judgment debtor or any person deriving title through the judgment debtor, or any person holding an interest in the property

PATNA

In sub rule (1), *for* the words "any person, either owning before such sale," *substitute* the words "the judgment debtor or any person deriving title through the judgment debtor, or any person holding an interest in the property at the date of the application under this rule

Synopsis

O 21 R 89 (Nagpur)

1. (37) AIR 1937 Nag 161 (161) (The amended rule entitles a transferee of the property after the execution sale to apply for setting aside the sale under this rule)

Other Topics (miscellaneous)

1 Legislative changes —

(1) The words sold in execution of a decree in sub rule (1) have been substituted *for the words sold under this* Chapter See Note 3 below

(2) The words any person either owning such property or holding an interest *therein by virtue of a title acquired before such sale in sub rule (1) have* been substituted for the words any person whose immovable property has been sold under this Chapter See Notes 10 to 15 *infra*

(3) The *words unless he withdraws his application and the words or* prosecute in sub rule (2) are new See Note 24 *infra*

Section 310A was introduced in the old Code for the first time by Act V of 1894 It was held in the undermentioned cases[1] that Section 310A was applicable to execution proceedings pending on the date Act V of 1894 came into force

2 Scope and object of the Rule —The provisions of this rule are in the nature of an indulgence to the judgment debtor they give him a last chance of getting the sale set aside before confirmation upon the terms of satisfying the decretal debt and of paying compensation to the auction purchaser for the loss of bargain [1] The object of the rule is not merely or not specifically to preserve the immovable property in the hands of the judgment debtor but to ensure so far as may be possible that immovable properties shall not at court sales be sold at inadequate prices [2]

It has been already mentioned in Note 2 to O 21 R 2 that once a court sale has been duly effected in favour of a third person it is not competent to the decree holder and the judgment debtor to get rid of it by merely asserting that the decree has been adjusted or satisfied out of Court The only means by which the sale can be avoided is by an application under this rule accompanied by the required deposit in Court where no such application is made within the time limited it is obligatory on the Court under Rule 92 to pass an order confirming the sale notwithstanding the circumstance that the decree holder had admitted satisfaction of the decree [3] But if the decree holder and the auction purchaser agree and the decree is otherwise adjusted to the satisfaction of the decree holder the Court can set aside the sale under its *inherent powers* notwithstanding that the procedure prescribed by this rule has

Order 21 Rule 89 — Note 1

1 (’95) 22 Cal 67 (’83) (FB) (Overruling 21 Cal 940)

(’95) 18 Mad 477 (478)

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of

Maclean C J)

(’1) AIR 1917 Mad 170 (1 6)

(’32) AIR 1932 Lah 238 (239)

(’26) AIR 1926 Nag 298 (300)

(’28) AIR 1928 Nag 136 (143)

not been followed[4] This rule has no application to a sale under O 21 R 32 to compensate a decree holder for the disobedience by the judgment debtor of a decree against him for restitution of conjugal rights[5]

Under this rule, the Court is *bound* to set aside a sale when once the proper amount has been deposited in time by the person entitled to make the application[6]

3. Applicability of this Rule to sales under mortgage decrees.—The words "sold under this Chapter" in Section 310A of the old Code gave rise to a conflict of opinion on the question whether that Section was applicable to sales under mortgage decrees The High Courts of Allahabad, Bombay and Madras and the Judicial Commissioner's Court of Oudh held that though the mortgaged properties were sold by virtue of a power given by the Transfer of Property Act, still the properties were sold under Chapter XIX (Execution of Decrees) of the Code and that Section 310A therefore applied to such sales[1] The High Court of Calcutta, however held a contrary view[2] This conflict has now been set at rest by the substitution of the words "sold in execution of a decree" for the words "sold under this Chapter" and by the incorporation in the Code of provisions relating to mortgage decrees It is now clear that the rule applies to sales in execution of mortgage decrees also[3]

The High Court of Calcutta has held that this rule applies to sales in execution of mortgage decrees passed on its original side[4]

4. Sales under decrees on award.—Where an award in a pending suit directs the sale of certain immovable properties, and a decree is passed in terms of the award, this rule applies to a sale held in pursuance of the terms of such award[1] The reason is that the sale is one in execution of the *decree*

5. Sales by receiver —A sale by the Official Receiver is not governed by this rule[1] Nor does this rule apply to a sale by the Official Referee in a partnership suit for the purpose of realizing the assets of the partnership[2]

6. Sales under Rent Acts.—This rule does not apply to sales under the Bengal Landlord and Tenant Procedure Act (VIII of 1869)[1] or to sales under the Public Demands Recovery Act[2] or to proceedings under the Madras Estates Land Act, I of 1908 (see Section 192A) or to proceedings under the Bengal Patni Regulation, VIII of 1819 [see Section 14A (b)][3]

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4 ('16) AIR 1916 Cal 64 (65 66) (Ap-
('33) AIR 1933 Mad 753 (754 755)
('25) AIR 1925 Oudh 128 (129)
('28) AIR 1928 Pat 40 (43) (Dis-
5 ('33) AIR 1933 Cal 96 (97) 56 Cal L Jour 140 [illegible]
6 [illegible]

[illegible] ly)

[illegible] (Overruling 23 Cal 682)
3 ('21) AIR 1921 Cal 169 (170) 48 Cal 69 [See ('20) AIR 1920 Oudh 204 (207)]

sented from in AIR 1931 Cal 688)
('37) 41 Cal W N 998 (999) ILR (1937) 2 Cal 606 (Principles laid down in this rule apply to such [illegible]

Note 4

1 ('23) AIR 1923 Cal 582 (583 584)

Note 5

1 ('28) AIR 1928 Rang 60 (61) 5 Rang 768 (Not governed by Order 21)
2 ('31) AIR 1931 Mad 484 (486 487)

Note 6

1 [See ('27) AIR 1927 Cal 752 (753)]
2 ('14) AIR 1914 Cal 554 (556)
3 [See ('35) 39 Cal W N 516 (517, 518)]

O. 21 R 89
Notes 6-8

The Bengal Tenancy Act (VIII of 1885) contains a provision in Section 174 almost similar to this rule prescribing the procedure for setting aside sales in cases where a tenure or holding has been sold for arrears of rent Under that Section as it originally stood the judgment debtor alone was entitled to apply Therefore it was held that the application of a person other than the judgment debtor came under the scope of this rule provided he was otherwise entitled to apply under this rule [4] This Act was amended by the Bengal Legislative Council by Act I of 1907 Section 54 which provided that Section 310A of the Code of 1882 (corresponding to this rule) shall not apply to sales under the Bengal Tenancy Act [5] It has been further amended by the Bengal Council in 1928 providing that the judgment debtor or any person whose interests are affected by the sale may apply The Legislative Council of Eastern Bengal and Assam to which territory also the Bengal Tenancy Act applies has not amended this Act Therefore in cases arising in that Province the application of a person other than the judgment debtor is governed by this rule [6] See also the undermentioned cases [7]

It was held that S 310A applied to sales under the Landlord and Tenant Act (Bengal Act X of 1859) [8]

Similar provision is made in respect of sales of a tenure or holding for an arrear of rent under the Orissa Tenancy Act II of 1913 (Section 228) Where the sale is in execution of a decree for an amount which is not really *rent* there is no bar to the applicability of this rule [9]

7 **Applicability of Order 9 to proceedings under this Rule** — An application to set aside a sale under this rule is a proceeding in execution and consequently the provisions of Order 9 do not apply to it [1] In the undermentioned case[2] a second application to set aside the sale after the dismissal for default of the first application was treated as one for review

8 **Immovable property.** — A simple mortgage bond[1] or a decree for sale in

4 (96) 23 Cal 393 (396)
(03) 8 Cal W N 55 (57)
(96) 1 Cal W N 114 (117 118)
(98) 2 Cal W N cclviii
[*See* (16) AIR 1916 Pat 307 (308) (Not a rent

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cannot be said to be without jurisdiction merely because Court h s inadvertently omitted to notice that certain transfer fee has not been pa d)
(37) AIR 1937 Pat 635 (639) (Decree-hold r admitting that he has received amount due to him outside Court within thirty days—Deposit within same period by judgment debtor of compensation money due to auction purchaser—Sale must be set aside)

8 (11) 11 Ind Cas 20 (10 21) ...
[**But see** (97) 2 Cal W N 127 (127) (The Code of Civil Procedure applies up to the sale and not after it)]
9 (33) AIR 1933 Cal 285 (286)

Note 7

1

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Note 8

1 (24) AIR 1924 All 796 (795) 46 All 917

enforcement of a mortgage[2] is not immovable property within the meaning of this rule But the interest of a mortgagee in a usufructuary mortgage is immovable property for the purposes of this rule [3] See also Notes to Order 21 Rule 54, *ante*

Where a judgment-debtor was the owner of a house and of the land on which it stood, and the superstructure alone was sold in execution of a decree, it was held that it was immovable property and that therefore an application would lie under this rule to set aside the sale [4]

See also Note 12 and Section 16 *ante*

9. Court, meaning of. — The "Court" mentioned in this rule is the Civil Court and not the Court of the Collector or of the Mamlatdar to which execution has been transferred under Section 68, *ante* Therefore, a deposit made in such Court is not a valid deposit [1] But where an applicant deposits the amount required in the office of the Collector who had sold the property, and intimation is sent to the Civil Court that the money had been transferred to the Civil Court account, within thirty days of the date of the sale, the deposit is good and the provisions of this rule are complied with [2]

The High Court of Bombay has, by virtue of its rule making powers, framed a new Rule 91A which provides that where a decree has been sent for execution to a Collector and the sale has been held by him or his subordinate, an application and a deposit made under this rule, if made to the Collector or his subordinate, must be deemed to have been made to or in the 'Court' within the meaning of this rule, and that the sale can be set aside on the basis of such an application and deposit.[3]

10. Who may apply under this Rule. — Where an application is made by a person to set aside a sale under this rule on the allegation that he is a person entitled to apply and such allegation is challenged by the opposite party, the question must be determined by the Court [1]

Under Section 310A of the old Code, "any person whose immovable property had been sold" was entitled to apply The amending words in this rule, "any person either owning such property or holding an interest therein by virtue of a title acquired before such sale," have widened the scope of this rule by allowing persons who are not parties to the suit to apply to have a sale set aside [2]

As to persons who are entitled to apply under this rule, see Notes 11 to 15 below

11. "By virtue of a title acquired before such sale." — The words "by virtue of a title acquired before such sale" apply to the words "owning such property" as well as to the words "holding an interest therein "[1]

Note 9

R 91 [illegible] holding that such applications are not valid are no longer law in Bombay

('24) AIR 1924 Bom 495 (498, 499) 48 Bom 638
('20) AIR 1920 Bom 130 (130) 44 Bom 50
('21) AIR 1921 Bom 209 (209) 45 Bom 1132

Note 10

1. ('96) 23 Cal 393 (396)
('23) AIR 1923 Pat 353 (353)
2. ('19) AIR 1919 Pat 501 (501, 502) 4 Pat L Jour 340
('19) AIR 1919 Cal 468 (469)
('11) 11 Ind Cas 196 (196) (Cal)
('21) AIR 1921 Mad 157 (159, 161) 44 Mad 554 (FB)

Note 11

1 ('21) AIR 1921 Mad 157 (160, 161, 163, 164) 44 Mad 554 (FB)
('26) AIR 1926 Nag 10 (13, 14) 21 Nag L R 102

O. 21 R. 89
Note 12

12. "Any person owning such property or holding an interest therein."— A judgment debtor who has not sold his property is clearly entitled to apply under this rule for setting aside the sale of his property A purchaser from a mortgagor judgment debtor, who is bound by the decree, is also entitled to apply under this rule[1] An interim receiver appointed under Section 20 of the Provincial Insolvency Act (V of 1920) after the execution sale of the insolvent's properties has no power to apply under this rule, as he cannot be said to be the owner *"by virtue of a title acquired before such sale"*[2] But where the interim receiver has been expressly authorized by the Court to make an application under this rule, he can do so In such a case, the application will be deemed to be made on behalf of the owner of the property[3]

A mortgagee of the property sold in execution of a decree is a person who has an interest therein by virtue of which he is competent to apply[4] Under the old Code it was held that he was not a person whose immovable property has been sold, as his interest in the mortgaged property could not pass by the sale[5] Under this rule, the word 'property' means *tangible* property (whether or not persons other than the judgment-debtor have any interest in it), and does not mean merely the right, title and interest of the judgment debtor alone[6] Therefore, a mortgagee or lessee whose interests are not affected by the sale is also entitled to apply[7]

Can a person who has purchased the property from the judgment debtor before *attachment* or a person who claims by a title paramount to that of the judgment-debtor, apply to set aside a sale? It was held under the old Code that he could not, on the ground that the property was *not sold as his*[8] Under the present Code there is a conflict of opinion, some cases holding that he can apply,[9] others that he cannot[10] It is submitted that the latter view unduly restricts the scope of this rule

Under the rule as amended by the Lahore High Court it is enough if the applicant claims interest at the time of *making the application* He need not prove

Note 12

1 ('95) 1895 Bom P J 311 (313)
('98) 21 Mad 416 (417) (Subsequent mortgagee defendant)
('23) AIR 1923 Pat 490 (491) 2 Pat 715
('15) AIR 1915 Sind 9 (10) 9 Sind L R 86 (Second mortgagee pending suit)
2. ('26) AIR 1926 Mad 357 (357)
3. ('37) AIR 1937 Mad 589 (590)
4 ('02) 29 Cal 1 (4, 10, 14 24) (F B) (Overruling 5 Cal W N 83)
('11) 10 Ind Cas 863 (864) 33 All 481 (Holder of the decree for money in execution of which property is sold though holder of the mortgages is not competent to make an application under this rule)
('12) 13 Ind Cas 144 (146) (Cal) (Mortgagee, after he obtains mortgage decree, does not lose his interest in the property)

party to the suit)
6 ('28) AIR 1928 Mad 1191 (1191) 51 Mad 770
('36) AIR 1936 Oudh 123 (129) 11 Luck 708
7. ('28) AIR 1928 Mad 1191 (1192) 51 Mad 770
(Lessee—Sale subject to lessee's right)
('23) AIR 1923 All 127 (127, 128) (Usufructuary mortgagee)
('15) AIR 1915 All 76 (77, 78) (Prior mortgagee)
('20) AIR 1920 Mad 290 (291) (Property sold subject to mortgage)
('36) AIR 1936 Oudh 123 (129) 11 Luck 703 (Simple mortgagee)
8. ('99) 23 Bom 450 (451, 453)
('03) 7 Cal W N 243 (244)
('08) 12 Cal W N 151 (152, 153)
('97) 1 Cal W N 114 (117)
[*See* ('03) 26 Mad 365 (366) (*Donee, prior to attachment*)

R. 58 will not preclude him from applying under this rule)
('27) AIR 1927 Mad 327 (328)
10 ('11) 10 Ind Cas 880 (883) (Cal).
('23) AIR 1923 Mad 659 (660)
[*See* ('38) AIR 1938 Pat 233 (234) (O 21 R. 89 does not confer right to make deposit on person who purchased property so far back from date of sale that his interest is not affected by sale —*Obiter*)]

that he had an interest in the property before the sale[11] The same is the law in the North West Frontier Province[12]

13. Transferee before court-sale. — A transferee from the judgment debtor of immovable property sold in execution of a decree for money, after the attachment but before the court sale, is the owner of the property and can apply to set aside the sale[1] Though under Section 64 *ante* the transfer may be void as against the claim under the attachment that Section does not invalidate the transfer for all purposes Under the old Code it was held that a judgment debtor who has sold the property after *attachment was also entitled to apply to set aside the sale*[2]

14. Transferee after court-sale. — Where the judgment debtor transfers his property to a third person after the execution sale but before confirmation thereof, the transferee is not a person who holds an interest in such property *by virtue of a title acquired before such sale* He is, therefore, not entitled to apply under this rule to set aside the sale of such property in execution of a decree[1] But, can the judgment debtor in such cases apply under this rule? Where the transfer is by way of a *mortgage* it is of course clear that the judgment debtor would still be the owner of the equity of redemption and therefore will be entitled to apply[2] Even where the transfer is by way of an *absolute sale*, it has been held by all the Courts except the Judicial Commissioner s Court of Oudh that he can apply[3] The reason is that, in such cases, the judgment debtor must be deemed to own the property for the purpose of the proceedings under this rule The Judicial Commissioner s Court of Oudh has, however, held that he is not so entitled to apply[4] It is submitted that this view is not correct It has been held by the High Court of Allahabad in the undermentioned case[5] that where after the court sale, the judgment debtor executes a mortgage of the properties and the mortgagee and the judgment debtor apply to set aside the sale, each depositing a portion of the amount the two applications may be treated as one made by the judgment debtor notwithstanding that the mortgagee is not independently entitled to apply

11 (35) AIR 1935 Lah 51 (52)
[*See also* (36) AIR 1936 Lah 561 (562) (Person

12 (34) AIR 1934 Pesh 25 (26)

Note 13

(27) AIR 1927 Mad 445 (446) (A I R 1923 Mad 653 Dissented from)

(39) AIR 1939 Sind 177 (179)
(37) AIR 1937 Oudh 103 (109 110)
2 (25) AIR 1925 Oudh 349 (350)
3 (26) AIR 1926 All 204 (208 210, 211) 48 All 155 (F B)
(16) AIR 1916 Bom 57 (57) 40 Bom 557
(21) AIR 1921 Mad 157 (160, 161, 163) 44 Mad

Note 14

1. (22) AIR 1922 Cal 271 (273) 49 Cal 454
(96) 1 Cal W N 259 (260)

(38) AIR 1938 Sind 177 (179)
4 (11) 9 Ind Cas 745 (746) 14 Oudh Cas 33
5 (27) AIR 1927 All 561 (562) 49 All 639

O.21 R.89
Notes 15-16

15. Other persons interested — Apart from the class of persons already mentioned in Notes 11 to 14 above, the following persons are also entitled to apply under this rule

(1) A beneficial owner in cases where the property has been sold in execution of a decree against his *benamidar* [1]

(2) A *benamidar* transferee from the judgment debtor [2]

(3) A co sharer in the property sold [3]

(4) Where the share of a member of a joint Hindu family is sold the other members having an interest in the properties [4]

(5) Where property is sold in execution of a decree against a Hindu widow, the reversioner to the estate [5] It is not necessary to have an interest *de præsenti*

(6) An under raiyat[6] or a *dar mokararidar* [7]

(7) Where the holding is sold in execution of a decree for arrears of rent due thereon a purchaser of a portion thereof [8] Where the holding is however, *non transferable* there is a conflict of opinion [9]

The following persons are not entitled to apply under this rule

(1) The holder of a money decree who has attached the property sold is not a person who has an interest in the property by virtue of a title acquired before such sale [10]

(2) A person having no title to the property and not in possession thereof is not entitled to apply [11] but a trespasser who has entered into possession before the court sale holds an interest therein by virtue of a title acquired before such sale even though his title has not been *perfected* or completed by prescription [12]

(3) A person in whose favour there is merely an agreement to sell the property cannot apply to have the sale set aside [13]

See also the undermentioned case [14]

16 Deposit in Court — The deposit made under this rule by an applicant must be of such a nature as to be payable at once to the parties Therefore a deposit

Note 15

1. (08) Cal L Jour 305 (307 308)
2 (02) 29 Cal 1 (5 15) (F B)
(97) 1 Cal W N 135 (136)
3 (08) 30 All 192 (196)
(97) 1 Cal W N 114 (118)
[But see (11) 6 Ind Cas 810 (812) 38 Cal 1

Bengal and Assam Tenancy Act does not exclude the operation of th s rule)
[But see (02) 29 Cal 409 (461) (Dissented from in 11 Cal W N 742)]
7 (05) 32 Cal 107 (110)

(Can apply)

(08) 7 Cal L Jour 282 (284) (Do)
(15) AIR 1915 Cal 356 (357) (Has no *locus standi*)
(24) AIR 1924 Pat 513 (515) (Do)
(15) AIR 1915 Cal 590 (590) (Do —Mortgagee)
10 (15) AIR 1915 All 160 (160)
(31) AIR 1931 Bom 277 (278) 55 Bom 239
(02) 6 Cal W N 57 (58)
11 (17) AIR 1917 Pat 159 (160) 2 Pat L Jour

12 (24) AIR 1924 Mad 723 (726) (Per Venkata subba Rao J)
13 (99) 23 Bom 181 (184)
(23) AIR 1923 Mad 659 (660)
14 (36) AIR 1936 Pat 119 (121) (Person in whose favour decree for specific performance of contract of sale has been passed against a

in order to be valid, must be in cash and not by Government promissory notes or cheque[1] A tender by a person who is neither an attorney nor a vakil nor a *muktear* for the applicant, does not comply with the provisions of this rule and is consequently invalid[2] But if the lodgment schedule was signed by the proper person, the fact that the actual payment into the treasury is not made by his recognized agent is immaterial[3]

It has been held that the deposit mentioned in this rule is not a condition precedent to the *entertainment* of the application although it is a condition precedent to the setting aside of the sale[4]

As to time for deposit, see Note 28, *infra*

See also Note 22, *infra*

17. Deposit and application. — An *application* for setting aside a sale is necessary before the Court can be called upon to act under this rule[1] A mere deposit of the amount without an application in time, is not enough, and the sale cannot be set aside[2] A mere lodgment schedule cannot be treated as an application within the meaning of this rule[3] It has been held by the High Court of Calcutta[4] that where a judgment debtor pays the requisite amount by a *challan* and prays that the execution may be closed, a separate application is not essential and that the *challan* which sets out the purpose is a sufficient compliance with this rule An application for permission to deposit in Court the decree amount and a sum equal to 5 per cent of the purchase-money is an application to set aside the sale, even though there is no *express prayer* in the application to set aside the sale[5] It has also been held that an application for challan or an application with a memo of deposit and its receipt is a proceeding within the meaning of Section 153 and can be amended by the inclusion of a prayer for setting aside a sale although the application for amendment is made beyond the period of limitation for an application to set aside the sale[6]

The application may be *oral* or *written*[7] It will not be rendered invalid by the

tenant of the property sold but who has not executed his decree cannot apply under this rule)

Note 16

1. ('87) 14 Cal 321 (323)
('15) AIR 1915 Low Bur 97 (97)
('35) 39 Cal W N 829 (831 833) (Rule contemplates deposit in cash—But there can be no cash deposit where nothing is due under the decree by reason of previous payments)
2 ('31) AIR 1931 All 449 (450)
('12) 13 Ind Cas 404 (405) (All)
('17) AIR 1917 Mad 739 (740)
('37) AIR 1937 Oudh 108 (110) (Application by judgment debtor to set aside sale — Tender by would be purchaser who acquired interest after auction sale—Tender is not valid)
3 ('24) AIR 1924 Mad 483 (483)
4. ('36) *AIR 1936 Pat 119 (120).*

Note 17

1. ('25) AIR 1925 Mad 639 (640).
('17) AIR 1917 Mad 662 (662)
('25) AIR 1925 Oudh 411 (412)
('39) 18 Pat 210 (213)
('40) AIR 1940 Pat 87 (88) 5 Cut L Tim 27 (28) (Application cannot be implied from the fact of deposit)
[**But see** ('05) 7 Bom L R 263 (264)]
3 ('26) AIR 1926 Mad 620 (621)
('22) AIR 1922 Mad 83 (83)
4. ('98) 25 Cal 216 (218, 222) (Section 174 Bengal Tenancy Act)
[*See also* ('39) AIR 1939 Cal 153 (154) (Challans by which amount is deposited may be regarded as sufficient application)]
6. *('37) AIR 1937 Mad 342 (343)*
7. ('12) 13 Ind Cas 404 (405) (All)
('21) 63 Ind Cas 140 (141) (All) (Application must be deemed to be one for setting aside sale)
('25) AIR 1925 Mad 909 (910)

('17) AIR 1917 Mad 662 (662)
('25) AIR 1925 Oudh 411 (412)

O. 21 R. 89
Notes 17-18

absence of a formal prayer for setting aside the sale[8] Where the application does not disclose the nature of the interest of the applicant, the Court should not reject the application, but should direct the applicant to supply the necessary particulars[9]

See also the undermentioned case[10]

18. Failure to deposit full amount. — It has been already mentioned in Note 2 *ante*, that this rule is in the nature of a concession shown to the judgment debtor The applicant must, therefore, strictly comply with the requirements thereof and a sale will not be set aside unless the *entire amount* specified in sub rule (1) is deposited within 30 days from the date of the sale[1] Thus, a *part payment* coupled with an undertaking to pay the balance cannot be considered as a valid deposit[2] But if the conditions of this rule are complied with, the failure to pay an additional amount to cover the poundage fee is a mere irregularity which will not prevent the Court from entertaining the application[3]

An execution sale cannot be set aside under this rule on deposit of a part of the amount specified in the proclamation of sale, even though the decree holder consents not to claim any further sum so far as that execution application is concerned[4] Where, however the amount mentioned in the proclamation of sale is deposited, the fact that the proclamation of sale was incorrectly drawn up and did not specify the full amount for the recovery of which the sale was ordered, will not render the deposit invalid[5] A contrary view has been expressed in the undermentioned case[6]

Sub rule (3) does not mean that the applicant should deposit also costs and interests not covered by the proclamation, and a Court cannot refuse to set aside a sale merely because such costs and interests are not also deposited within time[7] Nor can it refuse to set aside a sale merely because the amount due under *another* decree, the holder of which has applied for rateable distribution, has not been deposited[8]

A decree against a father and son ordered the sale of the father s interest and the son s interest was to be sold only if there was a balance due after the sale of the father s interest The father s interest was sold and then for the balance, the son s interest was also sold The son thereupon deposited the balance for which his properties were sold and applied under this rule It was held that he was not bound to deposit the whole of the decree amount and that his application was valid[9]

See also Note 22 *infra*

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8 (17) AIR 1917 Mad 225 (225 226) (Amendment of petition by adding a formal prayer allowed)
(23) AIR 1923 Pat 159 (161)
9 (25) AIR 1925 Nag 17 (19)
10 (39) AIR 1939 All 241 (241) ILR (1939) All 403 (Rule only requires two things viz , an application and a deposit The rule does not require three things, viz , an application, tender and deposit)

Note 18

1. (11) 9 Ind Cas 937 (938) (Mad)
(25) AIR 1925 Nag 30 (30)
(24) AIR 1924 Nag 216 (219) (Failure to deposit five per cent)
(28) AIR 1928 Rang 256 (256) 6 Rang 490 (Four rupees deficit paid one day late—Though shortage did not vitiate not being substantial, delay vitiates application)
(18) AIR 1918 Pat 82 (83) 4 Pat L Jour 55 (In a case under S 174 of the Bengal Tenancy Act whole amount of *decree* must be deposited)
(99) 23 Bom 531 (535)
(38) 1938 Mad W N 15 (16)
2 (2?) AIR 1922 Bom 193 (194) 46 Bom 171
3 (31) AIR 1931 All 756 (757) 53 All 9 9
(Failure to affix stamps by way of poundage fees)
(97) 20 Mad 158 (159)
(38) AIR 1938 Cal 523 (523) (After the sale is set aside the judgment debtor can be made to reimburse the auction purchaser for any cost and the poundage fee he has properly paid in

4 (Sec 174

19. Mistake in calculating the amount to be deposited. — Where the original deposit is deficient and it appears that the deficiency is due to a wrong calculation made by an officer of the Court and the applicant makes good the deficiency as soon as it is pointed out, though after thirty days have elapsed, is the deposit valid? It has been held that if the mistake is the act of the prescribed officer acting in accordance with the prescribed rules of the Court, then it will not affect the party [1] Otherwise no relief can be given to a party even though he is misled by an officer of the Court [2]

In the undermentioned case[3] it was held that a trifling mistake as to four annas in making the deposit should be overlooked on the principle *de minimis non curat lex* — the law pays no regard to trifling matters

20. Conditional deposit. — In order that a deposit under this rule may be valid, it must be *unconditional* [1] If the applicant prevents the money from being available to the decree-holder *forthwith and unconditionally*, the deposit is bad and will not entitle him to have the sale set aside [2] Since this rule is inconsistent with the notion that a payment into Court may be made under protest or subject to conditions, the Court has no power to order that the decree holder should draw out the money only on his executing a security bond [3] If, as soon as an objection to the conditional deposit is taken, the applicant withdraws his condition, the money becomes available for payment to the decree holder before he has made any attempt to withdraw it and therefore the deposit is not invalid [4]

Where a deposit is properly made under this rule, but subsequently an application is made that the money may be retained in Court pending the result of an application under O 9 R 13, the subsequent condition cannot invalidate the deposit which was originally good [5]

21. A sum equal to five per cent. — Sub rule (1) clause (a) provides that the deposit should include a sum equal to five per cent of the purchase money for payment to the purchaser, and a sale cannot be set aside unless the five per cent is also deposited [1] That amount is intended partly as a *solatium* to the purchaser for the loss

Note 19

1. ('30) AIR 1930 Cal 302 (304)
('34) AIR 1934 Pat 246 (246) (Shortage in deposit —Mistake due to officer of Court)
('33) AIR 1933 Pat 515 (516, 517)
('30) AIR 1930 Cal 249 (250)
('14) AIR 1914 Cal 656 (657)
('10) 7 Ind Cas 52 (53, 54) (Cal)
('98) 25 Cal 609 (611)
('91) 18 Cal 255 (258)
('07) 11 Cal W N 116 (119).
('98) 22 Mad 286 (288) (Court directed that judgment debtor need not pay five per cent —Shortage does not affect)
('98) 1 Oudh Cas 193 (196)

2. ('99) 26 Cal 449 (458 459, 460) (F B)
('16) AIR 1916 Pat 290 (292) 1 Pat L Jour 459 (26 Cal 449, Relied on)

3. ('37) AIR 1937 Pat 409 (410) (Deficit of four annas in deposit in favour of auction purchaser in challan of deposit — Judgment debtor mistakenly depositing deficit in name of decree holder—Application to set aside sale *held* should be allowed notwithstanding the mistake)

Note 20

1. ('21) AIR 1921 Bom 169 (171, 172) 45 Bom 1094
('28) AIR 1928 Pat 193 (194) 7 Pat 30
('38) AIR 1938 Sind 177 (182)
('35) AIR 1935 Mad 842 (844, 847) 58 Mad 972 (F B).

2 ('32) AIR 1932 Cal 216 (217, 218)
[*See* ('97) 1 Cal W N 132 (133) (The decision is under S 174, Bengal Tenancy Act)]

3. ('30) AIR 1930 Mad 921 (923 924) 53 Mad 943

4. ('11) 10 Ind Cas 880 (881) (Cal)
('23) AIR 1923 Pat 418 (420) 2 Pat 534
('23) AIR 1923 Pat 159 (160, 161) (10 Ind Cas 880, Followed)

5. ('04) 8 Cal W N 355 (356)

Note 21

1. ('34) AIR 1934 Pesh 25 (26)
('24) AIR 1924 Nag 216 (218)

O. 21 R. 89
Notes 21–22

of that which is, perhaps, a good bargain[2] A decree-holder-purchaser is as much entitled to that *solatium* as an outside purchaser[3] To hold otherwise would be to read into the rule after the word 'purchaser' the words 'if such purchaser be not the decree holder '[4] But a mere deposit of the five per cent without the decree amount is not a valid deposit.[5]

Where one of two joint decree-holders obtains permission to bid for himself alone and not on behalf of the other, and purchases the property and thereafter the sale is set aside under this rule, the compensation amount of five *per cent* should go exclusively to him and not to the other decree-holder.[6]

22. Less any amount received. — The amount that can be deducted under clause (b) of sub-rule (1) need not have been received by the decree-holder *before* the sale[1] Nor need such amount have been paid to him *through the Court.*[2]

If, after the proclamation of sale is drawn up, the decree-holder and the judgment debtor adjust the decree in full or in part, the adjustment is tantamount to a receipt of the amount by the decree-holder and it is not necessary that that amount should be deposited when applying to set aside a sale under this rule.[3] The expression "any amount which may have been received by the decree-holder" in sub-rule (1), clause (b) means money actually received by the decree-holder and does not include payment of the sale proceeds into Court,[4] which is not available to the decree-holder until the sale is confirmed.

Illustration

Certain properties divided into two lots, A and B, were ordered to be sold to realize a sum of Rs 843 9 9 Properties A and B fetched Rs 420 and Rs. 584 respectively at the sale The judgment-debtor paid into Court Rs 452 13-0 and applied to have the sale of lot B set aside. This amount would have sufficed to satisfy the requirements of the rule if the Rs 420 for which lot A was sold could be deducted from the decretal amount and if the five per cent could be

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[See ('16) AIR 1916 Pat 290 (292) 1 Pat L Jour 459 (Case under S. 174, Bengal Tenancy Act)]
2. ('99) 26 Cal 449 (451, 452, 457) (F B)
3. ('95) 1895 All W N 140 (140)
('33) AIR 1933 All 202 (293) 55 All 200
('99) 26 Cal 449 (451, 452, 457, 460) (F B).

808

Note 22
1. ('35) 39 Cal W N 829 (831)
('37) 41 Cal W N 998 (999) I L R (1937) 2 Cal 606
2. ('35) 39 Cal W N 829 (831)
('37) 41 Cal W N 998 (999) : I L R (1937) 2

cent. of the purchase money and receipt from decree holder on full satisfaction — Sale should be set aside)
('12) 14 Ind Cas 326 (326, 327) (Mad).
('11) 12 Ind Cas 109 (109) (Mad).
('03) 6 Oudh Cas 68 (71)
('37) 41 Cal W N 998 (1000) ILR (1937) 2 Cal 606.

('38) AIR 1938 Cal 252 (253). (The auction pur-

All 152)]

calculated on the purchase money of lot B alone It was held that as the decree holder had not actually received the sum of Rs 420 the deposit was not full and the sale could not be set aside [5]

On the same principle a judgment debtor is not entitled to take advantage of any deposit made by his co judgment debtor which was made not conjointly with him, but independently of him [6]

But where money is deposited by the judgment debtor in Court and it is available to the decree holder *without any obstacle of law* then does that money amount to receipt by the decree holder? According to the High Court of Allahabad it does Thus, where the judgment debtor deposited Rs 5000 in Court towards the decree on the date of sale, and subsequently on the same date the properties were sold and the judgment debtor thereafter deposited under this rule Rs 71,000 which, together with the Rs 5000 already deposited was the decree amount it was held that the amount of Rs 5000 must be held to be received' by the decree holder, and the deposit of the balance was proper [7] According to the High Court of Madras,[8] on the other hand, ' received ' does not mean "virtually received' or constructively received" and an amount which has been deposited in Court cannot be said to have been "received' within the meaning of this rule A similar view has also been held by the Sind Judicial Commissioner's Court [9]

Where a sale proclamation specified the entire amount due under the decree and also contained a direction that certain items were to be sold for only a part of the decree amount and after sale the persons interested in such items applied to set aside the sale on their depositing the amount for which their property was sold together with the five per cent due to the purchaser, it was held that the deposit was valid [10] The reason is that in such a case the words amount specified in the sale proclamation' can only mean the amount which is to be realized by the sale of the particular properties.

23. "For payment to the decree-holder." — The word decree holder in this rule means the decree holder *for the satisfaction of whose decree the sale was ordered* and does not include other decree holders who may be entitled to claim rateable distribution under Section 73 Therefore, it is not necessary for the applicant to deposit into Court the amounts due to the other decree holders claiming rateable distribution [1] There is a conflict of decisions as to whether money deposited under this rule will be 'assets' available for rateable distribution among the other decree holders of the judgment debtor The undermentioned decisions[2] have held that such money will not be 'assets' available for rateable distribution under Section 73, the reason being that the money has been paid for a specific purpose But the contrary view has been held in the undermentioned decisions [3] In view of the discussion in Note 4 to Section 73 *ante*, it is submitted that the latter view is more correct Where a decree

10 (26) AIR 1926 Mad 765 (766 767)

O. 21 R. 89
Notes 23-24

is attached by two persons who are both substituted for the decree holder defendant and a sale held in execution of the attached decree at the instance of one of them is set aside under this rule, both of them will be regarded as the "decree holder" and will be entitled to the amount deposited [4] Where the property of a judgment debtor is attached in execution of several decrees and a sale in execution of one of the decrees is set aside by a deposit, the sale does not put an end to the attachment made at the instance of the other decree holders [5]

Where, in a mortgage suit, a decree for sale in favour of the plaintiff was passed subject to the payment of a certain prior charge in favour of a defendant out of the sale proceeds, and the sale in execution was set aside under this rule by one of the subsequent mortgagees, the decree holder was held entitled to draw the whole amount without any deduction being made on account of the prior charge [6] The reason is that there were no sale proceeds out of which the prior charge was to be paid, as the sale was set aside

Upon a sale being set aside under this rule, the decree holder is not entitled to claim interest from the date of sale till the date of deposit [7]

24. Sub-rule (2) — The object of this sub rule is to prevent a person who intends to impeach a sale under Rule 90 from, at the same time, obtaining the benefit of the concession granted by this rule [1] It has been held by the Allahabad High Court[2] that where applications under Rules 89 and 90 made by the same person are pending, the Court ought to call upon the applicant to make his election as to which application he will prosecute But this view has been dissented from by the Nagpur High Court[3] which has held that it is for the applicant to withdraw the application under Rule 90 and not for the Court to ask him to do so The fact that an applicant makes an application under Rule 90 is not a permanent disqualification and therefore he may carry on the application under this rule, if the other application has been withdrawn [4] A person whose application under Rule 90 is *dismissed* is also not disqualified from subsequently applying under this rule [5] An application made by a person under this rule is not barred by the pendency of an application under Rule 90 by *another person* [6] But where the same person first applies under Rule 90 and then applies under Rule 89

4 [illegible]
5 (03) 13 Mad L Jour 221 (221)
6 (98) 8 Mad L Jour 135 (137)
7. ('14) AIR 1914 Low Bur 190 (190)

Note 24

1 (98) 8 Mad L Jour 56 (58)

5. [illegible]

6 (08) 30 All 192 (196)
(96) 23 Cal 682 (686) (Other judgment debtor appealing against an order under R 90)

devolved)]

R 89 not competent)]

Sub rule (2) will not apply if the application to set aside the sale does not come within the scope of Rule 90 but comes within the scope of Section 47, *ante*[8] Irregularity in the conduct of or in publishing the sale cannot be taken as a plea in an application under this rule[9]

There is no provision converse to this sub rule and therefore there is nothing to prevent an application being made under Rule 90 where an application under this rule has been made and withdrawn or dismissed[10]

25 **Setting aside sale in respect of portion of property sold.** — See Note 22 above

26. **Necessary parties to application.** — See Notes to O 21 R 92 *infra*

27. **Notice** — See Notes to O 21 R 92 *infra*

28 **Limitation** — An application under this rule to set aside a sale is governed by Article 166 of the Limitation Act and must be made on or before the thirtieth day from the date of the sale[1] The starting point of limitation for such an application is the date on which the sale is *completed* that is the day on which the highest bid is accepted and the twenty five per cent of the purchase money is deposited[2] and not the date on which the sale is confirmed[3] The provisions of Section 14 of the Limitation Act are not applicable to an application under this rule[4]

As to the effect of the failure to implead the auction purchaser and to issue notice to him within thirty days see Notes to Order 21 Rule 92

Sub rule (2) of Rule 92 *infra* and the words may apply on his depositing in this rule show that not only the application but the deposit also must be made within thirty days from the date of the sale[5] If the deposit is not made in time the Court has no power to extend the time either under Section 148 of the Code or under Section 5 of the Limitation Act[6] It has however been held by the Oudh Chief Court in the undermentioned case[7] that where a decree holder who is himself the auction purchaser consents to accept a deposit made by the judgment debtor in full

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8 (09) 4 Ind Cas 253 (254) 33 Bom 698 (To set aside sale on account of fraud under S 244 of the old Code)
9 (01) 28 Cal 73 (76)
[*See* (99) 23 Bom 531 (535)]
10 (25) AIR 1925 All 78 (779) 47 All 850
(11) 11 Ind Cas 196 (196) (Cal)

Note 28

ta 10 1 Act does 1 ot apply to an application under O 21 R 89)

(28) AIR 1928 Nag 111 (112)
(31) AIR 1931 Oudh 291 (292)
(35) AIR 1935 Oudh 131 (132) 10 Luck 557 (Collector selling property under directions of executing Court and Court approving sale subsequently—Sale is complete only when Court accepts it — See however Note 2 to S 84 in this connection)
3 (02) 29 Cal 626 (628 631 636)
(12) 17 Ind Cas 884 (884) (Nag)
(36) AIR 1936 Pat 558 (559)
4 (02) 29 Cal 626 (632)
5 (11) 10 Ind Cas 51 (53) (Cal)
(17) AIR 1917 Mad 1 6 (176 (177)
(9) AIR 1929 Nag 10 (11)
(36) AIR 1936 Pat 119 (120)
6 (11) 10 Ind Cas 148 (15?) (Cal)
(34) AIR 1934 Lah 875 (876)
(33) AIR 1933 Rang 8 (J)
(17) AIR 1917 Cal 554 (55)
(12) 13 Ind Cas 365 (365) (Cal)
(17) AIR 1917 Mad 176 (1) (Inherent power under S 151 cannot be invoked)
(1) AIR 1917 Pat 344 (344) 2 Pat L Jour 164
(28) AIR 1928 Rang 256 (256) 6 Rang 490
7. (36) AIR 1936 Oudh 55 (56) 11 Luck 418

O. 21 R. 89
Notes 28–29

satisfaction of his decree and consents to have the sale set aside on receipt of such deposit, it is open to the Court to set aside the sale although the deposit was made beyond thirty days from the date of the sale.

Where the applicant, without any fault of his own, is not able to deposit the money into Court, on account of the fact that the *challan* was not signed by the Judge and returned to him in time or on account of some other act of the Court, the deposit made on the next day will be a valid deposit on the principle expressed by the maxim *actus curiæ neminem gravabit* — an act of Court shall prejudice no man[8] Where the Court is closed on the last day for making the deposit it may be made on the next re opening day by virtue of the provisions of Section 10 of the General Clauses Act[9]

The provisions of Section 7 of the Limitation Act do not apply to the period of thirty days for making a deposit under this rule, as that period is not fixed by any provision of the Limitation Act, but by a provision in this Code, namely, Rule 92, *infra* Consequently a minor is not entitled, by reason of his disability, to an extension of the period under Section 7 of the Limitation Act[10]

Where *A* had applied under the rule, but the sale was set aside on the application of *B* under Rule 90 *infra*, whereupon *A* withdrew his application which was dismissed as withdrawn and got back the amount deposited, but subsequently *B*s application was dismissed by the appellate Court and the sale confirmed, it was held that *A* could not claim to revive the original application made by him by re depositing the amount after limitation[11]

See also the undermentioned case[12]

29. Appeal. — There was no provision in the old Code for an appeal against an order under Section 310A Being, however, a decision on a question relating to the execution, discharge or satisfaction of the decree, it was held that such an order would be appealable if the *decree holder* was the purchaser, inasmuch as the question was one between the parties to the suit[1] But where the auction purchaser was a stranger, there was a conflict of opinion as to the appealability of the order[2] See Note 19 to Section 47 for a fuller discussion

8. (22) AIR 1922 All 195 (196) 44 All 9
(34) AIR 1934 Lah 875 (876)
(11) 10 Ind Cas 880 (881) (Cal)
('24) AIR 1924 Mad 324 (326) 47 Mad 543 *(Obiter)*
(26) AIR 1926 Nag 331 (331) (The Court s direction to pay on the next day—Extension allowed)
(03) 6 Oudh Cas 68 (71)
9 (91) 18 Cal 231 (234)
(97) 19 All 140 (140)
(05) 9 Oudh Cas 214 (215)
(03) 6 Oudh Cas 68 (70)
10 (09) 1 Ind Cas 178 (179) 5 Nag L R 1
11 (34) AIR 1934 Mad 593 (595)
12 (37) AIR 1937 Pat 113 (116) 16 Pat 202 (FB) (Agreement between decree holder purchaser and judgment debtor that if the decretal amount was paid within a certain date the sale would be set aside and that on default it would be confirmed—*Held* on construction of agreement that matically became confirmed and no order of Court was necessary for the purpose)

Note 29

1 (09) 1 Ind Cas 304 (305) (Cal)
(11) 10 Ind Cas 51 (52) (Cal)
(02) 6 Cal W N 57 (60)
(01) 28 Cal 73 (76)
(97) 1 Cal W N 703 (705)
(08) 7 Cal L Jour 282 (283)
(09) 4 Ind Cas 253 (253, 254) 33 Bom 698
(06) 31 Bom 207 (214)
(99) 1 Bom L R 74 (75)
(98) 21 Mad 416 (416 417)
(10) 8 Ind Cas 855 (856) (Mad)
[**But see** (05) 27 All 263 (265)]
2 *No appeal lies*
(08) 30 All 379 (383)
(97) 19 All 140 (141)
(01) 25 Bom 631 (635)
(07) 5 Cal L Jour 204 (05)
(96) 1 Cal W N 114 (117)
(1900) 10 Mad L Jour 228 (229)

Under this Code an order setting aside a sale or refusing to set aside a sale under Rule 92 is appealable *as an order* under Order 43 Rule 1 clause *(j)*[3] An appeal will lie even in a case where the sale is in execution of a small cause decree, transferred to the original side for execution against immovable property[4] The *forum* of appeal depends upon the value for jurisdiction stated in the suit in which the decree has been passed[5] No second appeal will lie from an order under this rule read with Rule 92, by virtue of the provisions of Section 104[6]

Even though the matter may fall under Section 47 (in cases where the decree holder is the purchaser) the order will not be appealable as a decree under this Code, as the definition of decree in Section 2 excludes even an order under Section 47 if it is appealable *as an order* See Note 2 to Section 2, sub section (2)

In cases under Section 174 of the Bengal Tenancy Act an appeal lies as from a decree where the decree holder is the purchaser,[7] but not where such purchaser is a stranger[8] But the Bengal Legislature has in 1928 amended Section 174 of that Act by adding a clause providing for an appeal under that Section in such cases

When an application under this rule has been dismissed for default and an application for restoration thereof has been unsuccessful, no appeal lies against the order refusing to restore the application[9]

An order confirming the sale is tantamount to a refusal to set aside the sale on the application of the judgment debtor, and is therefore appealable[10]

No second appeal lies against an order setting aside or refusing to set aside a sale under this rule[11]

On a dispute between a person (not the judgment-debtor) who had applied under this rule to set aside a sale and the decree holder, the latter's application to withdraw the money deposited by the former was refused It was held that the matter did not fall under Section 47 and so was not appealable[12]

30. Revision. — Where a Court refuses to entertain an application, under this

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('11) 9 Ind Cas 472 (474) (Low Bur)
Appeal lies
('07) 29 All 275 (276)
('01) 25 Bom 418 (421)
('11) 12 Ind Cas 169 (169) (Mad)
('07) 30 Mad 507 (508, 509)
3. ('18) AIR 1918 All 192 (194) 40 All 425

[*See* ('11) 9 Ind Cas 937 (938) (Mad) (Party having right of second appeal under law before 1908—Cannot be defeated by O 43 R 1 of the present Code)]
7. ('12) 13 Ind Cas 365 (368) (Cal)
8 ('25) AIR 1925 Pat 525 (526) 4 Pat 718
9 ('07) 29 All 596 (597, 598)
10. ('33) AIR 1933 Lah 210 (210)
11. ('37) AIR 1937 Rang 537 (538)
12 ('35) AIR 1935 Mad 842 (847) 58 Mad 972 (F B)

O. 21 R. 89
Notes 28-29

satisfaction of his decree and consents to have the sale set aside on receipt of such deposit, it is open to the Court to set aside the sale although the deposit was made *beyond thirty days from the date of the sale.*

Where the applicant, without any fault of his own, is not able to deposit the money into Court, on account of the fact that the *challan* was not signed by the Judge and returned to him in time or on account of some other act of the Court, the deposit made on the next day will be a valid deposit on the principle expressed by the maxim *actus curiæ neminem gravabit* — an act of Court shall prejudice no man [8] Where the Court is closed on the last day for making the deposit it may be made on the next re opening day by virtue of the provisions of Section 10 of the General Clauses Act [9]

The provisions of Section 7 of the Limitation Act do not apply to the period of thirty days for making a deposit under this rule as that period is not fixed by any provision of the Limitation Act, but by a provision in this Code, namely, Rule 92, *infra* Consequently a minor is not entitled, by reason of his disability, to an extension of the period under Section 7 of the Limitation Act [10]

Where *A* had applied under the rule, but the sale was set aside on the application of *B* under Rule 90 *infra*, whereupon *A* withdrew his application which was dismissed as withdrawn and got back the amount deposited, but subsequently *B* s application was dismissed by the appellate Court and the sale confirmed, it was held that *A* could not claim to revive the original application made by him by re depositing the amount after limitation [11]

See also the undermentioned case [12]

29. Appeal. — There was no provision in the old Code for an appeal against an order under Section 310A Being, however, a decision on a question relating to the execution, discharge or satisfaction of the decree, it was held that such an order would be appealable if the *decree holder* was the purchaser, inasmuch as the question was one between the parties to the suit [1] But where the auction purchaser was a stranger there was a conflict of opinion as to the appealability of the order [2] See Note 19 to Section 47 for a fuller discussion

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8 ('22) AIR 1922 All 195 (196) 44 All 9
('34) AIR 1934 Lah 875 (876)
('19) AIR 1919 All 339 (340)
('15) AIR 1915 All 414 (415) 37 All 591 (Treasury officer regarded as an officer of the Court for purpose of this rule)
('11) 10 Ind Cas 51 (54) (Cal)
('11) 10 Ind Cas 880 (881) (Cal)
('24) AIR 1924 Mad 324 (326) 47 Mad 548 *(Obiter)*
('26) AIR 1926 Nag 331 (331) (The Court s direction to pay on the next day—Extension allowed)
('03) 6 Oudh Cas 68 (71)

9 ('91) 18 Cal 231 (234)
('97) 19 All 140 (140)
('05) 9 Oudh Cas 214 (215)
('03) 6 Oudh Cas 68 (70)

10 ('09) 1 Ind Cas 178 (179) 5 Nag L R 1

11 ('34) AIR 1934 Mad 593 (595)

12 ('37) AIR 1937 Pat 113 (116) 16 Pat 202 (FB) (Agreement between decree holder purchaser and judgment debtor that if the decretal amount was paid within a certain date the sale would be set aside and that on default it would be confirmed—*Held* on construction of agreement that matically became confirmed and no order of Court was necessary for the purpose)

Note 29

1. ('09) 1 Ind Cas 304 (305) (Cal)
('11) 10 Ind Cas 51 (52) (Cal)
('02) 6 Cal W N 57 (60)
('01) 28 Cal 73 (76)
('97) 1 Cal W N 703 (705)
('08) 7 Cal L Jour 282 (283)
('09) 4 Ind Cas 253 (253, 254) 33 Bom 698
('06) 31 Bom 207 (214)
('99) 1 Bom L R 74 (75)
('98) 21 Mad 416 (416 417)
('10) 8 Ind Cas 855 (856) (Mad)
[**But see** ('05) 27 All 263 (265)]

2 *No appeal lies*
('08) 30 All 379 (383)
('97) 19 All 140 (141)
('01) 25 Bom 631 (635)
('07) 5 Cal L Jour 204 (205)
('96) 1 Cal W N 114 (117)
(1900) 10 Mad L Jour 228 (229)

Under this Code an order setting aside a sale or refusing to set aside a sale under Rule 92 is appealable *as an order* under Order 43 Rule 1 clause (*j*)[3] An appeal will lie even in a case where the sale is in execution of a small cause decree, transferred to the original side for execution against immovable property[4] The *forum* of appeal depends upon the value for jurisdiction stated in the suit in which the decree has been passed[5] No second appeal will lie from an order under this rule read with Rule 92, by virtue of the provisions of Section 104[6]

Even though the matter may fall under Section 47 (in cases where the decree-holder is the purchaser) the order will not be appealable as a decree under this Code, as the definition of decree in Section 2 excludes even an order under Section 47 if it is appealable *as an order* See Note 2 to Section 2, sub section (2)

In cases under Section 174 of the Bengal Tenancy Act an appeal lies as from a decree where the decree holder is the purchaser,[7] but not where such purchaser is a stranger[8] But the Bengal Legislature has in 1928 amended Section 174 of that Act by adding a clause providing for an appeal under that Section in such cases

When an application under this rule has been dismissed for default and an application for restoration thereof has been unsuccessful, no appeal lies against the order refusing to restore the application.[9]

An order confirming the sale is tantamount to a refusal to set aside the sale on the application of the judgment debtor, and is therefore appealable[10]

No second appeal lies against an order setting aside or refusing to set aside a sale under this rule[11]

On a dispute between a person (not the judgment debtor) who had applied under this rule to set aside a sale and the decree holder, the latter's application to withdraw the money deposited by the former was refused It was held that the matter did not fall under Section 47 and so was not appealable[12]

30. Revision. — Where a Court refuses to entertain an application, under this rule, of a person who is entitled to apply, on the ground that the applicant has no *locus standi* to apply or allows the application of a person who has not the legal character specified in this rule is the order revisable by the High Court? It has been held by

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(11) 9 Ind Cas 472 (474) (Low Bur)
Appeal lies
(07) 29 All 275 (276)
(01) 25 Bom 418 (421)
(11) 12 Ind Cas 169 (169) (Mad)
(07) 30 Mad 507 (508 509)
3. ('18) AIR 1918 All 192 (194) 40 All 425.

(26) AIR 1926 Cal 400 (400)
(11) 10 Ind Cas 345 (345) 38 Cal 339
('10) 6 Ind Cas 573 (573) (Cal)
(21) AIR 1921 Lah 156 (157)

[*See* (11) 9 Ind Cas 937 (938) (Mad) (Party before of the

7.
8. (25) AIR 1925 Pat 525 (526) 4 Pat 718
9 (07) 29 All 596 (597, 598)
10. ('33) AIR 1933 Lah 210 (210)
11. (37) AIR 1937 Rang 537 (538)
12. (35) AIR 1935 Mad 842 (847) 58 Mad 972 (F B)

O. 21 R. 89
Notes 30-31

the High Courts of Calcutta,[1] Madras[2] and Patna[3] and by the Judicial Commissioner's Court of Nagpur[4] that the High Court can interfere on the ground that in such case, the Court either refuses to exercise a jurisdiction vested in it by law or exercises a jurisdiction not vested in it by law The High Court of Allahabad[5] has, however, taken a contrary view that the Court has jurisdiction to decide whether the applicant is entitled to apply and that a decision arrived at in the *exercise of such jurisdiction*, even though erroneous, cannot be interfered with by the High Court in revision

Where an applicant has complied with the terms of this rule but his application is nevertheless rejected,[6] or where a sale is set aside even though the applicant does not conform to the provisions of this rule,[7] the order is open to revision by the High Court

See also the undermentioned cases [8]

31. Deposit — Suit for refund and contribution. — Where property belonging to *A* is sold in execution of a decree against *B* and *A* has the sale set aside on depositing the amount under this rule, can he sue the decree holder for the recovery of such amount? It has been held by the High Courts of Bombay, Calcutta and Patna that he is not so entitled to recover [1] They proceed upon the view that the payment under this rule must be taken to have been deposited for payment to the decree holder voluntarily and unconditionally The decisions of the Madras High Court are conflicting

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Note 30

1 ('03) 30 Cal 425 (428)
2 ('24) AIR 1924 Mad 723 (724)
('23) AIR 1923 Mad 659 (660)
('21) AIR 1921 Mad 157 (161, 163) 44 Mad 554 (F B)

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... 340
[See however ('36) AIR 1936 Pat 119 (121) (*Held* Court had jurisdiction to decide if applicant had *locus standi* The fact that it decided it erroneously is no ground for revision)]
4 ('26) AIR 1926 Nag 10 (14 15) 21 Nag L R 102
5 ('23) AIR 1923 All 392 (392 393) 45 All 425 (F B)

hat

rt

... s Civil Court)
('31) AIR 1931 All 449 (450) (Rejection of application on the ground that the deposit not made by the proper person)
('19) AIR 1919 Bom 130 (131) 43 Bom 735 (Application under the rule not made within thirty days)

('17) AIR 1917 Mad 662 (662) (Erroneous decision on limitation)
('02) 5 Oudh Cas 377 (379) (Where no appeal lies no revision)
(

jurisdiction to decide question and no revision lay)
('37) AIR 1937 Oudh 108 (111) (Error of judgment on point of law — Tender under O 21 R 89 by would be purchaser acquiring interest in property after auction sale — Order of Court setting aside sale holding tender valid, though wrong, cannot be interferred with in revision)
Revision lies
('30) AIR 1930 Cal 249 (250) (Rejection on the ground that deposit is insufficient — Court officer misleading judgment debtor — Revision lies.)
('25) AIR 1925 Nag 17 (18 19) (Dismissal for default without asking applicant to give parti...

('01) 25 Bom 631 (635) (Do)
('02) 6 Cal W N 57 (60)

protest — *Held* that the order was without jurisdiction and could be set aside in revision)

Note 31

1 ('21) AIR 1921 Bom 169 (171, 172) 45 Bom 1094
('33) AIR 1933 Bom 239 (242) 57 Bom 601.

on this point[2] In a recent decision of that Court[3] it has been held that where a decree holder, though his decree has been fully satisfied, fails to enter satisfaction and fraudulently brings the property to sale and the mortgagee of the property makes a payment under this rule to avoid the sale, the payment so made can be recovered back by the mortgagee under Section 72 of the Contract Act It is pointed out in the decision that in such cases there is no outstanding decree as contemplated by this rule. O, 21 R Note

Where the deposit is made by one of several judgment-debtors or by a person entitled to apply under this rule and the sale is set aside in consequence, the person making the deposit is entitled to sue the other persons liable to pay the decree amount for contribution or for re-imbursement as the case may be.[4] The High Court of Madras has held in the undermentioned case[5] that where the sale is set aside at the instance of a purchaser subsequent to the court sale, the payment made by him is not lawful within the meaning of Section 70 of the Contract Act, even though he was allowed by the Court to apply and therefore, he cannot sue for compensation

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R. 90. [S. 311.] *(1)* Where any immoveable property[3] has been sold in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale,[8] may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it : O. 21 R.

Application to set aside sale on ground of irregularity or fraud.

Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court[2] is

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('07) 12 Cal W N 151 (152, 153)
('28) AIR 1928 Pat 193 (194, 195) 7 Pat 30
[*See also* ('02) 6 Cal W N 336 (337) (Suit by undertenant to recover money paid for his lessor)
('30) 20 Pat L Tim 640 (640). (Decree holder cannot be restrained from withdrawing the money deposited)]

2. ('31) AIR 1931 Mad 753 (757, 759) (Refund [illegible]

3. ('38) AIR 1938 Mad 493 (494, 495) (Reversing on Letters Patent Appeal, A I R 1935 Mad 961)

4. ('23) AIR 1923 All 127 (128) (Deposit by [illegible]

('13) 17 Ind Cas 90 (92) (Cal) (Suit by one of [illegible] co owners for compensation — Plaintiff [illegible]

a money decree against the defendant [illegible] by the plaintiff to set aside the sale of [illegible] dant's property in execution of rent [illegible] Plaintiff *held* entitled to the amount [illegible] defendant)

('10) 6 Ind Cas 810 (810, 812, 813) [illegible] (Cannot recover the five per cent)

('17) AIR 1917 Bom 141 (145, 147) [illegible] (Do)

[*See* ('04) 31 Cal 975 (978) [illegible] the deposit has an additional [illegible]

[**But see** ('28) AIR 1928 Rang [illegible] 500]

5. ('30) AIR 1930 Mad 644 [illegible]

O.21 R.90 satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

[1877, S. 311; 1859, S. 256.]

Local Amendments

ALLAHABAD

For the words 'Provided that no" *read* the words "Provided that—

(a) no . . . . . or fraud,"

and *add* the following proviso

'*(b)* no such application shall be entertained upon any ground which could have been taken by the applicant on or before the date on which the sale proclamation was drawn up '

CALCUTTA

Add the following to sub rule (1)

'or on the ground of failure to issue notice to him as required by Rule 22 of this Order '

Cancel the proviso and, *substitute* therefor the following

"Provided —

(i) that no sale shall be set aside on the ground of such irregularity, fraud or failure unless upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity, fraud or failure,

(ii) that no sale shall be set aside on the ground of any defect in the proclamation of sale at the instance of any person who after notice did not attend at the drawing up of the proclamation or of any person in whose presence the proclamation was drawn up, unless objection was made by him at the time in respect of the defect relied upon "[1]

LAHORE

Add the following proviso

"Provided that no such sale be set aside on the ground which the applicant could have put forward before the sale was conducted "[1]

MADRAS

After the first paragraph and *before* the present proviso to the rule, *insert* the following

"Provided that the Court may, before admitting the application, call upon the applicant either to furnish security to the satisfaction of the Court for an amount equal to that mentioned in the sale warrant or that realized by the sale, whichever is less, or to deposit such amount in Court

Provided also that the security furnished or the deposit made as aforesaid, shall

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O 21 R. 90 *(Local Amendments)*

1 **(Calcutta)** ('38) 42 Cal W N 661 (665) (O 21 R 90 Proviso (ii), is inapplicable if the particular defect in the sale proclamation that is complained of is no part of the order of the Court in drawing up the sale proclamation and it finds a place in the sale proclamation that is actually issued despite the direction of the Court to the contrary)

1. **(Lahore).** ('37) AIR 1937 Lah 309 (310) (Where objection to a sale of immoveable property is taken under S 60 (1) (c) after sale, but before sale is confirmed objection falls under O 21 R 90 as amended by the Lahore High Court and is not entertainable)

('38) AIR 1938 Lah 508 (508) (The objections as to the contents of the proclamation ought to be ... does not apply)

be liable to be proceeded against only to the extent of the deficit on a re sale of the property already brought to sale " **O. 21 R. 90**

In the present proviso *after* the word "Provided" *insert* the word "further"

NAGPUR

After the proviso to sub rule (1), *insert* the following further proviso ·

"Provided also that no such application for setting aside the sale shall be entertained upon any ground which could have been, but was not put forward by the applicant before the commencement of the sale "

N.-W. F. P.

Add the following further proviso to sule rule (1):

"Provided further that no such sale be set aside on any ground which the applicant could have put forward before the sale was conducted '[1]

OUDH

Add the following second proviso:

hall be
by the

PATNA

Substitute the following for the proviso to sub-rule (1) ·

"(i) Provided that no application to set aside a sale shall be admitted unless,

(a) it discloses a ground which could not have been put forward by the applicant before the sale was concluded, and

(b) the applicant deposits with his application such amount not exceeding 12½ per cent of the sum realized by the sale or such other security as the Court may in its discretion fix, unless the Court, for reasons to be recorded, dispenses with the deposit [1]

(ii) Provided further that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud "

Add the following as sub-rule (2)

" (2) In case the application is unsuccessful the costs of the opposite party shall be a first charge upon the deposit referred to in proviso (i) (b), if any "

RANGOON

For the present provisos to rule 90, *substitute* the following

"Provided that —

(a) no application to set aside a sale shall be admitted unless it discloses a ground which could not have been put forward by the applicant before the sale was conducted, and

(b) no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud "[1]

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1. **(N.-W. F P)** ('38) AIR 1938 Pesh 52 (53) (Objection that could have been raised before sale—Sale cannot be set aside)

1. **(Oudh)** ('35) AIR 1935 Oudh 336 (336) (Sale proclamation—Omission to specify value of property — Judgment debtor failing to object before sale — He cannot raise objection in application under this rule)

1. **(Patna).** ('37) AIR 1937 Pat 260 (261) (Provision as to deposit is not retrospective)

('38) AIR 1938 Pat 240 (241) 17 Pat 107 (The rule specifically allows the Court to accept security other than cash as the circumstances justify.

deposit cannot be rejected — Opportunity must

O.21 R.90

Synopsis

1. Legislative changes.
2. Scope and applicability of the Rule.
3. Immovable property.
4. Sale will not be set aside unless application is made under this Rule See Note 2
5. Who may apply under the Rule.
   6. Auction purchaser.
   7. Persons entitled to rateable distribution
   8. "Any person whose interests are affected by the sale."
   9. Strangers.
10. Grounds on which a sale can be set aside.
    11. Material irregularity in publishing or conducting the sale.
    12. Omission to attach property and irregularity in attaching property before sale
    13. Omission to make an order for sale.
    14. Omission to issue notice.
    15. Irregularities in publishing the sale — Omission to publish or irregularity in publishing sale proclamation.
        16. Misdescription of property.
        17. Omission or mis statement of the value of the property.
        18. Omission to state the revenue or rent payable on the land.
        19. Omission or mis-statement of the encumbrances over the property.
        20. Other mistakes in the sale proclamation
        21. Omission to beat drum
22. Postponement of sale and issue of fresh proclamation.
23. Irregularities in conducting the sale—Sale within thirty days of the proclamation.
23a. Omission to fix time for sale
    24. Sale on a holiday.
    25. Omission to hold sale at stated time and place.
    26. Sale of property in one lot though *advertised for sale in separate lots.*
    27. Irregularities regarding the order of sale of lots
    28. Other cases where the sale is not in terms of the proclamation.
    29. Purchase by decree-holder without permission to bid See Note 7, Rule 72
    30. Irregularities in the grant of permission to bid
    31. Sale after satisfaction of the decree
    32. Sale after an order of postponement.
    33. Sale after attachment under Rule 53.
    34. Omission to make the legal representatives of the deceased judgment-debtor or decree-holder parties to sale proceedings.
    35. Non representation of minor.
    36. Other instances of material irregularity.
37. Fraud in publishing and conducting the sale.
    38. Combination among bidders.
39. Substantial injury — Proviso
    40. Applicant must have sustained substantial injury by reason of such irregularity or fraud.
41. Waiver of irregularity and estoppel.
42. Bona fide purchaser for value without notice
43. Setting aside sale on grounds not taken in the application.
43a. Setting aside sale in part only, if and when permissible.
44. Joinder of claims under Section 47.
45. Suit to set aside sale for material irregularity See Notes to O 21 R 92.
46. Sale, if can be challenged by way of defence in suit for possession See Notes to O 21 R 92
47. Necessary parties. See Notes to O 21 R.92.
48. Applicability of Order 9 to applications under this Rule
49. Limitation.
49a. Step in-aid of execution.
50. Appeal.
51. Revision.

Other Topics (miscellaneous)

Appeal to Privy Council See Note 50
Compromise of proceedings under this rule — Whether can be recorded under O 23 R. 3 See Note 2
Mere inadequacy of price — Whether sufficient ground See Note 40
Objections that cannot be taken See Note 2
Proceedings under this rule—Judicial See Note 2
Rule whether applies to sales in execution of a decree on mortgage See Note 2
Sale — Whether can be set aside by consent. See Note 2
Sale without notice to receiver not in possession of property—Whether irregular See Note ...
Sale under the Bengal Tenancy Act —Rule, whether applies. See Note 2.
'The Court' — Application to Collector See Note 2.

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mittee of High Court 131 Ind Cas 721 AIR 1931 Rang 170 Overruled)
(35) AIR 1933 Rang 291 (293) (schedule Noti-

fication No 44 of 27th January 1937 has removed the necessity of a deposit under O 21, R. 90)

1. Legislative changes. —

1 The words "or any person entitled to share in a rateable distribution of assets" after the word "decree holder" have been newly added See Note 7

2 The words "or whose interests are affected by the sale" have been substituted for the words "or any person whose immovable property has been sold" See Notes 6 and 8

3 The words "or fraud" have been newly added after the word "irregularity" See Notes 37 and 50

4 The words "unless upon the facts proved the Court is satisfied" have been substituted for the words unless the applicant proves to the satisfaction of the Court" See Note 40

2 Scope and applicability of the Rule. — The rule provides for the setting aside of sales in execution on the ground of material irregularity or fraud in publishing or conducting them The auction-purchaser at an execution sale has no absolute right to its being confirmed when there is an irregularity or fraud in publishing or conducting it, if the irregularity or fraud is a *material* one and has caused *substantial* injury to any party the sale will be set aside at the instance of *that party*[1] even though the purchaser be a stranger [2]

Before a sale can be so set aside, the following conditions must be satisfied *viz* —

(1) *There must be an application for the purpose* [3] The Court cannot set aside the sale under its inherent powers[4] especially when it is barred by limitation [5] But the application need not be accompanied by a deposit as is necessary for an application under Rule 89 [6]

(2) *The application must be one under this rule* A sale cannot be set aside under this rule on an application made under Rule 89 [7]

(3) *The application must be by one or other of the persons specified in the rule* [8]

(4) *The application must be made to the Court executing the decree* As to the power of the Collector to set aside a sale in cases where the execution of a decree has been transferred to him, see Note 6 to Section 70, *ante*

(5) *The application must be based on an irregularity or fraud in publishing or conducting the sale* [9]

Order 21 Rule 90 — Note 2

1 ('15) AIR 1915 Mad 989 (993) 21 Ind Cas 389 (392) 38 Mad 387.

2 ('10) 5 Ind Cas 390 (395) (Cal)

3 ('82) 1882 All W N 1 (1)

('30) AIR 1930 All 556 (557) (Two decrees consolidated and property sold in execution by one bid—To challenge sale on ground of irregularity sales in execution of both decrees must be challenged)

[*See also* ('26) AIR 1926 Lah 514 (514) (An application signed by a duly authorized pleader is enough)]

[illegible] order to [illegible] to bring the matter within Order 21)]

[illegible] made)]

8. See Notes 5 to 9

9 ('26) AIR 1926 Cal 829 (829 830)

('34) AIR 1934 Nag 250 (251) (Inadequacy of [illegible] rule)

[*See* ('08) 30 All 146 (150)]

O. 21 R. 90
Note 2

Thus, the following objections are outside the scope of the rule, viz —

(i) An objection that the sale is illegal and therefore null and void [10]

(ii) An objection that the Court had no jurisdiction to execute the decree or sell the property [11]

(iii) An objection that the property is not legally saleable [12]

(iv) An objection that the decree is invalid,[13] for example, on the ground of fraud in obtaining the decree [14]

(v) An objection that the execution is barred by limitation[15] or that no execution ought to have issued under the decree [16]

(6) *The applicant must prove not only irregularity or fraud in the publishing or conducting of the sale but must also show that he has sustained substantial injury thereby* [17]

An application under the rule cannot be disposed of summarily, without any investigation [18] Opportunity must be given to either party to adduce evidence in respect of the several allegations made [19] The proceeding under this rule is a judicial one,[20] and the decision must be based on findings arrived at on legal evidence [21]

It is open to the parties to compromise the proceedings [22] In such a case all the parties affected must be parties to the compromise [23] The judgment debtor and the decree holder cannot, by a compromise between themselves have the sale set aside behind the back of the auction purchaser [24]

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10 (24) AIR 1924 All 698 (699)
(37) AIR 1937 All 407 (410)
11 (96) 18 All 141 (144 145)
(06) 28 All 273 (275)
(85) 7 All 365 (366) (On the ground that he was no party to decree)
[*See* (11) 9 Ind Cas 252 (253) (Mad) (An objection that the minor defendant was not properly under

13. (26) AIR 1926 Cal 109 (110)

(17) AIR 1917 Pat 467 (467) 2 Pat L Jour 157
16. (66) 6 Suth W R Misc 46 (47)
(11) 10 Ind Cas 625 (625) (Cal) (On account of uncertified adjustment)
17 (24) AIR 1924 Lah 592 (592)
(34) AIR 1934 Pat 540 (541)
(17) AIR 1917 Lah 136 (137)
('11) 9 Ind Cas 252 (253) (Mad)
(1865) 2 Suth W R 74 (74)
(87) 1887 All W N 117 (117)
(66) 3 Bom H C R A C 110 (112)
[*See also* (28) AIR 1928 Cal 3 8 (332)]
18 (75) 24 Suth W R 216 (217)

19. (32) AIR 1932 Pat 326 (327) 11 Pat 542
(34) AIR 1934 Pat 540 (541)
(11) 9 Ind Cas 383 (384) (Cal)
(1865) 4 Suth W R Misc 9 (9)
(69) 12 Suth W R 511 (512)
('82) 1882 All W N 61 (61)
20 ('73) 20 Suth W R 424 (425)
21 (70) 2 N W P H C R 142 (142)
(1865) 2 Suth W R Misc 1 (2)
(81) 7 Cal 34 (38, 41) (Regarding the service of process in execution proceedings the returns of the nazir are not evidence by themselves but must be proved on oath)
(32) AIR 1932 Nag 14 (15) 27 Nag L R 339
(24) AIR 1924 Mad 217 (218 221) 46 Mad 756
[*See also* (35) AIR 1935 All 182 (183) (Objection that sale proclamation was not posted in locality and beat of drum was not properly made—Negative evidence let in by judgment- ... holder

R 3 and not under O 21 R 2 as proceedings are not in execution)
(29) AIR 1929 Lah 686 (687) (It is not a proceeding in execution—It is in the nature of a suit—Compromise can be recorded under O 23, R 3—O 21 R 2 *does not apply*)
[*See* (23) AIR 1923 Pat 418 (419) 2 Pat 534]
23 (25) AIR 1925 Cal 779 (780)
24. (11) 10 Ind Cas 148 (151 152) (Cal)

O. 21 R. 90 Note 2

An execution sale vitiated by irregularity or fraud should ordinarily be set aside in its *entirety*[25] except when the sale is by separate lots[26] in which case only the sale of the lots so vitiated will be set aside[27] (See also Note 43a)

The effect of setting aside a sale under the rule is to restore the parties to the position which they occupied immediately before the sale[28] If the purchaser has got into possession after the sale, the judgment debtor can be put back in possession by way of restitution[29] In proper cases he can be awarded compensation for the loss of profits during the period he was out of possession[30] Conversely, the purchaser can recover from the judgment debtor any money which he might have paid *bona fide* in order to save and preserve the property,[31] and if there was no irregularity or fraud for which he was responsible, he can also be awarded interest on the purchase money deposited by him[33]

mortgage decrees[33] The principle

z —

(2) Sales under the Bengal Tenancy Act[35]

(3) Sales under the Madras Rent Recovery Act, VIII of 1865[36]

The rule does not apply to sales held by the Official Receiver under the Provincial Insolvency Act[37] It has also been held to be inapplicable to sales under the Madras Estates Land Act[38] Again, it has been held that where, as the result of the compulsory winding up of a company, the official liquidator sells a decree standing in the name of the directors by auction and the liquidator assigns the decree to the purchaser with the sanction of the Court, this rule does not apply and the Court has no power to set aside the sale[39]

As to whether an application under this rule can be filed after confirmation of the sale, see the undermentioned cases[40]

As to whether an application by a party to the suit to set aside the sale falls

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(31) AIR 1931 P C 33 (35 36) 58 Ind App 50 27 Nag L R 95 (PC) (Approving 10 Ind Cas 148)
(25) AIR 1925 Oudh 693 (693)
25. (28) AIR 1928 Cal 349 (351)
26 (26) AIR 1926 Cal 829 (829, 830)

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tach

(27) AIR 1927 Cal 511 (512) (On setting aside

[See (31) AIR 1931 All 655 (656) (Appellate decree in suit varied, amount reduced and

restitution)]
30. (14) AIR 1914 Cal 692 (693) (That is in case the decree-holder purchaser was guilty of fraud)

(30) AIR 1930 Pat 280 (281 282) 9 Pat 685
31 (17) AIR 1917 Cal 216 (217) (A benamidar court auction purchaser who had paid money to save and preserve the estate can when the sale is set aside for irregularity, recover it from the

(81) 7 Cal 163 (165)
36 ('11) 12 Ind Cas 137 (137) Mad
37. (29) AIR 1929 Lah 622 (623)
(32) AIR 1932 Lah 320 (320)
(18) AIR 1918 Mad 136 (136)
[See however (27) AIR 1927 Nag 262 (263)]
38 ('20) AIR 1920 Mad 292 (293) 43 Mad 351.
('21) AIR 1921 Mad 507 (508)
(39) AIR 1939 Mad 609 (609)
39 (38) AIR 1938 Mad 176 (177)
40 (10) 5 Ind Cas 390 (395) (Cal) (Sale can be set aside even after confirmation)
(17) AIR 1917 Pat 467 (467) 2 Pat L Jour 157. (After confirmation of a sale in execution the only remedy of the judgment-debtor is to apply to have the sale set aside under the rule)

O.21 R.90 Notes 2-6 under Section 47 or this rule, see Notes 51 and 55 to Section 47 *ante*, and the undermentioned cases[41]

3. Immovable property.—A house attached to land is "immovable property"[1] A debt secured by a mortgage of immovable property or a decree thereon is only moveable property and this rule does not apply to a sale thereof in execution[2] It has, however, been held in the undermentioned case[3] that mortgagee rights as well as the mortgage debt are immovable property See also Section 16, Note 4 and O 21 R 54

4. Sale will not be set aside unless application is made under this Rule — See Note 2 above

5. Who may apply under the Rule.—Under the old Code the right to apply under the corresponding Section was limited to the *decree holder* and to persons *whose property had been sold*[1] Under the present rule, however, the right is conceded to —

(1) the decree holder,

(2) any person entitled to share in a rateable distribution of the assets, and

(3) any person whose interests are affected by the sale

Where *A* who holds a decree against *B*, attaches a decree held by *B* against *C*, and as attaching creditor executes *B's* decree, and *C's* properties are sold in such execution, *B* will be considered to be a decree holder entitled to apply under the rule[2]

Where after making an application under the rule the applicant dies, his legal representative can continue the proceedings[3]

See also Notes 6 to 9 below

6. Auction-purchaser. — Under the old Code an auction-purchaser could not apply under this rule as he was neither a decree holder nor "a person whose immovable property has been sold"[1] In the present rule the expression "or any person whose interests are affected by the sale" has been newly introduced Does this expression include an auction purchaser? Yes, according to the High Courts of Madras, Allahabad, Patna and Nagpur, the reason being that the word "interests" is not confined to interest *prior to the sale* but includes "interest" *created* by the sale itself[2] The High Courts of Calcutta[3] and Lahore[4] and the Judicial Commissioner's Court of Sind[5] have, on the

[See ('99) 26 Cal 727 (730, 731)
('09) 32 Mad 242 (252)
('08) 35 Cal 61 (77)]

specific provision in this rule — The fact that the auction purchaser is not made a party will not affect the question)

Note 3

(Decree for possession of immovable property is not immovable property)]

3. ('33) AIR 1933 Lah 210 (211)

Note 5

1 ('83) 5 All 42 (44) (Co sharer whose share has not been sold is not entitled to apply)
2 ('98) 21 Mad 417 (418, 419)
3 ('32) AIR 1932 Pat 234 (236) 11 Pat 424

(Reversing AIR 1931 Lah 630 on Letters Patent Appeal)
5 ('31) AIR 1931 Sind 107 (110) 25 Sind L R 405

other hand held that the "interests" referred to in the rule are interests independent of the sale and not such as come into existence *as a result of the sale* The Bombay High Court has also held a similar view [6]

The decisions of the High Court of Rangoon[7] are conflicting on the point

7. Persons entitled to rateable distribution. — Although a person entitled to rateable distribution had not been specified in Section 311 of the old Code as a person entitled to apply thereunder, such right had been conceded to him on the ground that he was a "decree holder" [1] The present rule specifically includes such persons [2]

Persons entitled to dividends under the Provincial Insolvency Act are not "persons entitled to rateable distribution" within the meaning of the rule, and cannot therefore apply to set aside execution sales [3]

8. "Any person whose interests are affected by the sale." — The expression "any person whose immovable property has been sold" in the old Section 311 was interpreted by a Full Bench of the Calcutta High Court to mean "any person whose interests are affected by the sale"[1] The present rules gives effect to this view

The judgment debtor is a person whose "interests are affected by the sale" [2]

The 'interest' need not necessarily be a *proprietary* or a *possessory* interest, it may be a pecuniary or other interest [3] Thus, an attaching creditor *in whose favour a decree has been passed* is a person 'whose interests are affected by the sale within the meaning of this rule [4] Similarly, where a mortgage decree was passed *against A and B and the sale of the properties of A was postponed until the sale of* the properties of *B*, and the properties of *B* were sold for an inadequate price, it was held that *A* was a person whose interests were affected by the sale [5] There is a conflict

6 ('36) AIR 1936 Bom 311 (312) 60 Bom
7. ('29) AIR 1929 Rang 33 (33) 6 Rang 621 (
('27) AIR 1927 Rang 301 (302) 5 Rang 516 (

Note 7

1. ('93) 15 All 318 (320)
('02) 29 Cal 548 (554)
('87) 10 Mad 57 (59 62)
('01) 24 Mad 311 (315)
('98) 21 Mad 51 (53)
[*See* ('93) 20 Cal 673 (675) (But a person who is not entitled to come in under S 73 and share in the distribution of the sale-proceeds is not included within the term decree-holder under old S 311)]
2 *('15) AIR 1915 Cal 16 (16)*
('27) AIR 1927 Mad 67 (68)
('15) AIR 1915 Mad 541 (542) (A person not entitled to come in under S 73 is not entitled to apply under this rule)
('36) AIR 1936 All 626 (627) (He must have
3.
(
('05) 1 Cal L Jour 454 (455) (Do)
('19) AIR 1919 Cal 181 (181)
('18) AIR 1918 Cal 846 (847)
('36) AIR 1936 Cal 26 (27) (Case under S 174, Bengal Tenancy Act—Words of S 174 (1) being in *pari materia* with O 21 R 90)
('39) AIR 1939 Cal 146 (147) I L R (1939) 1 Cal 273
('39) AIR 1939 Nag 179 (181) I L R (1939) Nag 357

Note 8

1. ('88) 15 Cal 488 (492) (F B)
2 ('39) AIR 1939 Mad 193 (194)
3 ('24) AIR 1924 Cal 766 (767) 51 Cal 495.
('27) AIR 1927 Mad 783 (784)
('37) AIR 1937 Cal 7 (8) (Person obtaining order for attachment before judgment and subsequently getting decree before the sale)
(But see (1900) 4 Cal W N 542 (544))
5. ('31) AIR 1931 Pat 217 (217, 21

O. 21 R. 90
Note 8

of decisions as to whether a person who has merely obtained an attachment *before judgment* and in whose favour a decree has not yet been passed can be said to be a person having any such interest It has been held by the Madras High Court[6] that such a person is one whose interests are affected by the sale within the meaning of the rule But the Calcutta High Court has held a contrary view[7] It is not necessary that the applicant should have a *present* interest in the property,[8] a reversioner to a Hindu widow s estate[9] or a person who is entitled to specific performance of a contract to sell the property[10] can apply under this rule Similarly, a defaulting auction purchaser who would be liable to make good the deficiency on a re sale, and whose liability is only a contingent one, can apply under this rule[11] But whatever the nature of the interest might be, it must be in existence at the time when the sale takes place If it is created *after* the sale, it cannot be affected by the sale Thus, a person purchasing the property after the execution sale cannot apply under this rule[12] Similarly a decree holder who attaches the property *after* the court sale and before confirmation of the sale has no *locus standi* to apply under this rule to set aside the sale[13]

The following persons have been held entitled to apply as being persons *whose interests are affected by the sale'* —

(1) A real owner of property sold in execution of a decree against his benamidar[14]

(2) A judgment debtor who has sold away his property[15]

(3) The legal representative of a deceased judgment debtor[16]

(4) Where the judgment debtor is a minor, his guardian[17]

(5) Where the judgment debtor is a ward of Court, the Court of Wards[18]

(6) Where he is an adjudicated insolvent, the Official Receiver[19]

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7. (25) AIR 1925 Cal 1103 (1104)
(12) 15 Ind Cas 668 (669) (Cal)
(36) AIR 1936 Cal 26 (27) (Case under Bengal Tenancy Act S 174)
[**See however** (34) AIR 1934 Cal 477 (478) (Decree obtained after sale but before application—Attaching creditor can apply)]

8 (33) AIR 1933 Mad 694 (694, 695) (Judgment debtor who has been adjudged insolvent and whose property has vested in Official Receiver ...

ho ding cannot apply under this rule as no man is heir to a living person)

10 [*See* (19) AIR 1919 Pat 127 (127) 4 Pat L Jour 300)]

11 (33) AIR 1933 Cal 815 (815)

12 (39) AIR 1939 Cal 146 (148) I L R (1939) 1 Cal 273
[*See* (37) AIR 1937 Nag 161 (162) (Judgment debtor applying under R 90 and then selling property to another — Latter can continue application)]

13 (39) AIR 1939 Mad 501 (502)

14 (93) 20 Cal 418 (424 425)
(96) 19 Mad 167 (168)

15 (26) AIR 1926 Mad 217 (218) (Before court

rule)

17 (30) AIR 1930 Nag 185 (186 187) 26 Nag L R 173

18 (17) AIR 1917 Cal 745 (746)

19 (28) AIR 1928 Mad 454 (455) (An interim rec ...

O. 21 R. 90 Notes 8-10

(7) A purchaser from the judgment debtor *pendente lite*[20]

(8) A transferee of a tenure or occupancy holding sold in execution of a decree for arrears of its own rent[21]

(9) One only of several co sharer judgment debtors[22]

See the undermentioned cases[23] for further illustrations

9 **Strangers** — The words whose interests are affected by the sale are wide nough to cover persons who are not parties to the suit[1] But a person who claims the roperty sold by a title paramount that is adversely to the judgment debtor is not ne whose interests are affected by the sale and cannot therefore apply under this rule[2]

10 ***Grounds on which a sale can be set aside.*** — Before a sale can be set side under this rule it must be shown —

(i) that there has been a *material* irregularity or fraud in publishing and conducting the sale[1] and

[*See also* (33) AIR 1933 Cal 486 (486)]

0 (27) AIR 1927 Mad 783 (784)

33) AIR 1933 Cal 788 (789) (Purchaser after attachment and before sale is person whose interest has been affected)

[**See however** (82) 8 Cal 367 (369) (Does not include a purchaser of the same property at a prior execution sale which has not been con firmed)]

1 (25) *AIR 1925 Cal 925 (925) (Purchaser of a* non transferable occupancy holding)

95) 22 Cal 802 (804)

84) 10 Cal 496 (500)

05) J Cal W N 134 (140) (Purchaser of a por tion)

14) AIR 1914 Cal 524 (524 526) (Do)

25) AIR 1925 Pat 461 (461 462) (Do)

2 (03) 30 All 192 (196)

23 (35) AIR 1935 Pat 210 (211) (Expression any person interested in the sale in S 173

39) AIR 1939 Mad 193 (194) (Sale of property in execution of mortgage decree — Judgment debtor and attaching decree holder are persons whose interests *prima facie* are affected by the sale — But if by reason of the claims of mort gagees of the property there would be no

aff cted by the sale)

37) 41 Cal W N 1246 (1248) (A mortgagor judg ment debtor is entitled to maintain an applica tion under O 21 R 90 C P Code for setting aside the sale in execution of the mortgage decree although a receiver has been appointed by Court in respect of the mortgaged properties.)

35) AIR 1935 Pat 20 (0) 14 Pat 436 (Sale of joint family property in execution of decree against father—Sons can apply to set aside sal)

Note 9

1 (36) AIR 1936 Lah 909 (911)

2 (88) 15 Cal 488 (492) (FB) (Overruling 14 Cal 240 — Purchaser prior to attachment)

(16) AIR 1916 All 147 (148) 38 All 358 (Person not a party to a mortgage decree)

(13) 20 Ind Cas 16 (17) (All) (Do)

(27) AIR 1927 Cal 82 (83 84)

(1865) 2 Suth W R Misc 13 (14 15) (Purchaser prior to attachment)

(76) 25 Suth W R 79 (79)

(93) 16 *Mad 476 (478) (Decree against one* brother — Not binding on the other—He is not entitled to apply)

(26) AIR 1926 Nag 68 (71) (Where during the pendency of a partition suit the suit property was sold by auction in execution of a decree against one member alone as belonging to him only the other members cannot apply under R 90 to have the sale set aside as the decree-holder could validly take only the share of that member)

(23) AIR 1923 Pat 451 (452) 2 Pat 386

(22) AIR 1922 Upp Bur 22 (22) 4 Upp Bur R il 97

Note 10

1 (1900) 4 Cal W N 474 (477)

(14) AIR 1914 All 325 (325) (There was irregu larity but not a material one)

(19) AIR 1919 Cal 169 (170)

(08) 12 Cal W N 757 (758 759) (The statement of the value of property which proves to be in adequate is an irregularity but not a material irregularity)

(32) AIR 1932 All 369 (369)

(28) AIR 1928 Lah 918 (918)

(11) 12 Ind Cas 572 (572) (Lah)

(25) AIR 1925 Mad 729 (730)

(19) 52 Ind Cas 167 (167) (U P B R) (The mere absence of a notice to a judgment-debtor of the intended sale of his property is not a material irregularity)

(16) AIR 1916 All 156 (157)

O 21 R 90
Notes 10-12

(ii) that substantial injury has resulted to the applicant thereby [2]

A sale which is *illegal and void* is not within the contemplation of this rule Such a sale need not in fact be set aside at all and can be ignored [3] Nor need any injury be shown to have been sustained by reason of such sale [4] Where the decree holder is the purchaser it is open to the judgment debtor under Section 47 to attack a sale on grounds other than those specified in this rule [5]

In determining what is illegal and what is irregular it may be remarked that the distinction is one of *degree* [6] As a general rule in order to establish an illegality there must be shown some disregard of a positive prohibition of the law [7]

See Note 12 to Section 115 *ante* for a fuller discussion on this point

11 Material irregularity in publishing or conducting the sale — The term irregularity means not being in conformity to some recognized rule and in the present context it means not being in conformity to the rules prescribed for regulating execution sales [1] The material irregularity referred to in this rule is an irregularity in the procedure to be followed before property is put up for sale It does not include the irregularity of selling property not belonging to the judgment debtor [2] The expression publishing or conducting the sale refers respectively to the proclamation of sale under Rule 66 and to the action of the sale officer [3] The words conducting the sale do not refer to anything done *before* the sale or any proceedings unconnected with the actual carrying out of the sale [4] The material irregularity complained of must be one on the part of the Court or its officer [5]

12 Omission to attach property and irregularity in attaching property before sale —It was originally held by the High Court of Allahabad[1] that a regularly perfected attachment was an essential preliminary to sales in execution of simple money decrees and that where there was no such attachment the sale was *void* and not merely voidable In view of the decision of the Privy Council in *Tassaduk v Ahmad* I L R 21 Calcutta 66 it has now been held by the said High Court that the absence of attachment is only a material irregularity which would not render the sale *ipso facto* void [2] The same view has been held by other High Courts also [3]

[*See also* (14) AIR 1914 Cal 125 (126) 41 Cal 276 (Omission to issue a notification of a revenue sale in vernacular while it was notified in English is not an irregularity)]
2 (32) AIR 1932 All 369 (369)
(89) 11 All 333 (342 343)
3 (93) 15 All 324 (3 6 327)
(82) 4 All 382 (384)
(25) AIR 1925 All 551 (552)
(11) 9 Ind Cas 584 (585) (Cal)
(87) 1887 All W N 39 (32)
4 (89) 11 All 333 (338)
[But see (95) 5 Mad L Jour 70 (73) (There is rity or fraud in sale proclamation is covered by rule)]
4 (85) 7 All 641 (645)
(20) AIR 1920 Mad 481 (484) (Notice under Rule 66 not issued — It is not a material irregularity in publishing)
5 (1865) 4 Suth W R Misc S 11 (12)
5
6 (21) AIR 1921 Mad 583 (585) 44 Mad 35
7 (29) AIR 1929 Mad 275 (279)

Note 11

1 (95) 5 Mad L Jour 70 (73)
2 (33) AIR 1933 Pat 435 (440) 12 Pat 665 (S B)
3 (08) 32 Bom 572 (574)
[*See* (37) AIR 1937 Nag 140 (141) (Irregula-

Note 12

1 (83) 5 All 86 (91) (FB)
(85) 7 All 38 (40)
(88) 10 All 506 (514 517)
2 (99) 21 All 311 (313)
(34) AIR 1934 All 430 (432)
(13) 21 Ind Cas 46 (47) (All)
3 (27) AIR 1927 Cal 847 (847)
(31) AIR 1931 Cal 35 (36) 57 Cal 1206
(16) AIR 1916 Cal 465 (467 468)
(07) 34 Cal 787 (802)
(94) 21 Cal 639 (641)
(91) 18 Cal 188 (193)
(67) 8 Suth W R 415 (418 419)
(30) AIR 1930 Lah 685 (686)
(29) AIR 1929 Lah 441 (442)
(26) AIR 19 6 Mad 211 (213 to 215)
(18) AIR 1918 Mad 1262 (1263)

The question next arises whether, in cases in which it has been held that the absence of attachment is only a material irregularity, it is an irregularity in *publishing and conducting the sale* within the meaning of this rule According to the High Courts of Calcutta and Rangoon, it is not[4] The reason, it is conceived, is that such an irregularity is one which is *antecedent* to the publishing and conducting of the sale and, therefore, will be a ground for a proceeding only under Section 47 The High Courts of Allahabad, Lahore and Madras have on the other hand, held that it is an irregularity in publishing and conducting the sale[5] The publication of the attachment is a step leading up to the publication of the sale, the actual proclamation of sale being a notice to the public that the sale is to take place upon a particular date The absence of attachment may, therefore be deemed to be a material irregularity in the publishing of the sale[6]

Where there has been an attachment, an error in the warrant of such attachment[7] or the absence of notice of the attachment to the judgment debtor[8] would only be mere irregularities which will not vitiate the sale

13. Omission to make an order for sale. — The omission to pass an order absolute for sale under Section 89 of the Transfer of Property Act in a mortgage decree was held in the undermentioned case[1] to be not an irregularity in publishing or conducting a sale but one *antecedent* to it and, therefore, did not fall within this rule

14. Omission to issue notice — An omission to issue notice under Rule 22 is an irregularity in proceedings which are *anterior* to the publishing or the conduct of the sale[1] It also goes to the root of the jurisdiction of the Court executing the decree and renders the sale *illegal* and *void*[2] It is therefore not a matter coming under this rule In the undermentioned cases[3] however it has been held that want of a notice under O 21 R 22 is a ground for setting aside a sale under this rule (For a full discussion of the subject, see Order 21 Rule 22 Note 5)

There is a conflict of opinion as to whether the non service of notice under Rule 66 will be a ground for setting aside a sale under this rule According to the High

(13) 18 Ind Cas 498 (499) (Mad)

43
n—

(11) 9 Ind Cas 918 (922) (Cal) (But where an objection that the property proclaimed for sale has not been attached is taken before the sale, it is the duty of the Court not to proceed with

(37) AIR 1937 Nag 149 (149) I L R (1939) Nag 450

(36) AIR 1936 Mad 99 (100) (Even if there were no attachment at all a sale would not be set aside merely for want of it Still less where an

6 (99) 21 All 311 (313)
7. ('10) 6 Ind Cas 713 (715) 1909 Pun Re No 40. (30) AIR 1930 Lah 789 (791)
8 (1865) 2 Suth W R 74 (75)

Note 13

1 (88) 1 Oudh Cas 155 (156)

Note 14

1 (08) 32 Bom 572 (574)
2. (97) 21 Bom 424 (439 453) (F B)
3. (33) AIR 1933 Pesh 71 (72)

Court of Madras,[4] the irregularity is not one relating to the publication or the conduct of the sale and the question can be considered only under Section 47. The Chief Court of Lower Burma[5] has held that the absence of such a notice is more than an irregularity and renders the sale void The High Courts of Calcutta and Lahore and the Judicial Commissioner's Courts of Nagpur and Peshawar have held that it is an irregularity in publishing the sale[6] The onus of proving that notice under Rule 66 was not properly served is on the judgment debtor[7]

Where no notice under Rule 66 is required to be given, as where a fresh proclamation is ordered to issue under Rule 69, the non issue of notice is no ground for setting aside a sale under this rule[8]

The absence of notice prescribed by O 21 R 16 is not a mere irregularity but affects the jurisdiction of the Court[9]

A sale in execution of a decree pending an insolvency petition against the judgment debtor is not bad for want of notice to the interim receiver[10]

Non publication of the notices prescribed by Regulation VIII of 1819 in cases of *putni* sales has been held to be a *material irregularity*[11]

See also Section 47 Note 61, Order 21 Rule 16 Note 14 and Order 21 Rule 66, Notes 5 and 16

15. Irregularities in publishing the sale — Omission to publish or irregularity in publishing sale proclamation. — The failure to publish the sale proclamation is an irregularity within this rule,[1] so is an irregularity in the preparation and service thereof[2] As has been seen in the Notes to Rule 67 *ante*, the proclamation should be published on the spot[3] and a copy of the proclamation should be affixed to a conspicuous portion of the property,[4] and a failure to do the one or the other will be an irregularity within this rule If the properties are situated in several villages or are distinct the failure to proclaim the sale at each village or property will be an irregularity[5] If, however, the properties are sold in lots and they are sufficiently separated from each other, the affixture of the proclamation on one of such lots may

(20) AIR 1920 Mad 1034 (1035) 43 Mad 57 (Property already under attachment—Sale without notice to judgment debtor only irregularity)
4. (25) AIR 1925 Mad 1142 (1142)
(20) AIR 1920 Mad 481 (484)
[**See however** (35) AIR 1935 Mad 459 (462)]
5 ('18) AIR 1918 Low Bur 114 (114)

(39) AIR 1939 Pesh 9 (11)
7 (33) AIR 1933 Pat 640 (640)
8 (26) AIR 1926 Oudh 76 (76, 77)
9 (38) AIR 1938 Cal 734 (735 736)
10. (36) AIR 1936 Mad 121 (122) 59 Mad 438
11. ('16) AIR 1916 Cal 257 (259)

Note 15

1 ('26) AIR 1926 Cal 577 (578) (It is not an illegality)
(29) AIR 1929 All 948 (949 950) 52 All 115 (Where the Court alters the date fixed for a sale without giving notice to the parties as required by R 66 (2) there is a material irregularity)

[*See* (38) AIR 1938 Mad 174 (175) (The fact that there was no proclamation might legiti

[illegible] copy of the sale proclamation at the court house of the execution Judge amounts to irregularity of a material character as described in O 21 R 90)
3 (82) 1882 All W N 53 (53)
(81) 7 Cal 34 (39 41)

(02) 6 Cal W N 44 (46) (Affixed not on the property but on a school some distance off is a material irregularity)
(81) 7 Cal 466 (469 470)
(23) AIR 1923 Lah 671 (671)
5 (13) 19 Ind Cas 296 (298) 40 Cal 635 40 Ind App 140 (P C)
(85) 11 Cal 74 (76)

be enough[6] The failure to affix a copy of the sale proclamation in the Collector s office as required by Rule 54 has also been held to be an irregularity under this rule[7] but not the failure to direct an advertisement of sale in the Gazette[8] Where two lots, each lot comprising several villages, were brought to sale but the sale proclamation affixed in each village showed that the subject of sale was the *particular village* at which the copy was posted and not the lot of which such village was part, it was held that it was a material irregularity[9]

16. Misdescription of property. — A mere misdescription of property in the sale proclamation where the parties concerned knew what had been attached and sold, is a mere irregularity which would not necessarily invalidate a sale[1] But a fundamental misdescription of the property which has misled the purchaser will be a ground for setting aside the sale[2] The principle of *caveat emptor* cannot apply to such cases[3]

The non specification of the share of the judgment debtor in the property sold is also a material irregularity[4]

See also the undermentioned decision[5]

17 Omission or mis-statement of the value of the property. — A mere *omission* to state in the proclamation of sale the estimated value of the property to be sold will not be a material irregularity under the rule[1] But in particular cases it may

[**See however** ('11) 9 Ind Cas 698 (701) (Cal) (There need not be separate proclamation in each village unless proper notice of the sale could not otherwise be given)]

6 ('88) 1 Bom 368 (370) (Otherwise it would be an irregularity)
(30) AIR 1930 Lah 685 (687)

7 (91) 18 Cal 422 (426) (F B) (It is not an illegality)
(82) 8 Cal 932 (932 933)
(24) AIR 1924 Mad 217 (219 223) 46 Mad 736

8 (19) AIR 1919 Lah 260 (261)

9 (33) AIR 1933 Mad 225 (226 227) 56 Mad 356

Note 16

1 (26) AIR 1926 Nag 246 (248)
(33) AIR 1933 Lah 1031 (1032) (Boundaries not correctly given in sale proclamation—But every body recognizing property to be sold from municipal number—*Held* sale could not be set aside)
(33) AIR 1933 Cal 662 (663) (Advertisement in newspaper—One property fully described and for description of others reference to sale proclamation given — Bidders not misled — Irregularity does not vitiate sale)
(76) 25 Suth W R 326 (327) (Mention of wrong pargana)
(17) AIR 1917 Mad 967 (967)
(34) AIR 1934 Pat 186 (187) (Registry office wrongly described in respect of property—Irregularity is not sufficient to set aside sale)]

2 (25) AIR 1925 All 459 (462 464) 47 All 479
(26) AIR 1926 Lah 587 (588) (A mistake in the dimensions of the property is a material irregularity)
(05) 1905 Pun Re No 47, page 168
(03) 6 Oudh Cas 61 (62) (Inadequate description —Only numbers given and not boundaries)
(32) AIR 1932 Pat 234 (236, 237) 11 Pat 424 (430) (Where in the proclamation of sale the area of the land was stated to be 144 acres, whereas in fact it was 440 acres and its value as Rs 20 000 when in fact it was worth about two lakhs of rupees—A material irregularity)
(89) 12 Mad 19 (25) 15 Ind App 171 (PC) (As

property vague and misleading—*Held* to be material irregularity)
(35) AIR 1935 Lah 390 (391) (Proclamation not giving proper boundaries and silent on estimated value of property—No bidders except decree holder—Sale set aside)]

3. (25) AIR 1925 All 459 (462 464) 47 All 479

4. (87) 1887 All W N 50 (51)
(02) 6 Cal W N 526 (527, 528)
(78) 3 Cal 544 (546)
[*See* (38) AIR 1938 Rang 433 (434) (Proclamation not bad for not specifying shares of judgment-debtors *inter se*)]
[**See however** (31) AIR 1931 Bom 367 (368) (*Held* to be no misdescription but only a lacuna in it)
(21) AIR 1921 All 223 (224) (Mistake in sale proclamation regarding share of judgment debtor—Suit by auction purchaser to set aside sale—*Held*, intentional misrepresentation was essential)]

5 (36) AIR 1936 Cal 703 (705) (A condition of sale requiring the purchaser to assume certain

is intended to cover a flaw which goes to the root of the title.)

Note 17

1. (22) AIR 1922 Lah 35 (36)

O.21 R.90
Notes 17-19

be necessary to give the value in order to enable the bidders to judge the value of the property, the omission in such cases may amount to a material irregularity.[2]

A deliberate *mis-statement* of the value of the property calculated to mislead possible bidders and to prevent them from offering adequate prices or from bidding at all, is a material irregularity.[3] If it results in substantial injury, the sale will be set aside but not otherwise [4]

18. Omission to state the revenue or rent payable on the land. — The omission in the sale proclamation of the Government revenue payable on the land is a material irregularity under the rule,[1] as also a materially incorrect statement of such revenue [2] But the omission to state the *income* of the property has been held *not* to be a material irregularity.[3]

19. Omission or mis-statement of the encumbrances over the property. — An omission to state or a mis-statement of the encumbrances on the property will be a material irregularity under this rule.[1] It has been held in the undermentioned

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(16) AIR 1916 All 186 (187)
(33) AIR 1933 Cal 662 (663) (Omission by Judge to determine value is gross irregularity but sale will not be set aside unless substantial injury is [illegible]
hopelessly)
('28) AIR 1928 Nag 281 (282).
(38) AIR 1938 Lah 508 (508)
[*See* (24) AIR 1924 Cal 589 (592) (Valuation of both parties given in proclamation without value fixed by Court—It is no material irregularity)]
2 (29) AIR 1929 All 948 (948, 949). 52 All 115.
(30) AIR 1930 Nag 191 (192)
(35) AIR 1935 Lah 390 (391) (Proclamation silent as to estimated value of property—No bidders except decree holder—Fresh sale after fresh proclamation ordered)
3. (98) 20 All 412 (417, 418) 25 Ind App 146 (PC)
('33) AIR 1933 Cal 339 (340) (When discrepancy in value was so great as to shock the conscience, that circumstance must be regarded as something more than the kind of irregularity commonly alleged and it really was good evidence of fraud on the part of the decree-holder)
[illegible] 40 Ind
[illegible]
(19) AIR 1919 Cal 350 (351)
(17) AIR 1917 Cal 461 (462)
('12) 16 Ind Cas 974 (975) (Cal).
('11) 13 Ind Cas 337 (341) (Cal)
('11) 11 Ind Cas 438 (441) (Cal)
('11) 10 Ind Cas 475 (476) (Cal)
('11) 9 Ind Cas 698 (701) (Cal)
('10) 6 Ind Cas 135 (137) (Cal)
(01) 6 Cal W N 48 (56).
('01) 6 Cal W N 836 (838)
('13) 21 Ind Cas 592 (593) (Mad).
(15) AIR 1915 Mad 989 (991) 38 Mad 387.
(1900) 23 Mad 568 (570).
('30) AIR 1930 Oudh 81 (81 82) 5 Luck 481.
('28) AIR 1928 Pat 103 (109)
('21) 57 Ind Cas 640 (641) (Pat)
('18) AIR 1918 Pat 266 (267).
('17) AIR 1917 Pat 72 (74).
[illegible]
Even in such case Court would require high standard of evidence to prove that there had been fraud or irregularity on account of under-valuation *(Obiter)*]
[**See however** ('34) AIR 1934 Pat 186 (187). not [illegible] eld]
4 [illegible]
('34) AIR 1934 Mad 260 (262).
('17) AIR 1917 Pat 72 (74)
('37) AIR 1937 Rang 157 (158)

Note 18

1 [illegible]
('81) 7 Cal 723 (725).
(98) 21 Mad 51 (52, 53)
(1900) 23 Mad 628 (629)
[*See also* ('69) 12 Suth W R 488 (488, 489)]
2. ('15) AIR 1915 Mad 989 (991). 38 Mad 387.
('77) 26 Suth W R 44 (47).
3. (28) AIR 1928 Lah 918 (918).
('17) AIR 1917 Lah 136 (137).

Note 19

[illegible]

case[2] that an omission to mention encumbrances would not, of itself, be injurious to the judgment debtor as it would only be likely to persuade auction-purchasers to offer higher prices

An attachment is not an encumbrance on the property and hence an omission to mention an attachment in a sale proclamation is not a material irregularity.[3]

20. Other mistakes in the sale proclamation. — Where the sale proclamation advertised the sale of property in satisfaction of the whole decree amount but as a matter of fact part of the decree had been satisfied, it was held in the undermentioned case[1] that it was only an irregularity and did not render the sale a nullity

21. Omission to beat drum. — Omission to have the drum beaten at the time of the proclamation of sale as required by O 21 Rr 54 and 67 is a material irregularity within the meaning of this rule [1] But an omission to have the drum beaten at the time of the sale is not such an irregularity [2]

22. Postponement of sale and issue of fresh proclamation. — Where a sale is adjourned under Rule 69 by more than seven days, a fresh proclamation is necessary, unless the same has been waived (See Notes 8 and 9 to O 21 R 69, *ante*)

23. Irregularities in conducting the sale — Sale within thirty days of the proclamation. — A sale held within thirty days of the date of the publication of the proclamation at the place where the property is situate, or within thirty days of the affixture of the proclamation in the court-house is vitiated by a material irregularity within the meaning of this rule but it does not become *ipso facto* null and void [1]

23a. Omission to fix time for sale. — An omission to fix the time for sale is an irregularity [1]

24. Sale on a holiday. — To hold a sale on a holiday is neither an illegality nor an irregularity within the meaning of this rule [1]

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(35) AIR 1935 Lah 962 (962)
(35) AIR 1935 Mad 607 (609) (Parties agreeing that sale shall be free from encumbrances — Statement to contrary in sale proclamation not corrected — Omission to inform intending purchasers that sale is free from encumbrances — There is material irregularity and sale should be set aside)
[*See* (99) 1899 Pun Re No 30, page 153]
2. (33) AIR 1933 All 546 (548, 550) 55 All 519. (Under valuation making property fetch low price is not irregularity)
3 (37) AIR 1937 Pat 50 (52)

Note 20

1 (17) AIR 1917 Mad 739 (741)

Note 21

1. (86) 10 Bom 504 (505)
(33) AIR 1933 All 747 (747) 55 All 182
(97) 20 Mad 159 (161)
2 (20) AIR 1920 All 206 (207)

Note 23

1. (94) 21 Cal 66 (69) 20 Ind App 176 (P C)
(33) AIR 1933 Lah 156 (156) (The sale can be set aside and property re sold if the judgment debtor gave security for making up the deficiency if any in the re sale)
(89) 11 All 333 (339, 345) (Per Brodhurst, J)
(87) 9 All 511 (512, 513) (Per Mahmood J)
(85) 1885 All W N 304 (304)
(04) 31 Cal 385 (392)
(81) 7 Cal 34 (40 41)
(82) 11 Cal L Rep 303 (304) (Sale within thirty days of publication on the spot — Material irregularity)
(95) 5 Mad L Jour 70 (72 73)
(91) 14 Mad 227 (228)
(24) AIR 1924 Nag 293 (294)
(18) AIR 1918 Nag 213 (213 214)
('23) AIR 1923 Pat 45 (48) 2 Pat 207
('35) AIR 1935 Lah 962 (962)

In view of the Privy Council decision in 21 Cal 66 the following cases to the contrary are no longer good law

(87) 14 Cal 1 (8)
(85) 7 All 289 (289)
(82) 4 All 300 (301 302)

Note 23a

1 (35) AIR 1935 Lah 332 (332)
(37) AIR 1937 All 407 (409)

Note 24

1. (81) 3 All 333 (334)

O.21 R.90
Note 25

25. Omission to hold sale at stated time and place. — As to the effect of a sale held on a day different from that on which it was notified to be held, and of which judgment debtor could have had no notice, see Note 12 to Rule 69 See also the undermentioned cases[1] Where the Court ordered the sale to be held at a particular place but it was notified to be held and was actually held at a different place, it was held that the sale was illegal[2]

An officer conducting a sale is entitled to postpone a sale for a period of not more than seven days for sufficient reasons[3] Such reasons must, however, be recorded in writing otherwise the postponement will constitute a material irregularity[4] Where a sale is adjourned for a period of *more* than seven days it will be a material irregularity to hold the sale without a fresh proclamation[5] It has also been held that where a re sale is ordered or a sale is adjourned, the omission to fix the date and hour of the sale is a material irregularity[6] As to whether the holding of sale at an earlier or later *hour* than that specified is an irregularity, see Note 6 to Rule 66 and the undermentioned cases[7] See the same Note and the cases noted

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(82) 1882 All W N 169 (169)
[**But see** (1865) 3 Suth W R Misc 24 (24)]

Note 25

1 (33) AIR 1933 Cal 486 (487) (Date fixed for sale a holiday — Sale held the next day not a nullity)
('39) AIR 1939 Cal 369 (374) I L R (1939) 1 Cal 530 (Failure to mention in advertisement of sale date from which monthly sales commence is not irregularity — Also failure to mention therein that Collector has taken possession of properties under S 99, Cess Act, does not prejudice judgment debtor)
(37) AIR 1937 Pat 20 (21) (The holding of a sale, fixed for the first day of the monthly sales, on the following day in its due order, because it could not be held earlier is not illegal—It does not amount even to a material irregularity)
(

Rules)
(34) AIR 1934 Pat 659 (660) (Where *there is no* sale on the date advertised it cannot be said to

on the 20th a day which was not fixed for the sale it is not illegality but only an irregularity)

2. ('21) AIR 1921 Mad 583 (585 586) 44 Mad 35

3 (11) 12 Ind Cas 174 (175) 39 Cal 26 38 Ind App 200 (P C)
(*90) 17 Cal 152 (154)*
(81) 7 Cal 34 (40) (Illness of the selling officer is a good reason)
(72) 17 Suth W R 278 (278) (That the date originally fixed was a holiday is a good reason)
(72) 17 Suth W R 210 (210) (That there was no bidder is a good reason)

4 (32) AIR 1932 All 369 (369)
[*See* (90) 14 Mad 227 (228) (Adjournment without ground is a mere irregularity)]

5 [*See* (21) AIR 1921 Cal 597 (598)]
[**See however** ('10) 8 Ind Cas 564 (565) (Mad) (A sale in execution conducted from day to day for longer than seven days, is neither illegal nor irregular)]

(02) 6 Cal W N 48 (51)
(*97) 20 Mad 159 (161)*
('25) AIR 1925 Mad 631 (633) (Omission to mention date of sale in proper place in sale proclamation—Irregularity)
(38) AIR 1938 Nag 107 (109) I L R 1938 Nag 406
[*See also (33) AIR 1933 All 192 (195)*]
[**See however** (35) AIR 1935 All 182 (182, 183) (Sale officer adjourned the sale for want of time — No hour mentioned as regards the adjourned date—No irregularity)]

7. (70) 14 Suth W R 320 (321)
(34) AIR 1934 Bom 348 (351) 58 Bom 564 (Sale notified to take place from 11 A M to 5 P M begun at 12 noon and closed at 3 P M — Court finding that there were sufficient bidders and sale could be finished earlier—Closing of sale at 3 P M is not an irregularity)
(33) AIR 1933 Pesh 57 (58, 59) (Sale held earlier than hour mentioned in proclamation—Sale not void—It is material irregularity)
(85) 1885 Pun Re No 96 page 213 (Material *irregularity*)
(07) 4 Low Bur Rul 123 (124) (Do)
(87) 1887 All W N 129 (129)
(36) 38 Pun L R 515 (517) (Sale conducted two hours after appointed time — Intending bidders departing after waiting—Sale irregular)

below[8] as to the effect of the omission to state the place of sale, or of holding the sale at a place different from that notified

26. Sale of property in one lot though advertised for sale in separate lots. — Where property has been ordered and advertised to be sold in separate lots, it will be a material irregularity to sell it in one lot But if there was no order for sale in separate lots though the sale proclamation described the property in several lots, it is not a material irregularity to sell all the property in one lot[1] Again, where property has been advertised for sale in one lot it is not an irregularity to sell it in separate lots[2]

27. *Irregularities regarding the order of sale of lots.* — Where the *decree itself directs* the sale of properties in a particular order, a sale held in any other order will be vitiated by a material irregularity[1] Where a mortgage decree does not give any direction as to the order in which the mortgaged properties are to be sold but there are a number of judgment debtors with rights of contribution, they can apply to the executing Court to look into the equities *inter se* and direct a sale in consonance therewith Where the Court disregards such equities, there is a material irregularity.[2] In the absence of any direction in the decree, a particular course followed by the Court in selling the properties cannot be said to constitute a gross irregularity merely because a better way of carrying out the sale was possible[3]

Where, in the absence of a direction in the decree the executing Court fixes the order in which the properties are to be sold, any change in the order so specified will be a material irregularity unless the change is notified in time to the bidders[4]

The practice in the Madras Presidency as regards execution sales is to sell the lots in the order in which they appear in the sale proclamation and a departure from that order may amount to material irregularity[5]

In the absence of a direction by the executing Court for the sale of the properties in a particular order, the sale of the items in an order different from that specified in the sale list will not be irregular[6]

('39) AIR 1939 Nag 258 (259, 260) (Holding of sale two or three hours before the time fixed is not [illegible] vitiating the sale)
('94) 16 Cal 794 (798) (Sale before hour fixed — [illegible]

8 [illegible]
('23) AIR 1923 Lah 213 (216) (Assumed that time date and place were not specified)
('21) AIR 1921 Mad 484 (486) (Omission to state in the proclamation the place of sale did not mislead the bidders—*Held* sale not liable to be set aside)

Note 26

1. ('17) AIR 1917 Lah 1 6 (137)
[**But see** ('69) 12 Suth W R 492 (493 494)]
2. ('98) 21 Mad 417 (419)
[*See* ('75) 23 Suth W R 1 (4 5)]

Note 27

1. ('12) 16 Ind Cas 235 (236) (Cal)
('17) AIR 1917 Mad 877 (879)
2 ('25) AIR 1925 Pat 148 (150 151)
3. ('28) AIR 1928 Mad 684 (685)
4. ('69) 12 Suth W R 281 (282)
[*See also* ('96) 23 Cal 351 (353, 356)
('14) AIR 1914 All 325 (326) (Where property to be sold was divided in nine lots and the Court ordered the sale only of so many lots as would satisfy the decree, but the nazir sold all the [illegible]
[illegible] 1 Cal 530 (The disturbance by the officer conducting sale, of the list of properties to be sold in course of monthly sales prepared under Rule 233 of Calcutta High Court Civil Rules and the sale of property out of its turn is only a breach of [illegible]
5 ('39) AIR 1939 Mad 303 (303) ILR (1939) Mad 216
6. ('31) AIR 1931 All 159 (160)

O 21 R. 90
Notes 28-32

28. Other cases where the sale is not in terms of the proclamation. — It is a material irregularity for a decree holder to cause the sale officer to announce at the time of the sale an encumbrance not stated in the proclamation and an application to notify which had been rejected by the Court [1] It will be equally an irregularity if without notice the property is sold free of encumbrance, when the sale proclamation advertised the sale subject to encumbrances [2]

Where an entire interest in a property has been proclaimed and brought to sale but on the date of sale a portion only of such property is sold without fresh proclamation, does it amount to an irregularity? According to the High Courts of Allahabad, Madras and Patna it does not [3] But according to the High Courts of Calcutta, Lahore and Nagpur it amounts to a material irregularity rendering the sale liable to be set aside [4]

29. Purchase by decree-holder without permission to bid. — See Note 7 to Rule 72, *ante*

30. Irregularities in the grant of permission to bid. — Where after the decree holder had been given leave to bid and without notice to him the Court imposed a limit below which the decree holder should not bid and the property was sold at an undervalue it was held that the sale could be set aside for irregularity [1] Where there were three applications by the decree holder on different dates for leave to bid but the affidavit required by Rule 153 of the Madras Civil Rules of Practice was not attached to the first two applications but only to the last one, it was held by the Madras High Court that this did not amount to any irregularity [2]

31. Sale after satisfaction of the decree. — Where after a decree has been satisfied and the satisfaction has been recorded, a sale is held in execution of the decree, the sale is a nullity[1] and therefore the matter does not fall within this rule See Note 71 to Section 47, *ante*

If the satisfaction has not been recorded and the period for certification has expired the Court cannot go into the question at all and an application to set aside the sale on the ground that the decree was satisfied cannot be maintained under this rule [2] Even if the ninety days have not elapsed there is no irregularity or fraud in publishing or conducting the sale and the matter will not fall under this rule but only under Section 47 [3]

32. Sale after an order of postponement. — A sale held after an order of postponement passed by the executing Court is a *nullity* whether the order was or was not communicated to the selling officer before the sale [1]

As to the effect of sales held in contravention of a stay order, see Note 66 to Section 47 and Order 11 Rule 5

(33) AIR 1933 All 546 (547) 55 All 19

Note 28

1 (25) AIR 1925 Oudh 424 (424)
2 (11) 9 Ind Cas 383 (384) (Cal)
3. (32) AIR 1932 All 664 (664) (Under circumstances it may amount to irregularity)
(20) 11 Mad L W 477 (478 479)
(24) AIR 1924 Pat 803 (803)
4 (78) 3 Cal 544 (546)
(80) 6 Cal L Rep 237 (238)
(30) AIR 1930 Lah 15 (16) (Whole house advertised—Sale of half of the house irregular)
(39) AIR 1939 Nag 241 (242)

[*See also* (32) AIR 1932 All 664 (664) (Do)]

Note 30

1 (25) AIR 1925 Oudh 381 (382)
2 (25) AIR 1925 Mad 729 (730)

Note 31

(94) 16 All 5 (7 9)
2 (27) AIR 1927 Lah 84 (84)
3 (11) 10 Ind Cas 625 (625) (Cal)

Note 32

1. (21) AIR 1921 All 102 (103)

Where an order of *injunction* restraining the sale has been obtained but the sale is held *before* the order is communicated it is a material irregularity according to the Judicial Commissioner s Court of Nagpur[2] but not according to the High Court of Allahabad[3] Where the sale is held *after* the order of injunction was communicated, it is a nullity[4]

33. Sale after attachment under Rule 53. — A sale held in contravention of an attachment of the decree effected under Rule 53 is invalid as being without jurisdiction and is not a mere irregularity[1]

34. Omission to make the legal representatives of the deceased judgment-debtor or decree-holder parties to sale proceedings. — Where an execution is taken against a wrong representative, the sale is not a *nullity* though it may amount to a material irregularity[1]

A sale held during the lifetime of the judgment debtor but confirmed after his death without impleading his legal representatives on the record is not void[2]

Where properties had been attached during the lifetime of the decree holder but the sale was held after his death without impleading his legal representatives, it was held that there was no irregularity[3]

As to the effect of a sale where the judgment debtor dies after attachment but before sale and the sale is held without impleading his legal representatives see Note 12 to Section 50 *ante*, and the undermentioned cases[4]

35. Non-representation of minor. — A sale held in execution of a decree against a minor is not void for the reason that no guardian had been appointed for him in the execution proceedings[1] It will however be a material irregularity under this rule[2] But where the minor is not represented in the suit itself a sale in execution of such decree is void even though he is represented by a guardian in the execution proceedings[3]

Where subsequent to the decree but prior to the sale in execution the judgment debtor had been adjudged insane and no guardian was appointed for him in the execution proceedings it was held that there was a material irregularity under this rule[4]

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(90) 12 All 96 (98)
(80) 2 All 686 (687)
(74) 6 N W P H C R 354 (356)
(72) 4 N W P H C R 135 (137)
2. (20) AIR 1920 Nag 12 (13)
3 (22) AIR 1922 All 282 (282)
4 (25) AIR 1925 Oudh 424 (424 425)

Note 33

1 (05) 32 Cal 1104 (1106)

Note 34

1 (01) 25 Bom 337 (347 348) 27 Ind App 216

is irregularity — (*Quære*)]
4 (13) 19 Ind Cas 120 (121) (All) (Sale is not nullity)
(19) AIR 1919 Cal 411 (413) (Do)
(96) 23 Cal 686 (689) (Do)

Note 35

1 (96) 23 Cal 686 (689) (Nor even incorrect description of a person as a minor)
(33) AIR 1933 Mad 833 (836) (Decree obtained against minor s father — Death of father — Minor not impleaded but his mother brought on record as legal representative — *Held* execution proceedings were substantially right)
(33) AIR 1933 Mad 179 (180) (Minor judgment-debtor represented by Court officer—Representation sufficient)
(35) 61 Cal L Jour 322 (327)
2 (13) 19 Ind Cas 296 (297 298) 40 Cal 635 40 Ind App 140 (P C)
(27) AIR 1927 Cal 873 (874)
(26) AIR 1926 Cal 109 (112)
(21) AIR 1921 Cal 476 (479)
(16) AIR 1916 Cal 603 (604)
[But see (11) 9 Ind Cas 252 (253) (Mad)]
3 (33) AIR 1933 Cal 627 (629) 60 Cal 753.
4 (96) 19 Mad 219 (227 2..)

O. 21 R. 90
Note 36

36. Other instances of material irregularity. — The following have been held to constitute material irregularity within the meaning of this rule, *viz* —

(1) Collusion between the decree holder and the judgment debtor [1]

(2) Disparaging remarks by the decree holder about the property to be sold which are calculated to deter bidders from bidding at the sale [2]

(3) Omission in the execution of a mortgage decree of the name of the subsequent mortgagee [3]

(4) Holding sale in court room without notice to the public [4]

(5) Confirmation of sale before an application under this rule is decided [5]

3 (16) AIR 1916 Pat 64 (65) 1 Pat L Jour 261

4 (33) AIR 1933 All 161 (162)

5 (33) AIR 1933 All 137 (138)

6 (29) AIR 1929 All 671 (672) (Time given to produce a person offering a higher bid and sale in his favour)

(33) AIR 1933 Oudh 345 (346) 8 Luck 731 (Failure to deposit 25 per cent of purchase money immediately is only irregularity which does not affect validity of sale unless substantial injury is caused to judgment debtor)

(16) AIR 1916 All 186 (189) (Allowing a bidder for several lots to deposit 25 per cent at the conclusion of the sale of all the lots is an irregularity)

(85) 1885 All W N 319 (319) (Landed ancestral estate which ought to be sold under rules made by Government by the Collector was sold by the Civil Court — *Held* it is a material irregularity)

(82) 1882 All W N 39 (39) (Judgment debtor preventing decree holder from bidding — Sale must be set aside)

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(

under R 84 is a material irregularity — See also O 21 R 84 Note 4)

(88) 1888 Pun Re No 5 (The omission to get

gularity)

(25) AIR 1925 Sind 101 (102) (Two secured

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(36) AIR 1936 Pat 572 (576) (Property in possession of receiver — Sale in execution of d cr e without leave of Court is irregular and not void)

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R 90 only after sale takes place but is no

(

a material irregularity but whether such irregularity results in substantial injury depends

(

valued and low upset price fixed — Sale must be set aside)

O.21 R 90
Note 36

In the following cases the sale was held to be *void* on the ground of *illegality*

(1) Omission to serve notice under Rule 22[7] *Vide also* Notes under Rule 22

(2) Omission on the part of the Judge to sign the order of attachment and sale notification[8]

(3) Selling the property as being subject to a mortgage when the decree directs its sale free from the mortgage[9]

(4) Selling property not covered by the decree[10] (See also Note 68 to Section 47 *ante*)

(5) Decree holder deterring persons by threats and intimidation from attending and bidding at the sale[11]

The following circumstances have been held to constitute no irregularity

(1) Omission to make an application for sale as required by Rule 66[12]

(2) Holding a sale for a sum larger than what is really due[13]

(3) Knocking down the sale to the highest bidder for a price which is subsequently found to be too low[14]

(4) Knocking down the sale to a lower bidder when the higher bidders are not *bona fide* and have no money to deposit as required[15]

(5) Sale held without notice to a receiver who is not in possession of the property sold[16]

(6) Conducting a sale from day to day and fixing a date for bringing the sale to an end[17]

(7) Decree holder purchaser dissuading others from bidding at a court sale and thus causing the property to be sold at a low price[18]

(8) Reduction of upset price during the conduct of the sale without notice to the judgment debtor[19]

See also the undermentioned cases[20]

Where the same property has been notified for sale in execution of two decrees it is quite proper and regular to hold one sale in respect of both of them[21] In the

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(37) AIR 1937 Lah 113 (114) (Depos t of 25 per cent made three days after sale and accepted by Court—There is mere irregularity)

8 (85) 7 All 506 (510) (PC)
(81) 3 All 701 (70 05)
9 (93) 20 Cal 599 (602)

14 (54) 8 Bom 4 4 (4 5)
(73) 5 N W 1 H C R 19 (0)
15 (1861) 9 Moo Ind App 321 (341 342) (PC)

(So held under the unusual circumstances of the case)
16 (29) AIR 1929 Rang 311 (312) 7 Rang 425
17 (33) AIR 1933 Mad 225 (227) 56 Mad 356

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the

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20 ... 935)
Nag 436
(3) AIR 1935 Mad 697 (699) (Or l r f r sale — R ceiver appo n ed b s e Court in pect of sam propt n ano L r su t — la r a are of a o e der appl ng f r a lj urn nt so that he may pa d d tt — Subsequent sale — (s ou to g t lea e of Court is not fatal — Sale should not be set aside)
21 (1) 1 31 All W N 89 ( )

O 21 R 90
Notes 36–37

undermentioned case[2] the High Court had directed stay of sale on the judgment debtor furnishing security He did not furnish security but on the day of sale offered a security which was rejected by the officer conducting the sale Thereupon the sale was held It was held that the sale could not be set aside on the ground that there was an impression that the sale had been postponed and consequently few bidders attended the sale

37 Fraud in publishing and conducting the sale — Section 311 of the old Code provided only for cases of material irregularity as a ground for setting aside a sale and did not include *fraud* in publishing and conducting a sale as a ground of attack It was held under that Code that such an application came within the scope of Section 244 (now Section 47) [1] The fact that Section 312 of the old Code provided that the sale shall be confirmed in the absence of an application under Section 311 on the ground of material irregularity was held not to deprive the Court of the power to refuse to confirm the sale where it had been brought about by fraud [2] The present rule has been framed so as to include fraud as well so that an application can now be made under this rule to set aside a sale on the ground of fraud in publishing and conducting the sale [3] The effect of including fraud in this rule is to take the applications setting up fraud in publishing and conducting the sale out of the scope of Section 47 and to bring them under this rule [4] See also Note 55 to Section 47 *ante*

The word fraud in this rule means that which is dishonest and morally wrong and does not include an irregularity [5] The burden of proving fraud rests upon the applicant and must be proved by clear and definite evidence [6] General and vague allegations of fraud[7] and mere proof of suspicious circumstances are not enough [8] But it is open to a Court to make an inference of fraud from established facts taken together as a whole [9] In order to enable an applicant to succeed it is not necessary that the *auction purchaser* should also have been a party to the fraud the fraud of the decree holder would be sufficient [10] The reason is that the applicant claims relief not against the purchaser alone but also against the decree holder The view expressed in the undermentioned case[11] that it must be proved that the auction purchaser was a

22 (81) 1881 All W N 104 (104)

Note 37

1 (06) 28 All 681 (682 683)
(05) 2 All 02 (03) (Appl cat on could be made e en after confirmat on of sale)
(09) 4 Ind Cas 253 (254) 33 Bom 698
(07) 5 Cal L Jour 328 (332)
(02) 6 Cal W N 283 (285 288)

2 (81) 2 Mad 264 (269 2 0)
3 (16) AIR 1916 All 184 (185)
(15) AIR 1915 Mad 150 (155)
4 (3) AIR 1923 Lah 592 (593) 4 Lah 243

t on of fraud aga nst purchaser alone — he a can succeed)
(01) 6 Cal W N 279 (281 283) (Do)]
11 (97) 20 Mad 10 (12)

A mere undervaluation of property will not amount to fraud within the meaning of this rule [12] But a wilful mis statement of value in the sale proclamation evidencing a deliberate design to get the property sold for a low price will amount to fraud [13] Similarly any other wilful mis statement in the sale proclamation calculated to affect the price of the property may amount to fraud [14] So also a great discrepancy between the value of the property stated in the proclamation and the real value is valuable evidence of fraud [15] **O 21 R 90 Notes 37–38**

See also the undermentioned cases[16] as to particular instances of fraud

See the undermentioned cases[17] for circumstances which were held not to amount to fraud

38 **Combination among bidders.** — *There is nothing necessarily unlawful in two or more persons agreeing not to bid against one another at an auction sale*[1] *Therefore a charge against a bidder or decree holder that he and other bidders who*

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(25) AIR 1925 Pat 521 (521) (Gross undervaluation of property and non service of processes do not by themselves constitute fraud)

13 (22) AIR 1922 Pat 507 (510 511) 2 Pat 65

(11) 11 Ind Cas 295 (297) (Cal)

14 (28) AIR 1928 Mad 1138 (1139) (To bring property to sale subject to a bogus mortgage is fraud)

(72) 18 Suth W R 340 (343) (Where six tenures with separate recorded jamas were lumped together and sold in one lot and no description of the property to be sold was given in consequence of which the purchaser was the only bidder the sale was set aside as being fraudulent)

15 (33) AIR 1933 Cal 339 (340) (Real value seventy times more than given in the proclamation)

to the nature and interest put to sale and he

representa

dders from

(11) 11 Ind Cas 399 (401) (PC) (Where the plaintiff was dissuaded from bidding at the sale by the pleader for the judgment-debtor falsely assuring him that he had instructions to apply for a postponement the auction purchaser could not be held responsible for the misrepresentation.)

(35) AIR 1935 Mad 257 (257) (Uncertified agreement between judgment debtor and decree-holder not to sell property of judgment-debtor — Agreement cannot be relied on to prove fraud in conducting sale)

(35) AIR 1935 Cal 93 (93) (Any fraud antecedent to the decree cannot be a ground for setting aside a sale under S 174 Bengal Tenancy Act.)

Note 38

1 (94) 18 Bom 342 (346)

O.21 R.90
Notes 38-39

have acted in concert with him have acted in such a manner as to prevent the best price from being obtained, does not *of itself* amount to a charge of fraud, nor will proof of such concert invalidate the sale [2] There is a distinction between an honest combination among intending purchasers and a dishonest concert for the suppression of all competition If the object be to obtain the property at a sacrifice by artifice the combination is fraudulent if the object be to make a fair bargain or even to divide the property for the accommodation of the purchasers, the combination cannot be said to be fraudulent [3]

39. Substantial injury—Proviso.—Before a sale is set aside under this rule it is essential under the proviso to the rule that there should have been *substantial injury* and that such injury should have been sustained by the applicant *by reason of the irregularity or fraud* A Court has no jurisdiction to set aside a sale under this rule without going into the question of substantial injury [1] That is to say, the applicant must prove substantial injury in addition to the material irregularity or fraud in publishing and conducting the sale, and a mere proof of irregularity or fraud alone is of no avail [2] A decree holder who has suffered substantial injury is entitled to have a sale set aside under this rule it does not matter whether that substantial injury is suffered by him in his capacity as a decree holder or as an individual [3] The onus of proving substantial injury lies on the applicant [4]

"Injury means loss which is wrongful [5] Such loss must also be *substantial* [6] The fact that the price realized at the sale is less than the value stated in the proclamation of sale is no proof of wrongful loss [7] Nor is the *market value* of the property a safe criterion in finding substantial injury [8] But a denial of opportunity to purchase the property is a substantial injury [9]

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(16) AIR 1916 Sind 20 (21) 10 Sind L R 53
3 (07) 6 Cal L Jour 111 (115 116)

Note 39

1 (18) AIR 1918 Pat 352 (352) (No publication of sale on spot — Substantial injury not proved —Sale cannot be set aside)
[*See* (01) 25 Bom 337 (348) 27 Ind App 216 (PC)
(90) 12 All 96 (98) (Where sale is illegal no injury need be proved)
(88) 10 All 506 (517) (*Do*)]
[*See also* (95) 5 Mad L Jour 70 (73 74) (In both cases injury must be proved—This is not good law)]

2 (11) 12 Ind Cas 174 (175) 38 Ind App 200 39 Cal 26 (P C)
(33) AIR 1933 Cal 486 (487) (Date fixed for sale holiday—*Sale on following day— No allegation* or proof as to paucity of bidders—Sale held could not be set aside although there was material irregularity)
(11) 10 Ind Cas 475 (476) (Cal) (Deliberate undervaluation of property in sale proclamation *held* material irregularity— Property sold below proper value—Sale set aside)
(09) 1 Ind Cas 246 (247) (Cal)
(82) 8 Cal 932 (933)
(14) AIR 1914 Mad 312 (315 317)
(14) AIR 1914 Oudh 164 (165)

(31) AIR 1931 Pat 43 (44)
(30) AIR 1930 Pat 58 (60) (And one of the most usual forms of showing that the applicant has sustained injury is to show that the property has been sold for a gross undervalue)
(24) AIR 1924 Pat 785 (786)
(21) AIR 1921 Pat 479 (480)
(22) AIR 1922 Upp Bur 22 (22) 4 Upp Bur Rul 97
(25) AIR 1925 Sind 253 (254) 18 Sind L R 130

...nstances no ... suo ... act that de... perty to the judgment debtor for the price bought may be considered to see whether judgment debtor suffered injury)
(37) AIR 1937 All 407 (410)

3 (33) AIR 1933 All 161 (162)
4 (25) AIR 1925 Pat 148 (149)
5 (03) 7 Cal W N 439 (440) (When a person loses what he has been in the habit of wrongfully gaining it is no substantial injury or injury of any sort or kind)
(25) AIR 1925 All 459 (462) 47 All 479 (Loss

14

8 (72) 18 Suth W R 197 (197, 198)
9 (33) AIR 1933 All 161 (163)

Where in a case it was found that there had been material irregularity in the conduct of the sale and the property fetched an inadequate price in consequence, the mere fact that the real value of the property did not exceed the amount of the decree and that the unsatisfied balance of the decree could not be realized from the judgment debtor on account of limitation, would not bring the case within the proviso to this rule [10]

See the undermentioned case[11] which is illustrative of what is and what is not "substantial injury "

40. Applicant must have sustained substantial injury by reason of such irregularity or fraud. — As has been already mentioned in Note 39 above, in order that an applicant under this rule may have a sale set aside, a mere proof of irregularity is not enough, he must show that he sustained substantial injury *as a result of* such material irregularity or fraud [1] In the absence of evidence to show that the injury is the result of irregularity, the Court cannot presume from the proved existence of irregularity and injury that the latter occurred by reason of the former [2]

The proviso to Section 311 of the old Code provided that "no sale shall be set aside . *unless the applicant proves to the satisfaction of the Court* that he has sustained substantial injury by reason of such irregularity " In a case[3] arising under that Section their Lordships of the Privy Council observed as follows

"Their Lordships cannot accept the judgment of the Judicial Commissioner that loss is to be inferred from the mere fact that a sale was held without full compliance with the provisions

10 ('12) 15 Ind Cas 728 (729) (Cal)

11 ('36) AIR 1936 Pat 26 (27) (No interest of judgment debtor in property sold or having doubtful claim therein at date of sale — Price fetched not inadequate— Judgment debtor *held* not materially prejudiced)

Note 40

1 ('83) 9 Cal 656 (660 662) 10 Ind App 25 (PC) (Injury cannot be inferred from proof of irregularity)
('34) AIR 1934 Pat 186 (187) (Undervaluation in sale proclamation is not always by itself sufficient to set aside sale)
('34) AIR 1934 Pat 274 (279) 13 Pat 467
('20) AIR 1920 All 206 (207)
('16) AIR 1916 All 186 (187)
('13) 20 Ind Cas 16 (17) (All)
('24) AIR 1924 All 698 (699)
('28) AIR 1928 Cal 328 (331)
('24) AIR 1924 Cal 1055 (1055)
('21) AIR 1921 Cal 597 (598)
('20) AIR 1920 Cal 518 (518)
('19) AIR 1919 Cal 1005 (1006)
('12) 16 Ind Cas 394 (395 396) (Cal)
('07) Cal L Jour 240 (242) (F B)
('05) 32 Cal 702 (507 508) (F B)
('74) 22 Suth W R 550 (550)
('73) 19 Suth W R 78 (78)
('71) 15 Suth W R 95 (95)
('69) 12 Suth W R 492 (493)
('69) 12 Suth W R 488 (489)
(1866) 6 Suth W R Misc 45 (46)
('66) 6 Suth W R Misc 31 (31) (Smallness of price is not sufficient ground for setting aside sale unless it be the effect of irregularity)
(1865) 2 Suth W R Misc 1 (2)
('30) AIR 1930 Lah 634 (635)
('27) AIR 1927 Lah 84 (84)
('26) AIR 1926 Lah 587 (588)
('24) AIR 1924 Lah 592 (592)
('23) AIR 1923 Lah 213 (216)
('22) AIR 1922 Lah 35 (36)
('19) AIR 1919 Lah 260 (262)
('18) AIR 1918 Mad 1262 (1264)
('11) 9 Ind Cas 252 (252 253) (Mad)
('89) 12 Mad 19 (26) 15 Ind App 171 (P C)
('98) 1 Oudh Cas 155 (156)
('98) 1 Oudh Cas 14 (17)
('17) AIR 1917 Pat 694 (695)
('18) AIR 1918 Pat 686 (687)
('13) 20 Ind Cas 192 (193) (Low Bur)
('96) 18 All 141 (143)
('88) 15 Cal 488 (491) (FB)
('17) AIR 1917 Mad 877 (878) (Some connection must be shown)
('38) 42 Cal W N 661 (662)
('37) AIR 1937 All 407 (410)
('35) AIR 1935 Lah 390 (391)
('36) AIR 1936 Lah 555 (557)
('34) 36 Pun L R No 183 (184)
[*See also* ('35) AIR 1935 Cal 743 (744) (For annulment of sale under the Bengal Land Revenue Sales Act by Civil Court sale must be contrary to provisions of Act and substantial injury to owner must be caused by irregularity)]

2 ('83) 9 Cal 656 (660 662) 10 Ind App 25 (P C)
('89) 12 Mad 19 (25 26) 15 Ind App 171 (P C)
('85) *11 Cal 658 (660 661)*
('85) 11 Cal 200 (210 213) (F B)
[**But see** ('81) 7 Cal 730 (732) (Where both material irregularity and injury have been proved Court may reasonably presume that the injury is due to such irregularity)]

3. ('94) 21 Cal 66 (70) 20 Ind App 176 (P C)

O. 21 R. 90
Notes 38–39

have acted in concert with him have acted in such a manner as to prevent the best price from being obtained, does not *of itself* amount to a charge of fraud, nor will proof of such concert invalidate the sale[2] There is a distinction between an honest combination among intending purchasers and a dishonest concert for the suppression of all competition If the object be to obtain the property at a sacrifice by artifice, the combination is fraudulent, if the object be to make a fair bargain or even to divide the property for the accommodation of the purchasers, the combination cannot be said *to be fraudulent*[3]

39. Substantial injury—Proviso. — Before a sale is set aside under this rule, it is essential under the proviso to the rule that there should have been *substantial injury* and that such injury should have been sustained by the applicant *by reason of the irregularity or fraud* A Court has no jurisdiction to set aside a sale under this rule without going into the question of substantial injury[1] That is to say, the applicant must prove substantial injury in addition to the material irregularity, or fraud in publishing and conducting the sale, and a mere proof of irregularity or fraud alone is of no avail[2] A decree holder who has suffered substantial injury is entitled to have a sale set aside under this rule, it does not matter whether that substantial injury is suffered by him in his capacity as a decree holder or as an individual[3] The onus of proving substantial injury lies on the applicant[4]

'Injury means loss which is wrongful[5] Such loss must also be *substantial*[6] The fact that the price realized at the sale is less than the value stated in the proclamation of sale is no proof of wrongful loss[7] Nor is the *market value* of the property a safe criterion in finding substantial injury[8] But a denial of opportunity to purchase the property is a substantial injury[9]

2 (1900) 23 Mad 227 (233, 234) 27 Ind App 17 (PC) (Affirming 19 Mad 315 on this point)
(09) 1 Ind Cas 158 (161) 36 Cal 226
(09) 4 Ind Cas 1006 (1012) (Lah)
('16) AIR 1916 Sind 20 (21) 10 Sind L R 53
3 (07) 6 Cal L Jour 111 (115 116)

Note 39

1 (18) AIR 1918 Pat 352 (352) (No publication

good law)]

not be set aside although there was material irregularity)
(11) 10 Ind Cas 475 (476) (Cal) (Deliberate un

(14) AIR 1914 Mad 312 (315 317)
(14) AIR 1914 Oudh 164 (16…)

(31) AIR 1931 Pat 43 (44)
(30) AIR 1930 Pat 58 (60) (And one of the most usual forms of showing that the applicant has sustained injury is to show that the property

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cree holder offered to return the property to … may be

need not be pecuniary)
6. (27) AIR 1927 Cal 873 (874)
(26) AIR 1926 Pat 202 (203) 4 Pat 69…
7. (22) AIR 1922 Pat 550 (551) 1 Pat 214
8 (72) 18 Suth W R 197 (197, 198)
9 (33) AIR 1933 All 161 (163)

O. 21 R. 90
Notes 40-41

The inadequacy must have been occasioned by some irregularity [14] In the absence of proof to the contrary the presumption is that the price fetched at a court sale is adequate [15]

For other instances where substantial injury has been held to be the result of irregularity or fraud, see the cases cited below [16] See also the undermentioned case [17]

41. Waiver of irregularity and estoppel —If a judgment debtor has received notice under Rule 66 *ante*, or has *knowledge of the contents of the proclamation of* sale before it is issued, and neglects to take any objection to the proceedings he will not afterwards be allowed to object to the sale under this rule on any of the grounds which he might have then urged [1] The reason of this rule of estoppel is stated by their Lordships of the Privy Council as follows It would be very difficult indeed to conduct proceedings in execution of decrees by attachment and sale of property, if the judgment debtors could lie by and afterwards take advantage of any misdescription of the property attached and about to be sold which they knew well but of which the execution creditor or decree holder might be perfectly ignorant that they should take no notice of that, allow the sale to proceed, and then come forward and say the whole

14 (25) AIR 1925 Mad 729 (730)
(34) AIR 1934 Nag 250 (251)
15 (33) AIR 1933 All 218 (2?3) 55 All 221
16 (13) 21 Ind Cas 592 (593) (Mad) (Irregularity in fixing value)
(25) AIR 1925 Oudh 424 (424) (Irregularity in proclaiming incumbrance)
(15) AIR 1915 Oudh 124 (1?6) 18 Oudh Cas 1 (Time of sale on adjourned date not specified)
(12) 15 Ind Cas 858 (890) 16 Oudh Cas 86 (Fact that the decree holder agrees to bid for the property for the amount of the decree and purchases it for a sum less than that amount is sufficient to show that his fraud has led to substantial loss)
17 (36) AIR 1936 Pat 26 (27) (Decree for [illegible]
(14) AIR 1914 Mad 312 (317)
(22) AIR 1922 Mad 301 (302) (Defendant becoming major after decree not recorded as major — Sale held—Ex minor knew of proceedings—Is estopped)
(31) AIR 1931 Pat 63 (64)
(24) AIR 1924 Pat 111 (112) 2 Pat 916
[illegible]
(31) AIR 1931 Oudh 398 (399) (Where an [illegible] ion to to [illegible] l as [illegible] debtor)

Note 41

[illegible] d not stated in sale proclamation is only a material irregularity—Failure to serve sale proclamation but judgment debtor aware of it—Sale is not vitiated)
(12) 16 Ind Cas 235 (236) (Cal)
(30) AIR 1930 Lah 655 (656)
(24) AIR 1924 Mad 217 (215 2?0) 46 Mad 736
(17) AIR 1917 Mad ?67 (?67)
[[illegible] is not maintainable—Yet he can plead inadequacy of price and consequential loss.
Note The decision seems to offend the principle that mere inadequacy of price is no ground for setting aside a sale under this rule—See Note 40)]
[**But see** (30) AIR 1930 Nag 191 (193) (Judgment debtor not appearing though served to settle terms of proclamation — Still he is not estopped from applying to set aside sale)
(01) 4 Oudh Cas 3?9 (3?4)
(71) 15 Suth W R 95 (9?) (Silence of judgment-debtor on previous occasion is no bar to his

O. 21 R. 90
Note 41

proceedings were vitiated '[2] The same principle will apply if the judgment debtor had consented to the irregularity before sale [3]

Where a judgment debtor applies for postponement of the sale and gets it adjourned he must be deemed to have admitted that the proclamation was correct, or at any rate, there was no such mistake or irregularity as would be likely to mislead [4] The judgment debtor cannot also urge any objections to the sale if at the time of postponement of the sale he consented to waive any irregularity [5] Where, however, he was not aware of the facts to which he was bound to object at the time when he had an opportunity of so doing, there can be no waiver or estoppel [6] The reason is that a person can be taken to have waived only such rights as were within his knowledge

In the following instances it has been held that there is no waiver

(1) Where a judgment debtor agrees to waive an irregularity provided the sale is postponed, but the Court does not allow such postponement, there can be no relinquishment of his right to object to the sale [7]

(2) Where the judgment debtor waives the issue of a fresh proclamation only, he can urge any objection on the ground of an irregularity in the publication of the *original* proclamation [8]

(3) Even though a sale is postponed at the instance of the debtor on the condition that fresh proclamation is waived, if an attaching decree holder subsequently applies that a fresh proclamation should issue and that prayer is refused, *the latter* can question the sale on the ground of want of fresh proclamation [9]

(4) A judgment debtor who waives a fresh proclamation will not be deemed to have waived the non specification of the hour of sale on the day to which the sale is postponed [10]

(5) The fact that the applicant himself bid at the sale will not amount to a waiver of the irregularity [11]

Where a judgment debtor's objection to an irregularity made before sale is overruled by the Court, he is not precluded from urging the same ground in an application to set aside the sale [12]

Where, during the pendency of an application under this rule to set aside

being heard when he objects alleging material irregularity)
2 (89) 12 Mad 19 (25) 15 Ind App 171 (PC)

(37) AIR 1937 Lah 113 (114)
[*See also* (35) AIR 1935 Mad 150 (151) (Judgment debtor getting adjournment of sale by giving up objections to sale proclamation will be estopped from raising same objection in an application under this rule)
(38) AIR 1938 P C 230 (231 232) 32 Sind L R 879 (PC) (Waiver of the necessity for a fresh proclamation necessarily implies a waiver of objection to any defect appearing on the face of the sale proclamation But the waiver of any necessity for a fresh sale proclamation will not imply a waiver of the right to object to irregularities in attachment)]
5. (26) AIR 1926 Cal 577 (578)

('18) AIR 1918 Cal 293 (294)
(05) 2 Cal L Jour 584 (587 589)

(07) 6 Cal L Jour 62 (67 to 70)
(01) 6 Cal W N 42 (43 44)
(07) 6 Cal L Jour 111 (113) (Judgment debtor

a sale, the debtor got time for paying the decree amount on condition that the petition should be dismissed on his failure to do so, he would be estopped, on his failure to abide by the agreement, from continuing the proceedings [13]

A question of waiver is a mixed question of law and fact [14]

As to whether an objection can be taken in the event of appeal, see Note 43.

42. Bona fide purchaser for value without notice. — Where the conditions laid down in this rule are satisfied, the fact that the auction purchaser is a stranger and a *bona fide* purchaser for value without notice of irregularity or fraud will not prevent the sale from being set aside [1] See also Note 37, *ante* The plea of *bona fide* purchaser for value may, however, be given effect to in proceedings or suits to set aside sales on the ground that the decree and the execution proceedings are tainted by fraud and collusion [2]

43. Setting aside sale on grounds not taken in the application. — It has been held by the High Courts of Allahabad and Lahore that where an application under this rule is made on certain grounds, it is not open to the applicant to ask the Court to adjudicate upon objections which were not expressly taken in the application [1] But he can apply, even after the expiry of thirty days, to be allowed to furnish *further particulars* and this application may be treated as one to amend the original application [2] The High Court of Madras[3] has, however, held that there is nothing to prevent a Court even in appeal from considering the validity of the sale from every point of view and exercise its inherent powers in setting aside a sale on a ground not pleaded It has been held by the Nagpur High Court[4] that where an irregularity is demonstrable from the record itself, it is within the power of the Court to consider the objection based on such irregularity even if not specifically taken in the application But a new ground requiring evidence cannot be taken for the first time in appeal [5]

43a. Setting aside sale in part only, if and when permissible. — It has been held by the Patna High Court that where properties are sold in several lots, the Court can set aside the sale in respect of some only of the lots but that the circumstances under which this can be done are limited to cases in which *both* the irregularity and the injury can be satisfactorily allotted to one part only of the sale where the irregularity extends to the whole property and to all the lots, it is not justifiable to retain the efficacy of the sale with respect to some of the plots only in which the sale

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13 (02) 29 Cal 577 (580)

14 (11) 9 Ind Cas 698 (704) (Cal) (And should not be allowed to be raised at a late stage of the proceedings)

Note 42

1 (23) AIR 1923 Cal 538 (541)
(1) AIR 1917 Mad 42 (42)
(-3) AIR 1923 Pat 435 (435)
[*See also* (68) 9 Suth W R 196 (199) (FB) (It must be decided in each case in accordance with the principles of justice equity and good conscience, as to whether the sale ought to be set aside or not)]

2 (66) 10 Moo Ind App 454 (473 474) (P C)

[illegible]

Note 43

1. (32) AIR 1932 Lah 576 (576) (Objections taken after period of limitation)
(99) 21 All 140 (142)
('19) AIR 1919 Lah 260 (261) (Objections not stated in application cannot be entertained by [illegible]

[illegible]

3. (24) AIR 1924 Mad 778 (778)
[*See* (-7) AIR 1927 Nag 319 (319) (If in the [illegible]

[illegible]

(83) 9 Cal 656 (663) 10 Ind App -5 (P C)

O 21 R 90
Notes 43a–44

price obtained cannot be shown to be inadequate in view of the advertised value[1] But this view has been dissented from by the Madras High Court which has held that in such cases the sale should be set aside only in respect of the items which have been sold for an inadequate price in consequence of the irregularity but not in respect of the items which notwithstanding the irregularity have been sold for an adequate price[2]

It has been held by the Calcutta High Court that where after dismissing the applications under this rule made by some of the judgment debtors the Court passes an order setting aside the sale on an application by another judgment debtor under this rule the order will take effect only so far as the share and interest of that judgment debtor are concerned and the sale will stand confirmed as regards the share and interest of the other judgment debtors[3] But this decision has been distinguished by the Nagpur High Court in the undermentioned case[4] in which it was held that where there are several judgment debtors to whom the property belongs but the application is made by only one of them and the property sold consists of only one item and the irregularity cannot be apportioned the entire sale must be set aside and not only with regard to the share of the judgment debtor who applies

See also Note 2 *ante*

44 Joinder of claims under Section 47 — A prayer for a relief coming within the scope of Section 47 can be joined with a prayer for a relief under this rule in one and the same application[1] Every application to set aside a sale involves a question relating to the execution discharge or satisfaction of the decree and therefore comes within the scope of Section 47[2] But where the application falls within the scope of this rule and Section 47 a second appeal against an order on such an application is barred by Section 104[3] See Note 15 to Section 2 sub section (2) *ante* But where the matter falls within Section 47 *alone* even though the application purports to be under this rule also and the question is between parties to the suit the order will be appealable as a decree[4] Where an application contains grounds coming both under Section 47 and this rule that portion of the order relating to the question under Section 47 is

[*See* (23) AIR 1923 P C 93 (94 95) (P C) (Applicant did not ask for opportunity to let in evidence —Cannot ask for it before the Privy Council)]

Note 43a

1 (33) AIR 1933 Pat 223 (224) 12 Pat 181
2 (36) AIR 1936 Mad 121 (122) 59 Mad 438
3 (37) 41 Cal W N 224 (225)
4 (39) AIR 1939 Nag 258 (260) (Where there is only one house which is sold and the irregularity in the conduct of the sale could not be appor

Note 44

1 (28) AIR 1928 Pat 272 (272) 7 Pat 331
[**But see** (96) 18 All 141 (143 144)]
2 (17) AIR 1917 Mad 924 (925)
(17) AIR 1917 Mad 877 (8 9)
[*See* (34) AIR 1934 Nag 91 (2) 31 Nag L R 67 (Application to set aside sale on ground of fraud or irregularity—Only decree-holder made party—Stranger purchaser not formally joined — Application is not under Rule 90 but under Section 47)]
3 (1) AIR 1917 Mad 924 (9 5)
(24) AIR 1924 Mad 778 (779)
4 (32) AIR 1932 Cal 672 (6 3) 59 Cal 906 [illegible]

only under S 47 C P C)
(24) AIR 1924 Mad 431 (432) 47 Mad 988 (FB)
(25) AIR 19 5 Mad 1142 (1149)
(17) AIR 1917 Mad 924 (925)
(24) AIR 1924 Rang 124 (124) 1 Rang 533 (Defective attachment — Question comes under Section 47)
(24) AIR 1924 All 698 (699)
[*See* (35) AIR 1935 Mad 438 (435) (It is not clear from the report of this case whether the [illegible]

is by the judgment debtor therefore S 47 would [illegible]

mitted the judgment is not correct)]

open to second appeal[5]

Where an application really comes under this rule, the mere mention of Section 47 in the application will not make it one under that Section for the purpose of appeal[6]

45. Suit to set aside sale for material irregularity. — See Notes to Order 21 Rule 92, *infra*

46. Sale, if can be challenged by way of defence in suit for possession.— See Notes to Order 21 Rule 92, *infra*

47. Necessary parties. — See Notes to Order 21 Rule 92, *infra*

48. Applicability of Order 9 to applications under this Rule.—The general trend of opinion is that the provisions of Order 9 do not apply to proceedings under this rule[1] See Note 2 to Section 141 But the Court has inherent power to dismiss an application under this rule for default where the applicant fails to appear in support of his application[2] So also, the Court has got inherent power to set aside an order under this rule passed *ex parte* or to restore an application dismissed for default[3] See also Note 1 to Order 9, 'General'

As regards appeal against orders of dismissal for default of an application under this rule and orders refusing to restore such an application, see Note 50 below.

49. Limitation. — It has been already mentioned in Note 37 *ante*, that under the old Code it was held that an application to set aside a sale on account of fraud in publishing and conducting the sale fell within the scope of Section 244 (now Section 47) Article 166 of the Limitation Act of 1877 did not apply to cases where the application to set aside a sale was based on the ground of fraud in publishing or conducting the sale It was therefore held that under Article 178 (now Article 181) of the Limitation Act of 1877, the period of limitation for such an application was three years from the date of the sale[1] Under the Limitation Act of 1908, an application to set aside a sale in execution of a decree on whatever ground the application is based is governed by Article 166 which provides for a period of thirty days from the date of sale Therefore an application under this rule whether made on the ground of material irregularity or fraud must be made within thirty days of the date of sale[2]

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5 (24) AIR 1924 Mad 431 (432) 47 Mad 258 (FB)

[See ( ) AIR 19[illegible] Cal 103 (110).]
[*See also* (17) AIR 1917 Mad 924 (925) (Converse case).]

2. (38) AIR 1938 Mad 495 (495) ILR (1938) Mad 636

3. (31) AIR 1931 All 591 (594, 595)

[illegible] rity under the old Code.)
(04) 6 Bom L R 1140 (1145) (Do.)

O. 21 R. 90
Note 49

The starting point of limitation is the date on which the officer conducting the sale has accepted the final bid, therefore, the period of limitation does not begin to run until then [3]

The period of limitation prescribed by Article 166 cannot be enlarged by Section 5 of the Limitation Act [4] Where an execution sale is held by the Collector to whom the decree has been transferred for execution and the applicant applies to the Collector under this rule and after the expiry of thirty days prefers a second application to the *Court*, the time spent in prosecuting the first application cannot be excluded under Section 14 of the Limitation Act [5] Where the applicant was a minor on the date of sale it was held in cases arising under the old Limitation Act of 1877 that he was entitled to the benefit of Section 7 of the Limitation Act in computing the period of limitation for an application under this rule [6] The present Sections 6 and 7 of the Limitation Act, 1908 *limit the application of those Sections to applications in execution of a decree* and do not apply to an application to set aside a sale [7]

Where, in an application under this rule made more than thirty days of the sale the applicant relies upon fraud as an exemption from limitation he must bring his case within Section 18 of the Limitation Act [8] Where a sale is brought about by fraud for instance by suppression of processes and submission of false returns and an application to set aside the sale is made more than thirty days after the date of the sale, it is not enough for the applicant to show that the execution proceedings were irregular and fraudulent but he must carry the fraud further and show that the existence of his right to set aside the sale had been kept concealed from his knowledge by fraud [9] Such fraud need not necessarily be that of the decree holder or auction purchaser but may be of a third person [10] When once such fraud has been established by the applicant, it is for the opposite party to show at what precise point of time the applicant had clear and definite knowledge of the facts which would entitle him to apply for setting aside the sale The reason is that the fraud is a continuing *influence* and until that influence ends, it retains its power of mischief [11]

(10) 6 Ind Cas 713 (714, 715) 1910 Pun Re No 40 (Do)
(17) AIR 1917 Low Bur 80 (81) (Do)
(36) AIR 1936 Pat 558 (560) (Sale set aside after one month — Order setting aside reversed on appeal — Fresh application to set aside by another person—Limitation runs only from date the sale)
[*See* (14) AIR 1914 Mad 297 (298) (Where sale is nullity Art 166 does not apply)

3 (30) AIR 1930 Lah 41 (42)
(35) AIR 1935 Pesh *160 (161) (The sale is com*plete as soon as the offer of the auction purchaser is accepted by the auctioneer and it is immaterial for the purpose of Art 166 whether the 25 per cent deposit is made or not)

4 (26) 92 Ind Cas 839 (839) (Lah)
(34) AIR 1934 All 314 (314)
(39) AIR 1939 Cal 310 (312) ILR (1939) 1 Cal 452

5 (99) 23 Bom 531 (535)

6. (87) 9 All 411 (413)
(10) 6 Ind Cas 488 (489) (Lah)

7 (35) AIR 1935 Pat 450 (450)

8 (18) AIR 1918 Cal 77 (78)
[*See* (99) 3 Cal W N 333 (336)
(36) AIR 1936 Cal 706 (707) (Execution sale fraudulently conducted by decree holder — Application to set aside sale beyond time—S 18 cannot apply when property is purchased *bona fide* by third party)
(35) AIR 1935 Cal 89 (90) (Auction purchaser guilty of fraud — Application to set aside sale under S 173 Bengal Tenancy Act — S 18 Limitation Act can be availed of)]

9 (11) 11 Ind Cas 438 (442) (Cal)
(97) 1 Cal W N 67 (68 70)
(26) AIR 1926 Cal 229 (230 231)
(25) *AIR 1925 Pat 521 (522 523)*
(23) AIR 1923 Pat 435 (436)
(39) AIR 1939 Cal 663 (665) 43 Cal W N 663 (665) I L R (1939) 2 Cal 163

10 (33) AIR 1933 Mad 626 (627) 56 Mad 734

11 (28) AIR 1929 Cal 349 (350)
(33) *AIR 1933 Cal 339 (340)*

In cases where fraud is relied on in support of an application made after time it is immaterial that the application is made after confirmation of the sale [13]

Where notice under Rule 22 of this Order is not given the sale is *void* But if an application is made under this rule *to set it aside* it must be filed within thirty days of the sale [13]

See also Notes to Article 166 in the Authors Commentary on the Limitation Act

49a Step-in-aid of execution — It has been held that an application by a decree holder praying for the dismissal of an application made by the judgment debtor under this rule is a step in aid of execution within the meaning of Article 182 of the Limitation Act [1]

50. Appeal — Order 43 Rule 1 clause *(j)* provides for an appeal against an order under Rule 92 *infra* setting aside or refusing to set aside a sale [1] Section 174 of the Bengal Tenancy Act as amended by the Bengal Legislative Council in 1928 allows an appeal against an order under that rule [2]

It has been already mentioned in Note 37 *ante* that Section 311 of the old Code allowed an application to be made only on the ground of material irregularity and that an application to set aside a sale on the ground of fraud in publishing and conducting the sale fell within the scope of Section 244 It was therefore held that no second appeal lay against an order on an application seeking to set aside a sale on the ground of material irregularity [3] but that if fraud was the ground of the application a second appeal would lie if the matter was between parties to the suit [4] But under this Code

(26) AIR 19
(1) AIR 19
(12) 16 Ind
(03) 30 Cal
(29) AIR 1929 Pat 228 (229 230)
(30) AIR 1930 Pat 58 (60)
(24) AIR 1924 Pat 496 (497)
(22) AIR 1922 Pat 422 (423)
(39) AIR 1939 Cal 663 (665) 43 Cal W N 862 (867) ILR (1939) 2 Cal 163

13 (32) AIR 1932 Cal 381 (381)

Note 49a

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(

708 (Where on the judgment debtor applying under this rule the decree-holder files a list of witnesses and a petition of objections it amounts to taking a step in aid of execution)

Note 50

1 (11) 10 Ind Cas 148 (150 151) (Cal) (Auc

139
(87) 9 All 411 (412 413)

an order is made against him he can appeal under O 43 R 1)
(80) 5 Cal 259 (262)
(39) AIR 1939 Mad 482 (483) I L R (1939) Mad 349 (Order of Court declining to entertain application under O 21 R 90 falls under O 43 R 1 ( )

2 *The following cases are no longer law in view*

(01) 28 Cal 4 (6)
(95) 22 Cal 802 (804)
(91) 18 Cal 422 (426)
(66) 6 Suth W R Misc 119 (119 120)
(98) 21 Mad 417 (419)
(96) 19 Mad 29 (30)
(96) 19 Mad 167 (168)
(69) 5 Mad H C R 213 (214)

4 (12) 16 Ind Cas 690 (691) (Cal) (Right of second appeal under the old Code cannot be affected by new Code)

O. 21 R 90
Note 50

an order on an application under this rule whether made on the ground of material irregularity or on the ground of fraud is not open to second appeal by virtue of the provisions of Section 104 [5] The result will be the same even if the question fell within Section 47 for the order being appealable as an *order* will not fall within the definition of the term decree in Section 2 *ante* As to the right of second appeal in cases where objections are taken both under this rule and under Section 47, see Note 44 *ante*

Where the objection to the sale does not fall under this rule but falls under Section 47, a decision deciding such objection will be open to second appeal [6]

No appeal lies under the Letters Patent against the order of a single Judge of the High Court made on appeal or in revision against the order of an executing Court in an application under this rule [7]

The provisions of Section 104 and O 43 R 1 cannot restrict the provisions relating to appeals to the King in Council Therefore an appeal to the Privy Council will lie against an order of the High Court under Rule 92 [8]

An *order dismissing an application under this rule for default* is appealable under O 43 R 1 the effect of such order being the confirmation of the sale [9] The fact that a distinct order confirming the sale has not been recorded does not alter the

(04) 31 Cal 385 (390 391)
(99) 26 Cal 539 (542 545)
(99) 26 Cal 324 (326)
(09) 2 Ind Cas 983 (984) (Cal)
5 (29) AIR 1929 All 553 (553)
(33) AIR 1933 Mad 838 (838)

to an allegation of an irregularity in an auction sale and comes under Order 21 Rule 90)
(32) AIR 1932 Lah 530 (531)
(28) All 1928 All 354 (354)
(18) AIR 1918 All 209 (210) 40 All 122
(32) AIR 1932 Cal 203 (204)
(12) 13 Ind Cas 147 (147) (All)
(27) AIR 1927 Cal 657 (658) (Even though between decree holder purchaser and judgment debtor)
(26) AIR 1926 Cal 229 (231)
(17) AIR 1917 Cal 9 (9)

(10) 8 Ind Cas 3 (4) (Cal) (Do)
(11) 9 Ind Cas 135 (135) (Cal)
(30) AIR 1930 Lah 208 (209)
(28) AIR 1928 Lah 444 (444)
(28) AIR 1928 Lah 414 (416)

(20) AIR 1920 Lah 377 (377) 1919 Pun Re No 163
(19) AIR 1919 Lah 152 (154)
(15) AIR 1915 Lah 293 (295)

(29) AIR 1929 Mad 624 (624)
(10) 8 Ind Cas 883 (883) (Mad)
(30) AIR 1930 Nag 58 (58)
(17) AIR 1917 Oudh 45 (45)
(24) AIR 1924 Pat 803 (803)
(24) AIR 1924 Pat 182 (183)
(24) AIR 1924 Pat 111 (112) 2 Pat 916
(20) AIR 1920 Pat 710 (710)
(18) AIR 1918 Pat 297 (298) 3 Pat L Jour 645
(18) AIR 1918 Upp Bur 30 (31) 2 Upp Bur Rul 139
(38) AIR 1938 Nag 107 (107) I L R (1938) Nag 436
(37) AIR 1937 Pat 90 (91)

(36) AIR 1936 All 696 (697) (Second app[illegible] treated as revision)
(36) AIR 1936 All 763 (764) (No second appeal lies even where the purchaser is the decree-holder himself)
[**But see** (30) AIR 1930 Nag 131 (132) (Submitted to be erroneous)]
6 (36) AIR 1936 Lah 573 (574) (Objection on ground that executing Court had no jurisdiction to sale)

App 140 (P C)

character of the order and is no ground for refusing to entertain an appeal.[10] But an order refusing to restore an application under this rule which has been dismissed for default is not appealable.[11] The reason is, as already mentioned in Note 18 *ante*, that Order 9 does not apply to proceedings under this rule.

An application by the Official Receiver to set aside a sale in execution is one under this rule and not under Section 47, inasmuch as he is not the representative of the judgment-debtor for this purpose. No second appeal therefore lies in such a case.[12]

In an appeal from an order confirming the sale, the purchaser in auction is the principal person interested and is a necessary party.[13]

Where an application by a judgment-debtor for setting aside a sale is dismissed and thereafter he is adjudicated insolvent on an application by a creditor filed subsequent to the sale, the judgment-debtor can appeal from the order, the property in such cases does not vest in the Official Receiver, having been sold away before adjudication.[14]

51. Revision. — Where a sale is set aside under this rule without proof of substantial injury,[1] or on the application of a person who is not entitled to apply,[2] or where a sale is confirmed before an application under this rule is decided,[3] or where the lower Court sets aside a sale having misunderstood the legal position with regard to sales,[4] the order is open to revision. Similarly, an order refusing to set aside a sale, on the ground that the applicant had no *locus standi* to apply, is open to revision.[5] But an order passed by a Court under this rule in the exercise of its jurisdiction is not revisable even though it may be erroneous.[6] An order dismissing an application

See ('26) AIR 1926 Cal 25 (26) : 53 Cal 616 (Opposite party ready — Order of dismissal is appealable — AIR 1926 Cal 773 Distinguished.)]
[But see ('26) AIR 1926 Cal 773 (778) : 53 Cal 679 (Dissented from in AIR 1929 Cal 407.)
('07) 10 Oudh Cas 171 (174).]

10. ('29) AIR 1929 Cal 407 (409) : 56 Cal 969.

11. ('86) 10 Bom 433 (434).
('27) AIR 1927 Cal 938 (938).
('26) 97 Ind Cas 704 (704) (Cal).
('20) AIR 1920 Cal 447 (448).
('15) AIR 1915 Cal 539 (540).
('10) 6 Ind Cas 148 (148, 149) (Cal).
('04) 31 Cal 207 (209).
(1900) 27 Cal 414 (415).
('26) AIR 1926 Lah 109 (109).
('07) 1907 Pun Re No. 25, page 99.
('88) 11 Mad 319 (321).
('07) 10 Oudh Cas 353 (354).

12. ('32) AIR 1932 Cal 203 (204).

confirming the sale — But it seems that his adjudication was before the sale and not afterwards as in the case adumbrated in the above proposition.)]

Note 51

1. ('24) AIR 1924 All 693 (699).
('30) AIR 1930 Pat 58 (60).
('24) AIR 1924 Pat 785 (786).
('01) 24 Mad 311 (315).
('76) 9 Mad 145 (146).
('37) AIR 1937 Pat 357 (359).
2. ('93) 20 Cal 8 (11) : 19 Ind App 154 (PC).
3. ('33) AIR 1933 All 137 (138).
4. ('37) AIR 1937 Pat 101 (105) (Advertising sale on certain day but actually holding it one day afterwards does not amount to material irregularity owing to Rr. 14 and 15, Patna High Court General Rules.)

meaning of S. 115, C. P. C.)
('37) AIR 1937 Cal 7 (8). (There is failure to exercise jurisdiction by lower Court in such a case.)
6. ('32) AIR 1932 All 140 (140).
('29) AIR 1929 Bom 198 (199).
('28) AIR 1928 Cal 189 (190) (Erroneous view of limitation.)
('26) AIR 1926 Cal 773 (774, 775, 778) : 53 Cal 679 (Refusal to restore an application dismissed for default.)

O. 21 R. 90 Note 51 under this rule for default is not open to revision, since the order is appealable[7] See also the undermentioned cases[8]

It is not open to the petitioner to urge a new point in revision which was not taken in the Court below[9]

O. 21 R. 91

Application by purchaser to set aside sale on ground of judgment debtor having no saleable interest

R. 91. [S. 313] The purchaser at any such sale in execution of a decree may apply to the Court to set aside the sale, on the ground that the judgment-debtor had no saleable interest in the property sold.

[1877, S 313]

Synopsis

1 Scope of the Rule
2 Saleable interest
3 Who may apply under this Rule
 4 Necessary parties to application
 5 Limitation
6 To what Court application should be made where execution is transferred to Collector
7 Notice See Rule 92 proviso
8 Compensation for loss of property bought at court sale.
9 Suit for refund of purchase money where there is no saleable interest See Notes to Order 21 Rule 93
10 Appeal

Other Topics (miscellaneous)

No warranty of title in court sales See Notes 1 and 8
Remedies open to purchaser See Notes 1 and 8.
Rule inapplicable to purchaser knowing want of saleable interest at sale itself See Note 1

1. Scope of the Rule. — The general principle is that a court sale carries with it no guarantee that the property is the property of the judgment debtor the auction purchaser takes the risk and bears the loss if it is subsequently discovered not to be

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(95) 22 Cal 802 (805)
(94) 21 Cal 799 (806)
(31) AIR 1931 Cal 425 (426)
(70) 13 Suth W R 250 (251) (Absence of specific ...tion—Court treating it as an

8 (31) AIR 1931 ...
(29) AIR 1929 All 793 (793) 51 All 1023
(25) AIR 1928 All 354 (354)
(26) AIR 19 6 All 305 (306) 48 All 256
(93) 15 All 407 (403)
(29) AIR 1929 Cal 736 (737)
(26) AIR 19 6 Cal 90 (91)
(21) AIR 19 1 Cal 251 (252) 48 Cal 119
(24) AIR 1928 Lah 414 (41.)

(78) 2 Mad 264 (269)
(29 ... (590)
(35 ...
sal
—
diction—notice —
(38) AIR ... (1949) 17 Pat 10...
R 90 (P...
tion for ...
rity ins...
to it and refusing—Dismissal of ...
set aside sale for failure to make deposit—Appeal
—Order refusing to accept security—Revision is maintainable)
(39) AIR 1939 Lah 222 (222) (Objection to sale ... Court owing to ...

[See also (12) 13 Ind Cas 147 (148) ...
(31) AIR 1931 Pat 63 (64)
(24) AIR 1924 Nag 293 (294)]
9 (22) AIR 1922 Lah 35 (36)
(25) AIR 1925 Pat 461 (461)

the property of the judgment debtor A sale in execution of a decree is therefore not void, so far as the purchaser is concerned, by reason of the fact that the property sold does not belong to the judgment debtor [1] This rule may be considered an exception to the general principle in that it allows an auction purchaser to set aside a sale by an application under this rule, on the ground that the judgment debtor had no saleable interest in the property sold. The distinction between this rule and Rule 90 is that while the latter provides for the setting aside of a sale for irregularities in the proceedings *which have led up to the sale*, this rule applies to an entirely different state of affairs and comes into operation in those cases where in spite of the prescribed procedure having been *regularly followed* property has been sold in which the judgment debtor had no saleable interest [2] The object of the rule is to provide a quick and inexpensive remedy in such cases by which the auction purchaser could get out of his difficulty [3] But the rule is intended for the protection of an *innocent* auction-purchaser where therefore, the purchaser *knew* at the time of the sale that the judgment debtor had no saleable interest in the property sold,[4] or where the purchaser has abused the process of the Court for a fraudulent purpose and has not acted in good faith,[5] he is not entitled to the benefit of the provisions of this rule

It follows from what has been stated above that an auction sale cannot be set aside on the ground of want of a saleable interest in the judgment debtor, except by an application under this rule within the period of limitation prescribed therefor [6] Where therefore no application under this rule is filed within time and the sale is confirmed under Rule 92 the auction purchaser cannot treat the sale as void or (where he is the decree holder) apply for execution again on the ground that he has subsequently discovered that the judgment debtor had no saleable interest in the property sold This is the view of the High Court of Madras [7] The High Court of Patna has however held in the undermentioned cases[8] that the proposition that no judicial sale can be set aside for want of saleable interest in the judgment debtor, except by a resort to the procedure of Order 21, is not well founded, it has accordingly held that where, in a suit to which both the auction purchaser and the judgment debtor were parties, the auction sale has been declared to be invalid as against a stranger, the sale must, in effect, be taken to have been set aside, and the auction purchaser, if he is the decree holder, can again apply for execution But the same High Court has held in the undermentioned Full Bench decision[9] distinguishing the above cases, that

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Order 21 Rule 91 — Note 1

(39) AIR 1939 Nag 179 (182) I L R (1939) Nag 357

discovery of a defect in the title of the judgment

purchaser)

real owner)]

2 (33) AIR 1933 Pat 435 (440) 12 Pat 665 (FB)

. 309

O. 21 R. 91
Notes 1–2

once a sale has been *confirmed*, it will not be open to the decree holder auction purchaser to apply for execution again on the ground that the judgment debtor had no saleable interest in the property The Allahabad High Court has also held the same view[10]

So also, except by following the procedure laid down in this rule and in Rule 93 *infra*, an auction purchaser cannot recover the purchase money paid by him on the ground that the judgment debtor had no saleable interest in the property[11] See for fuller discussion, Notes to Rule 93, *infra*

Where a sale in execution of a decree is set aside on the ground that the judgment debtor had no saleable interest in the property sold, the execution proceedings are revived and the decree holder can file an application for execution again within three years of the judgment of the Court setting aside the sale[12]

This rule does not apply to sales held under the Bengal Tenancy Act 1885[13] or to sales under the Orissa Tenancy Act, II of 1913 [Section 228, sub section (3)], or to proceedings under the Madras Estates Land Act, I of 1908 [Section 192 sub section (a)] It does not also apply to sales held by the Registrar under Chapter 27 of the Calcutta High Court Rules[14]

This rule is applicable to proceedings under the Chota Nagpur Tenancy Act see Rule 95 Note 1, *infra*

Where after a sale in execution of a decree, a third party files a suit for a declaration that the properties belong to him, and the purchaser thereupon files an application that he should be allowed to pay the purchase money after the decision of the declaratory suit, it has been held that such an application is not one under this rule and is not justified by any provision in the Code[15]

2. Saleable interest. — The words "no saleable interest" in this rule mean "nothing to sell" and are not intended to be confined to cases where a judgment debtor's interest is unsaleable either by prohibition of law or for some other reason[1] Where there is a total failure of consideration for the price paid by the purchaser at a court sale by reason of the fact that the judgment debtor has no saleable interest whatever in the property sold, the sale can be set aside on an application under this rule[2] But where the judgment debtor has some saleable interest however small it may be, the purchaser buys at his own risk and, there being no warranty that the property sold shall answer to the description given of it, the sale cannot be set

10 (38) AIR 1938 All 593 (601) ILR (1938) All 922 (FB) (Order confirming sale is *res judicata* between decree-holder auction purchaser and judgment debtor and former cannot re open matter by application for further execution or by any other means)
[*See also* (35) AIR 1935 All 910 (911)]

11 (38) AIR 1938 Pat 447 (449) (No inherent power under S 151, C P C, to grant refund without setting aside sale)
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(39) AIR 1939 Cal 310 (312) ILR (1939) 1 Cal 452 (Suit or application under S 151 C P C not maintainable)
(37) AIR 1937 All 18 (19)
(38) AIR 1938 All 593 (601) I L R (1938) All 922 (FB) (Suit for refund of purchase money not maintainable)
(38) AIR 1938 Cal 263 (268) ILR (1939) 1 Cal 519 (D)
(Do)

12 [illegible]

13. (26) AIR 1926 Cal 738 (739 740) (S 174 excludes such applicability)

14 (29) AIR 1929 Cal 207 (208)

15 (31) AIR 1931 Lah 244 (245)

Note 2

1 (83) 5 All 577 (585 588) (FB)
2 (13) 21 Ind Cas 774 (776) (Cal)
(83) 9 Cal 217 (220)
(80) 6 Cal L Rep 85 (90)
(25) AIR 1925 Sind 193 (194) 17 Sind L R 251

aside under this rule[3] Thus, where in a court sale several parcels of immovable properties are sold in one lot and it is found that the judgment debtor has a saleable interest in one of such parcels and none in others, this rule does not apply[4] The fact that it is found that the property sold is subject to a mortgage does not mean that the debtor has no saleable interest,[5] and this is so even if the amount due under the encumbrance exceeds the value of the property[6]

The saleable interest contemplated by this rule is the interest *on the date of sale*[7] Thus, where a decree for foreclosure of certain mortgaged properties allowed time till 20th July 1883 to the mortgagor to redeem and the property was sold in execution of a money decree on 30th June 1883, it was held that the fact that before the *confirmation* of the sale the judgment debtor had lost his interest was immaterial and that this rule did not apply, inasmuch as on the date of sale he had a saleable interest[8]

See also Note 5 to Section 60, *ante*

3. Who may apply under this Rule. — It is only the *auction purchaser* who is entitled to apply under this rule[1] The judgment debtor cannot apply under this rule[2] But a decree holder auction purchaser can apply under this rule[3] Where the purchase is made by an executor of the deceased judgment debtor in his personal capacity, he is not debarred from applying under this rule, even though he had applied under Rule 90 in the capacity of executor[4]

4. Necessary parties to application. — A person alleged by the auction-purchaser to be the real owner of the property is not a necessary party to an application under this rule as he is not a person who will be affected by the order[1] See also Notes to Rule 92 *infra*

5. Limitation. — An application under this rule is governed by Article 166 of the Limitation Act and must be made within thirty days of the date of the sale[1]

6. To what Court application should be made where execution is transferred to Collector — Where a decree is transferred for execution to the Collector, an application under this rule should be made to the Civil Court and not to the Collector[1] See also Rule 91A added by the Bombay High Court

3 ('13) 21 Ind Cas 774 (776) (Cal)
('09) 3 Ind Cas 438 (439) (Cal)
('01) 28 Cal 235 (237)

4. ('12) 15 Ind Cas 109 (110) (Mad)
('14) AIR 1914 Low Bur 142 (142)
5 ('83) 9 Cal 506 (507)
('18) AIR 1918 Pat 636 (637) 3 Pat L Jour 516
[But see ('81) 8 Cal L Rep 468 (470)]
6 ('8?) 9 All 167 (168)
7. ('25) AIR 1925 Sind 193 (195) 17 Sind L R 291
('05) 2 Cal L Jour 506 (507) (Purchaser after default in payment of revenue cannot apply in the event of a subsequent revenue sale.)
8 ('84) 1884 All W N 318 (318)

Note 3

1 ('05) 1 Nag L R 167 (168)
2. ('07) 29 All 612 (613)
3 ('35) AIR 1935 Mad 340 (341) (His only remedy is to apply under this rule)
('35) AIR 1935 All 910 (911)
4 ('15) AIR 1915 Cal 536 (539)

Note 4

1 ('14) AIR 1914 Mad 318 (319)

Note 5

1. ('27) AIR 1927 Mad 394 (395) 50 Mad 639
('27) AIR 1927 Mad 635 (636, 638)

Note 6

1. ('87) 9 All 43 (45)
('89) 11 All 94 (96)

O.21 R.91
Notes 7-8

7. Notice. — See Rule 92, proviso

8. Compensation for loss of property bought at court-sale. — As has been seen in Note 1 above, there is no warranty of title in court sales[1] The reason is as observed by Peacock, C J "A purchaser at a sale in execution knows that all that he purchases is the right and title of the judgment debtor He knows that no one guarantees to him that the judgment debtor has a good title and he purchases the property with his eyes open, and he regulates the price which he bids for the land with reference to the circumstances under which he is purchasing, and the risk he runs"[2]

Now, suppose that, subsequent to the sale, the auction purchaser finds that the judgment debtor has title only to a portion of the property, that is to say, that he has only a fractional interest It has been already mentioned in Note 2 *ante*, that to such a case this rule does not apply Has the purchaser got any other remedy? On the principle mentioned above, he cannot claim to recover a proportionate part of the purchase money by way of compensation either by an application in the execution proceedings[3] or by a separate suit[4] Where the purchaser is induced by *misrepresentation or fraudulent concealment* to buy the property for a price much more than it is really worth the purchaser has no remedy under this rule[5] He can, however, recover compensation in a *separate suit*[6]

It has been held by the High Court of Calcutta[7] that in the case of execution sales held by the Registrar on the original side of that Court, the purchaser is entitled to recover compensation for deficiency of the interest of the judgment debtor See also Note 1 above

An execution sale is also liable to be set aside on account of the misrepresentations of the officer conducting the sale, which has led to a useless property being sold for a high price[8] The reason is that it is incumbent on the Court to be scrupulous in

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1. [illegible]
('38) AIR 1938 Oudh 84 (86) 13 Luck 746 (Auction purchaser therefore cannot assume the position of *bona fide* transferee without notice)
('34) AIR 1934 Pat 683 (685)
('38) AIR 1938 Pat 447 (449)

2. ('69) 12 Suth W R 8 (10) (FB)
[*See also* ('37) AIR 1937 All 18 (19)]

3. ('31) AIR 1931 All 377 (378) 53 All 496
(1900) 27 Cal 264 (268)
('21) AIR 1921 Cal 115 (117)
('80) 1880 Pun Re No 16, p 37
[**But see** ('33) AIR 1933 All 218 (220, 221) 55 All 221 (Rule of *caveat emptor* is not to be extended to case where purchaser is decree holder and sale is found to be nullity in another suit)]

4. ('21) AIR 1921 All 223 (224)
('05) 27 All 537 (539)
('01) 23 All 355 (357, 358)
('80) 2 All 828 (829 830)
('16) AIR 1916 Mad 622 (623)
('94) 17 Mad 228 (231)
('19) AIR 1919 Lah 253 (254) 1919 Pun Re No 52
('79) 1879 Pun Re No 131 page 355
[*See also* ('20) AIR 1920 Mad 316 (317) 43 Mad 309]
[**But see** ('71) 3 N W P H C R 67 (69)]

5. ('93) 20 Cal 8 (10, 11) 19 Ind App 154 (PC)
('15) AIR 1915 Cal 548 (550)
('84) 10 Cal 368 (372)

6. ('09) 3 Ind Cas 438 (439 440) (Cal)
[illegible]
[*See* ('14) AIR 1914 Low Bur 142 (142) (... cannot recover when he is not misled by such [illegible]

7. ('02) 29 Cal 420 (426)
[*See* ('02) 29 Cal 370 (374)]

8. ('09) 1 Ind Cas 122 (123 124) 36 Ind App 32 36 Cal 323 (PC)
[*See also* ('18) AIR 1918 Bom 59 (63)]

the extreme and to be very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its officers. O. 21 R. 91 Notes 8-10

9. Suit for refund of purchase money where there is no saleable interest. — See Notes to Order 21 Rule 93 *infra*

10 Appeal. — Under Order 43 Rule 1 clause (j) an appeal lies against an order setting aside or refusing to set aside a sale under Rule 92 read with this rule

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Local Amendment

BOMBAY

The following shall be added as Rule 91A

91A Where the execution of a decree has been transferred to the Collector and the sale has been conducted by the Collector or by an officer subordinate to the Collector an application under Rules 89, 90 or 91 and in the case of an application under Rule 89 the deposit required by that rule if made to the Collector or the officer to whom the decree is referred for execution in accordance with any rule framed by the Local Government under Section 70 of the Code shall be deemed to have been made to or in the Court within the meaning of Rules 89, 90 and 91 [1] O 21 R. 91A (Bombay)

R. 92. [Ss 312, 314] *(1)* Where no application is made under rule 89, rule 90 or rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale,[12] and thereupon the sale shall become absolute O. 21 R. 92

Sale when to become absolute or be set aside

(2) Where such application is made and allowed, and where, in the case of an application under rule 89, the deposit required by that rule is made within thirty days[3] from the date of sale, the Court shall make an order setting aside the sale :

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby [4]

(3) No suit[5] to set aside an order made under this rule shall be brought by any person against whom such order is made.

[1877, Ss 312, 314; 1859, Ss 256, 257]

Local Amendments

ALLAHABAD

In sub rule (1) *after* the words the Court shall, *insert* the words subject to the provisions of Rule 58 (2)

MADRAS

In sub rule (2) *after* the words within thirty days from the date of sale *insert* the following words

and in case where the amount deposited has been diminished owing to any

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O 21 R 91A (Bombay)

1 (38) AIR 1938 Bom 203 (209) (There is nothing to compel an applicant to make his application to the Collector rather than to the Civil Court)

O 21 R 92
Notes 1-2

cause not within the control of the depositor such deficiency has been made good within such time as may be fixed by the Court

NAGPUR

In sub rule (1) *after* the word make *insert* the words subject to the provisions of Rule 58 (2)

OUDH

In sub rule (1) *after* the words the Court shall *insert* the words subject to the provisions of Rule 58 (2)

PATNA

In sub rule (1), *after* the words the Court shall *insert* the words subject to the *provisions of Rule 58 (2)*

Synopsis

1 Legislative changes —

1 Under Section 312 of the old Code the Court was bound to confirm the sale only if no application under Section 311 (now Rule 90) had been made or if such application is made and disallowed Under the present rule the Court should confirm the sale only where no application is made under Rules 89 90 or 91 or where such application is made and disallowed

2 The words as regards the parties to the suit which occurred in the first paragraph of Section 312 of the old Code have been omitted See the undermentioned case[1]

3 The words on the ground of such irregularity after the words no suit to set aside in the last paragraph of Section 312 corresponding to sub rule (3) have been omitted

2 Scope of the Rule — This rule provides for the confirmation of sale in certain cases and for the setting aside of sale in certain other cases A sale should be *confirmed* where no application is made under Rules 89 90 or 91 or where such

Order 21 Rule 92 — Note 1

1 (1900) 1 Low Bur Rul 53 (54)

application is made and disallowed It is the duty of the Court in such cases to confirm the sale,[1] even without an application by, or the presence of, the party concerned[2] Where the purchaser is a stranger, the Court cannot refuse to confirm the sale on the ground that the decree has been subsequently adjusted by the decree holder and judgment debtor[3] Upon confirmation the sale will become absolute[4] The rule requires an *order confirming the sale* *In the absence of such order, the sale will not automatically get confirmed* merely because no application to set aside the sale has been made within the period of limitation or an application has been made and disallowed[5] It has, however, been held that an *express* order of confirmation is not necessary[6]

A sale should be *set aside* under this rule where an application under Rules 89, 90 or 91 is made and allowed But this does not mean that the Court has no power to set aside an execution sale on any ground whatever in the absence of such an application Thus under Section 47 of the Code the Court can at any time before the sale is confirmed take notice of an objection by the judgment debtor that the property is not liable to sale and refuse to confirm the sale[7] Under its *inherent powers*, the Court can refuse to confirm the sale or can set it aside where it has been misled by

Note 2

1. ('26) AIR 1926 Mad 12 (14, 15)
('34) AIR 1934 Lah 146 (146) (No irregularity in publishing and conducting sale — Executing Court cannot refuse to confirm sale.)
('93) 20 Cal 8 (11) 19 Ind App 154 (PC)
('76) 3 Ind App 230 (236) (PC)
('99) 21 All 140 (141)
('96) 18 All 141 (14[illegible])
('84) 8 Bom 424 [illegible]
('9[illegible]) 24 Cal 682 ([illegible])
('73) 19 Suth W R 2[illegible]7 (2[illegible])
[illegible]
[illegible]
('25) AIR 1925 Rang 271 (273) 3 Rang 132
('27) AIR 1927 Lah 71 (72)
[illegible]

3 ('34) AIR 1934 Lah 508 (509) 15 Lah 801
('31) AIR 1931 PC 33 (34) 58 Ind App 50 27 Nag L R 95 (PC) (Adjustment between decree holder and judgment debtor after execution sale—Court cannot refuse to confirm the sale on the ground of adjustment—AIR 1922 Nag 248 and AIR 1928 Nag 43, Overruled)
See also Notes to Rules 2 and 89 ante, and the following cases
('31) AIR 1931 Rang 148 (149) 9 Rang 104 (*Held* that Court ought not to stay confirmation)
('28) AIR 1928 Nag 265 (272) 24 Nag L R 137 (F B) (Court cannot confirm sale where purchaser is decree holder, but it can confirm where purchaser is a third party)
('26) AIR 1926 Nag 299 (300) (Does not affect a
[illegible]
der
[illegible]

6. ('27) AIR 1927 Cal 881 (882)
('15) AIR 1915 Lah 9 (9) 1915 Pun Re No 81.
7. ('39) AIR 1939 Lah 113 (115) I L R (1939) Lah 103
('39) AIR 1939 All 368 (369) I L R (1939) All 395 (Legal representative of judgment debtor failing to object in execution proceedings that property sought to be sold or sold is his personal
[illegible]
in execution take an objection to the executability of such a decree under S 47 within 30 days of the sale of the property of the puisne mortgagees, and relief cannot be refused to him)]

O. 21 R 92 Note 2

the decree holder or where there has been abuse of the process of Court,[8] or where the decree has been reversed before the date of confirmation of the sale[9] Similarly, a sale can be set aside on the ground that before the sale the decree had been adjusted between the parties although the fact of such adjustment is brought to the notice of the Court only after the sale[10] (See also Note 2 to Section 151) But a sale is not liable to be set aside merely on the ground that the application for execution was time barred,[11] or on the ground that the decree has been amended[12] Similarly the inherent power of the Court cannot be invoked where there is another remedy available for getting the sale set aside[13] The Court has also no jurisdiction to set aside a sale under Section 151 of the Code on the application of a *third* party alleging that owing to the conduct of another third party he was misled and therefore did not attend and could not bid at the auction of the property[14 15] As to the effect of the reversal of a decree on the rights of the auction purchaser see Note 13 to Section 144

This rule relates only to cases of valid sale where no application is made under Rules 89 90 and 91 or where such application is made and disallowed It has no application to cases where the sale is a nullity[16] In such cases the Court can declare the sale to be void[17]

Where an application is made to set aside a sale under the inherent powers of the Court[18] or where an application is made under Rule 90 after the expiry of thirty days from the date of the sale relying on Section 18 of the Limitation Act[19] the fact that the sale has been confirmed is no bar to the maintainability of the application

Where a sale is set aside and, in the meanwhile the purchaser has obtained possession of the properties the Court has got inherent power to order restitution to be made[20] See also Note 34 to Section 144

A decree holder is entitled to interest on the decretal amount up to the date of confirmation inasmuch as he is not bound to withdraw the money deposited by the

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8 (23) AIR 1923 Mad 635 (636 638) 46 Mad 583
(33) AIR 1933 Mad 399 (401) (Sale in contravention of direction of Court)
(30) AIR 1930 Lah 208 (210)
(15) AIR 1915 Oudh 140 (142)
(81) 6 Cal 103 (106)
(72) 18 Suth W R 11 (12)
(72) 18 Suth W R 333 (334)
(30) AIR 1930 Lah 793 (794)
(80) 2 Mad 264 (269)
(26) AIR 1926 Nag 17 (18) 24 Nag L R 48
(25) AIR 1925 Sind 253 (254) 18 Sind L R 130
See also Note 2 to Section 151
[*See* (29) AIR 1929 All 485 (491 492) (Where the remedy is time barred it cannot be given by the use of inherent powers)]

9 (20) AIR 1920 Cal 99 (101)
(21) AIR 1921 Nag 121 (122)
[*See also* (25) AIR 1925 Nag 60 (61) 20 Nag L R 168)]

10 (39) AIR 1939 Lah 326 (327) 41 Pun L R 220 (221)

11 (13) 19 Ind Cas 377 (378) (Cal)
(65) 11 Cal 3 6 (378)
(81) 7 Cal 91 (96)
(83) 6 Mad 237 (238)
(1) AIR 1917 Pat 467 (467) 2 Pat L Jour 157
[But see (70) 13 Suth W R 273 (275)
(38) AIR 1938 All 89 (90)]

12 (25) AIR 1925 All 264 (266)
[S [illegible] ting aside [illegible]]

13 (38) AIR 1938 Rang 433 (435) (Where a [illegible] 39 90 or inherent [illegible] al und r [illegible] Punjab Alienation of Land Act — As Act itself provides for remedy inherent power of Court cannot be invoked)

14 15 (39) AIR 1939 Cal 161 (162)

16 (33) AIR 1933 Mad 593 (605) 56 Mad 803

17 (36) AIR 1936 Mad 205 (214) 59 Mad 461 (F B) (Judgment debtor dead — *Property* sold without impleading his legal representatives— Sale is void)

18 (24) AIR 1924 All 261 (262) 46 All 193
(98) 26 Cal 7 7 (731)
(02) 6 Cal W N 283 (285)

19 (23) AIR 1923 All 232 (234) 45 All 316

20 (30) AIR 1930 Pat 260 (231 232) 9 Pat 635
(18) AIR 1918 Pat 52 (53) 2 Pat L Jour 206
[*See* (05) 8 Oudh Cas 254 (256)]

auction purchaser before the sale is confirmed [21]

The effect of an order setting aside the sale is to remit the parties to the position in which they stood before the date of the sale [22]

Section 21 of the Central Provinces Debt Conciliation Act II of 1933 does not preclude the Court from confirming an execution sale held prior to an application made by the debtor under Section 4 of the Act [23]

2a Court, meaning of — The word Court in this rule means the Court which held the sale [1]

3. Deposit made within thirty days — See Notes to Order 21 Rule 89

4 Necessary parties and notice to them. — It has been seen in the Notes to Rules 89 90 and 91 that an application under these rules to set aside the sale must be made within thirty days of the date of the sale under Article 166 of the Limitation Act If no such application is made within time the sale cannot be set aside under this rule [1]

Before an order setting aside a sale under this rule is made it is essential that notice of the application should be given to all persons affected by the order thereon [2] Thus notice must be given to the auction purchaser [3] An order setting aside the sale, made without giving such persons an opportunity of being heard is according to the High Courts of Madras and Patna without jurisdiction [4] According to the High Court of Calcutta such an order is not a nullity and if the person affected does not impugn the validity of the order in a proceeding directed against it he cannot attack it collaterally in any other proceeding [5] The Peshawar Judicial Commissioner s Court has held that the omission to issue notice under this rule makes the order setting aside the sale illegal [6] Where on an agreement between the decree holder and *some* of the judgment debtors the Court settled a sale with X and confirmed it on the same date without notice to the other judgment debtors it was held by the High Court of

(38) AIR 1938 Cal 362 (363) (The debt which was extinguished by the sale is revived as soon as the sale is set aside)

23 (38) AIR 1938 Nag 2 3 (275) ILR (1939) Nag 104
[*See also* (37) AIR 1937 Nag 98 (99) (Executing Court cannot refuse to confirm sale on ground that after the sale the Debt Conciliation Board issues a certificate under S 15 (1) of the Act)]

Note 2a

1 (34) AIR 1934 Cal 822 (823)

Note 4

(96) 1 Cal W N 161n
(21) AIR 1921 Lah 156 (157)

(23) AIR 1923 Pat 353 (353)
(24) AIR 1924 Pat 507 (509)
(25) AIR 1925 Cal 157 (158) (If a party has actual notice the absence of formal notice does not vitiate the proceedings)
(12) 14 Ind Cas 67 (69) 39 Cal 687

however there is a conflict of decisions for which see Note 6 to R 90)

4 (16) 32 Ind Cas 591 (593) (Mad)
(21) AIR 1921 Pat 293 (94)

5 (33) AIR 1933 Cal 464 (466)
(28) AIR 1928 Cal 96 (68) (It is only a wrong order)

6 (38) AIR 1938 Pesh 14 (15) (Notice not given to auction purchaser—Order set aside on appeal by him)

O. 21 R. 92
Notes 4–5

Allahabad that the proceedings were materially irregular and that the sale should be set aside[7] But in any case it is not necessary that the notice should be given *within thirty days* of the date of the sale[8]

It is not necessary that the persons who would be affected by an order under this rule need be described as parties in the application it is sufficient if the notice required by this rule is given to them.[9] Certain decisions, however, hold that such persons are *necessary parties*[10] Where an application to set aside a sale was made *bona fide* impleading the decree holder as a party, but he was dead on the date of the application, and his legal representative was brought on the record after the expiry of the period of limitation, it was held in the undermentioned case[11] that the application would not be defeated by reason of the fact that the legal representative of the decree holder was not impleaded within the period of limitation

Where the auction purchaser is alleged to be a *benamidar* for a third party, it is not necessary to give notice to the latter under this rule[12] Persons who have applied for rateable distribution in the proceeds of an execution sale have no such direct or proximate interest as would entitle them to notice under this rule[13]

5. Suit to set aside or restore sale.—Section 312 of the old Code provided in the last paragraph thereof that "no suit to set aside on the ground of such irregularity, an order passed under this Section shall be brought " etc In the undermentioned cases[1] these words were interpreted as not including suits to *confirm* the sale which had been set aside under Section 312 These cases are now no longer law in view of the alteration effected in sub rule (3) of the present rule which enacts that "no suit to set aside *an order made under this rule* shall be brought," etc

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7 (29) AIR 1929 All 671 (672)
8 (13) 19 Ind Cas 475 (476) 37 Bom 387
(28) AIR 1928 Lah 413 (414)

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(22) AIR 1922 Oudh 129 (130)
(30) AIR 1930 All 167 (168)
(35) AIR 1935 Cal 502 (503) 62 Cal 286 (Application not bad in form because notice has not

(24) AIR 1924 Pat 37 (37 38) 2 Pat 800
(14) AIR 1914 Oudh 307 (307) 25 Ind Cas 907

(37) 167 Ind Cas 166 (166) (Lah) (Auction purchaser is necessary party)
11. (32) AIR 1932 Cal 733 (733)
12. (02) 29 Cal 682 (686)
[See also (23) AIR 1923 All 462 (463)]

to rateable distribution is entitled to notice under this rule)]

Note 5

1. (98) 20 All 379 (381, 382) (F B) (Overruling 18 All 437)
(03) 25 All 355 (357)
(81) 3 All 554 (558, 561) (F B)
(88) 1888 All W N 248 (248)
(87) 9 All 602 (604)
(91) 1891 All W N 41 (42)
(81) 3 All 701 (704)
(81) 3 All 206 (210)
(76) 1 All 374 (377)
(95) 19 Bom 216 (219, 220)
[*See also* (69) 1 N W P H C R 61 (63) (*Held* that the order was not under Ss. 256, 257 and could not be regarded as bar to the suit)]

A suit to set aside an execution sale on grounds covered by Rules 89 90 and 91 is barred by sub rule (3),[2] inasmuch as the suit would in effect be one to set aside an order under this rule

A suit to set aside a sale in execution on grounds other than those covered by Rules 89, 90 and 91 is not within the prohibition of sub rule (3) and is, therefore, not barred by it [3] Thus, where the decree and the sale are attacked on the ground of fraud (not covered by Rule 90)[4] or where the sale is attacked on the ground of want of jurisdiction,[5] a suit to set aside such a sale on those grounds is not barred by this rule Where in execution of a mortgage decree a property not included in the mortgage was sold, a suit by the mortgagor to recover possession of the property from the mortgagee purchaser was held not to be barred by this rule [6]

The rules relating to the execution of decrees under this Code do not apply to

(16) AIR 1916 All 184 (185)
(85) 7 All 450 (454)
(83) 1883 All W N 264 (264)
(81) 1881 All W N 38 (39)
(02) 26 Bom 40 (42)
('19) AIR 1919 Cal 411 (413)
(15) AIR 1915 Mad 150 (155)
(89) 16 Cal 33 (40)
(73) 19 Suth W R 414 (416)
(29) AIR 1929 Lah 618 (619)
(26) AIR 19.. Lah 1.. (1..) 7 Lah 1
(28) AIR 1928 Mad 1138 (1139)
(21) AIR 1921 Mad 121 (121) 44 Mad 351
(29) AIR 1929 Nag 130 (131) 25 Nag L R 58
(26) AIR 1926 Oudh 45 (46)

tion purchaser for refund of purchase money on ground that judgment debtor had no saleable interest in the property is maintainable)
(38) 68 Cal L Jour 431 (433)
(37) AIR 1937 Nag 140 (142)
(35) AIR 1935 All 470 (473) 57 All 690
(35) AIR 1935 Cal 356 (357)
[*See* (92) 19 Cal 341 (345)
(91) 18 Cal 139 (143)
(84) 10 Cal 496 (500)

3 See cases in points 4 to 6 *infra*
(32) AIR 1932 Cal 126 (128) 59 Cal 117 (The sub rule however has no application here what is prayed for in the suit is not the setting aside of the order confirming the sale but certain declarations the nature of which has already been set out and also an injunction as regards the taking of possession)

(25) AIR 1925 Pat 376 (378) (The rule does not apply when the property for possession of which the judgment debtor sued was never sold at all but was wrongly taken possession of by the auction purchaser)
(85) 7 All 450 (452)
(69) 12 Suth W R 41 (42)
(11) 11 Ind Cas 399 (401) (PC) (So assumed)
[*See also* (83) 11 Cal 135 (138) 11 Ind App 234 (PC)
(35) AIR 1935 All 470 (475) 57 All 690 (Where a decree in execution of which the sale took place is itself found to be invalid, or where it is found that the sale officer had no authority to sell the property the remedy of a separate suit would not be barred)]
[**See however** (38) AIR 1938 Lah 690 (691) (In this case a suit by judgment-debtor to set aside sale on an allegation of fraud not covered by R. 90 was held to be barred by S 47)]

ds ot

(34) AIR 1934 Lah 400 (400) (Declaratory suit by stranger purchaser on ground of fraud not barred by a prior dismissed application under O 21 R 90 for the same relief)
(25) AIR 1925 All 146 (150, 154) 47 All 217
(97) 24 Cal 546 (548)
(69) 11 Suth W R 297 (298)
(35) AIR 1935 All 470 (475) 57 All 690 (Decree itself attacked as invalid — Remedy of separate suit not barred)

suit not barred)]
6 (28) AIR 1928 All 363 (364, 365) 50 All 686
(29) AIR 1929 All 673 (673)

O.21 R 92
Notes 5-7

insolvency proceedings therefore a suit questioning an order dismissing an application to set aside a sale held by the Insolvency Court is not barred by this rule[7]

It has been held that the auction purchaser can sue for damages for loss suffered by him on account of the fraud practised by the decree holder in regard to the sale[8] See also Note 4 to O 21 R 93 *infra*

An application to set aside a sale was withdrawn on a compromise between the parties and the sale was confirmed Afterwards the compromise was declared by a decree to be void It was held that the effect of this was that the order confirming the sale also became void and the application to set aside the sale should be heard on the merits[9]

6 Plea of irregularity or fraud in defence — Where a party applies under Rule 90 to set aside the sale and the application is dismissed he will in answer to a suit by the purchaser for possession be barred by *res judicata* from impeaching the sale on the same grounds[1] Even if no such application is made such a plea in defence cannot be raised after confirmation of the sale[2] The reason is that the sale becomes absolute and the order confirming the sale amounts to a judicial determination that none of the objections exists upon which the validity of the sale could have been questioned Nor can a third person impeach the title of the auction purchaser on the ground of any alleged irregularities in the execution sale[3]

It has been held in the undermentioned case[4] that the fact that an application under R 89 or R 90 has been dismissed will not preclude the mortgagor judgment debtor from pleading by way of defence in a suit by the auction purchaser for possession that the properties sold were not included either in the mortgage or in the decree thereon

7 Suits to set aside sales under other Acts —

(1) *Public Demands Recovery Act (Bengal Act III of 1913)* — It was held under the repealed Act I of 1895 that this rule did not apply to sales held in enforcement of a certificate under that Act and that a suit to set aside such a sale was maintainable[1] See Section 25 of Act III of 1913

(2) *Bengal Tenancy Act (VIII of 1885)* — It has been held that this rule does not apply to sales held under the Bengal Tenancy Act inasmuch as S 174 thereof contains a complete rule on the subject[2] There is a conflict of opinion as to whether a suit is maintainable to set aside or to confirm such a sale See the cases cited below[3]

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7 (23) AIR 1923 Lah 224 (225)
8 (37) AIR 1937 Pat 532 (533) 16 Pat 196
[*See also* (34) AIR 1934 Lah 400 (400) (Suit
[illegible]
sale property on misrepresentation that the property is subject to a mortgage is barred by sub-rule (3))]
9 (34) AIR 1934 All 433 (434)

Note 6

1 (1) AIR 191" Cal 193 (193)
(09) 3 Ind Cas 24 (25) 31 All 509
(16) AIR 1916 Cal 465 (467)
2 (25) AIR 19 5 Cal 81 (81 82)
(9) AIR 19 9 Cal 3 4 (3 8 3 9) 57 Cal 403 (F B)
3 (27) AIR 1927 Cal 82 (83 84)
4 (21) AIR 1921 Mad 2 9 (250)

Note 7

1 (06) 33 Cal 451 (458)
(05) 32 Cal 1130 (1140)
(02) 29 Cal 94 (98)
(02) 29 Cal 73 (91 93) (F B)
[illegible]
2 (21) AIR 1921 Pat 54 (55) 6 Pat L Jour
3 (91) 18 Cal 481 (483) (No)

As to cases under Bengal Act XI of 1859 and Act X of 1859 see the undermentioned cases[4] O 21 R 92 Notes 7-12

(3) *Madras Estates Land Act (I of 1908)* — A suit will lie to set aside a sale held under the Madras Estates Land Act[5]

8. Limitation for suits to set aside sales — In cases not covered by this rule and to which the bar under sub rule (3) does not apply a suit to set aside an execution sale should be brought within one year from the date of confirmation of sale under Article 12 of the Limitation Act of 1908[1] That Article however does not apply where the sale is a nullity[2] Such a sale does not require to be set aside but may be *declared* to be void A third person whose property has been sold is not bound by the sale and a suit by him for setting aside the sale is not governed by Article 12 of the Limitation Act[3]

9 Court-fee on a plaint in suit to set aside sale — A suit to set aside an auction sale for arrears of revenue is in no sense a suit for a mere declaration without consequential relief[1] The plaint in such a suit should be stamped as if it were a suit for recovery of the property sold[2]

10 Sale by receiver — A sale by a receiver appointed by a Court is not one in execution of a decree and need not be confirmed under this rule[1]

11 Sale held by Collector — Confirmation — The Collector to whom a decree has been transferred for execution is not a Court executing the decree[1] The Civil Court is the proper Court to confirm a sale held by the Collector[2] See Notes 2 4 5 and 6 to Section 50

12 Confirmation before thirty days — No sale can be confirmed or can become absolute under this rule before the expiry of the period of thirty days from the date of the sale[1] A sale becomes complete only where the bid is accepted and

(21) AIR 1921 Pat 54 (5) 6 Pat L Jour 16 (No —Reversing A I R 1919 Pat 240)
(18) AIR 1918 Pat 125 (125) 3 Pat L Jour 122 (Yes)
4 Under Act XI of 1859
(98) 25 Cal 8 6 (8 9) (Revenue sale where there is no arrear of revenue is void and can be set

5 (27) AIR 1927 Mad 1035 (1036 103) 51 Mad 76
(26) AIR 1926 Mad 190 (191) 49 Mad 490

Note 8

1 (01) 25 Bom 337 (351 352) 27 Ind App 216 (PC)
(13) 19 Ind Cas 120 (121) (All)
(95) 23 Cal 775 (785 786) 23 Ind App 45 (PC)
(85) 11 Cal 287 (292)

of fraud is governed by Art 95 and not by Art 12)]
2 (29) AIR 1929 All 673 (673)

(28) AIR 1928 All 363 (365) 50 All 686
(24) AIR 1924 Lah 396 (396 397)
3 (86) 9 Mad 460 (463)

(33) AIR 1933 Lah 10 (11) (Person not party to sale not suing to set aside sale but only contending that his rights are not affected by the sale—Art 12 does not apply)]

Note 9

1 (24) AIR 1924 Cal 31 (32) 51 Cal 216
2 (81) 9 Cal L Rep 231 (232)

Note 10

1 (26) AIR 1926 All 124 (126) 48 All 209

Note 11

1 (25) AIR 1925 All 146 (149) 47 All 217
2 (96) 1896 Pun Re No 63 page 261

Note 12

(36) AIR 1936 Pat 164 (166) (But a petition of compromise between the parties under which the sale is to be confirmed without the auction purchaser having to pay the full purchase-

O. 21 R. 92
Notes 12-13

declaration is made of such bidder being the purchaser [2]

12a. Compromise after sale but before confirmation. — After a sale and before its confirmation the decree holder and judgment debtor came to an arrangement that the judgment debtor should pay the decree amount by 29th December 1930, that the confirmation of the sale should be held over till that date and that if the amount was not paid as agreed the sale should be confirmed without delay Both parties applied to the Court to pass orders accordingly The Court passed orders accordingly and stated 'the darkhast is allowed to be withdrawn for the present" It was held that these words must be taken as amounting only to an order staying the execution till 29th December 1930, and that on the failure of the judgment debtor to pay the amount as agreed the sale should be confirmed [1]

13. Appeal. — An order under this rule setting aside or refusing to set aside an execution sale is appealable under Order 43 Rule 1 (j) of the Code [1] An order *merely* confirming the sale in the absence of an application to set it aside,[2] or an order *refusing* to confirm a sale on the ground that the decree had been satisfied,[3] is not an order setting aside or refusing to set aside a sale and is, therefore, not appealable Similarly, an order setting aside a sale *suo motu* under the Court's *inherent* powers is not one under this rule and is not appealable [4] In the undermentioned case[5] it was held that an order directing the re sale of the property on the failure of the auction purchaser to deposit 25 per cent of the purchase money as required by Rule 84 was covered by this rule and that it was appealable As to whether an appeal lies from an order setting aside or refusing to set aside a sale under the Madras Estates Land Act or the Bengal Tenancy Act or the Agra Tenancy Act, see the undermentioned cases [6]

money may be recorded before the expiry of thirty days)

2 ('34) AIR 1934 Oudh 25 (27) 9 Luck 393

Note 12a

1. ('33) AIR 1933 Bom 358 (359) 57 Bom 616

Note 13

[See ('37) AIR 1937 Pat 672 (672) (An order refusing the application of one of the parties for an order directing the other party to act up to the terms of a compromise whereby the parties had agreed to the postponement of the confirmation of the sale is not open to appeal)]

As to the right of appeal in cases arising under the old Acts see the following decisions

('81) 3 All 316 (320) (No appeal—Decision under the Code of 1877 as amended by Act XII of 1879)

('74) 6 N W P H C R 309 (310) (No appeal—Decision under Act XXIII of 1861)

('78) 1 Cal L Rep 250 (251) (No appeal—Decision under Act of 1859)

4. ('25) AIR 1925 Sind 253 (254) 18 Sind L R 130

5 ('39) AIR 1939 Lah 46 (46) (The auction purchaser in this case was the decree holder himself and therefore it was held that an appeal lay under S 47 also)

6. ('28) AIR 1928 Mad 1107 (1107) (Madras Estates Land Act — No appeal lies)

('19) AIR 1919 Cal 921 (921) (Bengal Tenancy Act — No appeal lies)

('05) 2 All L Jour 130 (131) (Agra Tenancy Act — No appeal lies)

No second appeal will lie from an order setting aside or refusing to set aside a sale under this rule[7] See Section 104, sub section (2) As to whether an appeal lies under the Letters Patent against an order under this rule, see Note 50 to Order 21 Rule 90 and the undermentioned cases[8]

In an appeal from an order rejecting an application under this rule to set aside an execution sale, the auction purchaser is a necessary party If he is not made a party, the appeal must be dismissed[9] As to whether the auction purchaser is a necessary party to an appeal against an order *setting aside* a sale, see the undermentioned decision[10]

Where there is an appeal filed against an order refusing to set aside the sale under this rule the sale does not become absolute within the meaning of Article 180 of the Limitation Act until the disposal of the appeal, even though the Court has confirmed the sale[11]

An auction purchaser is a ' party to a proceeding for setting aside a sale and hence, he can appeal from an order passed in such proceeding[12] See also the under mentioned case[13]

14. Appeal to the Privy Council. — See Note 6 to Section 109 and Note 50 to Order 21 Rule 90

15. Step-in-aid of execution. — An application or an objection preferred by the decree holder praying that an application to set aside a sale should not be granted is a step in aid of execution within the meaning of *Article 182 of the Limitation Act*[1] But an application merely asking for a confirmation of sale where no application under Rules 89 90 or 91 is preferred is not a step in aid of execution, inasmuch as it is the duty of the Court to confirm the sale even in the absence of any application for that purpose[2] Nor will the mere act of confirmation by the *Court* amount to a step in aid

lies

(1865) 2 Suth W R Misc 19 (19)
('27) AIR 1927 Lah 808 (809)
('12) 17 Ind Cas 884 (884 885) 8 Nag L R 177.
('17) AIR 1917 Oudh 45 (45)
('18) AIR 1918 Upp Bur 30 (31) 2 Upp Bur Rul

Court setting aside sale — Appellate Court

('37) 167 Ind Cas 166 (167) (Lah)
('36) AIR 1936 Lah 478 (479) (Affirming on Letters Patent Appeal AIR 1935 Lah 802)
[*See also* ('35) AIR 1938 Nag 525 (527)]
[See however ('37) AIR 1937 Lah 263 (265)

12. ('39) AIR 1939 Sind 62 (64) I L R (1939) Kar 417
13. ('36) AIR 1936 Lah 368 (368) (A judgment debtor who was declared insolvent during the sale proceedings has no *locus standi* to appeal from an order confirming the sale)

Note 15

1. ('94) 21 Cal 23 (26)
2. ('04) 31 Cal 1011 (1013)

O.21 R.92 Notes 15-16

by the party [3]

16. Revision. — See Note 24 to Section 115 and the undermentioned cases [1]

O.21 R.93

R. 93. [S. 315.] Where a sale of immoveable property is set aside under rule 92,[2] the purchaser shall be entitled[6] to an order for repayment of his purchase-money, with or without interest[7] as the Court may direct, against any person to whom it has been paid.

Return of purchase-money in certain cases.

[1877, S. 315; 1859, S. 258.]

Synopsis

1. Legislative changes. — Section 315 of the old Code ran as follows —

. . . . his purchase money (with or without interest as the Court may direct) from any person to whom the purchase money has been paid

The repayment of the said purchase-money and of the interest (if any) allowed by the Court may be enforced against such person under the rules provided for by this Code for the execution of a decree for money "

As to the effect of the changes introduced into this rule, see Notes 3 and 4 below

2. "Where a sale of immoveable property is set aside under Rule 92." — This rule applies only where the sale is *set aside under Rule 92* Where a sale is not so set aside, the mere fact that the auction-purchaser finds that the judgment debtor had no saleable interest in the property sold will not entitle him to a refund under

3 ('82) 10 Cal L Rep 330 (330)
('70) 13 Suth W R 315 (315)
('69) 11 Suth W R 117 (117)
('68) 9 Suth W R 100 (101)
('67) 8 Suth W R 359 (360)
('70) 4 Beng L R A C 115 (116)
[But see ('72) 18 Suth W R 156 (157)
('73) 20 Suth W R 31 (33)
('74) 12 Beng L R 500n]

Note 16

1. ('25) AIR 1925 Sind 253 (254) 18 Sind L R 130 (Where sale is set aside under inherent powers a revision lies)
('33) AIR 1933 All 137 (137).
('33) AIR 1933 Lah 100 (100) 13 Lah 701 (Refusal to confirm sale—Revision lies)
('36) AIR 1936 Oudh 172 (172)

this rule[1] Where a sale of immovable property is set aside under Rule 92 *supra* the auction purchaser is entitled to an order under this rule for repayment of the purchase money[2] The decree holder is also entitled to apply for a fresh sale but limitation therefor under Article 181 of the Limitation Act does not begin to run until he is compelled to refund the purchase money[3] Although this rule only applies to cases where the sale is set aside under Rule 92 yet even where the sale is set aside under Section 47, the Court has inherent power to order a refund of the purchase money by the decree holder[4] See also Note 1 below

This rule is applicable to sales for arrears of rent under the Orissa Tenancy Act, II of 1913 Section 228 sub section (2) as well as to sales of immovables under the Chota Nagpur Tenancy Act See Rule 95 *infra*

2a. Right of decree-holder to withdraw purchase-money before confirmation of sale. — This rule implies that the decree holder may be allowed to withdraw the purchase money even before the confirmation of the sale But he cannot claim to do so *as of right* The matter is in the discretion of the Court[1] At the same time he is not *bound* to withdraw the money before the confirmation of the sale and where he is entitled under the decree to interest up to the date of realization of the decretal amount he is entitled to interest up to the date of confirmation[2]

3 Sale set aside for want of saleable interest. — It has been already mentioned in Notes 1 and 8 to Rule 91 *supra*, that there is no warranty of title in court sales The purchaser must be taken to buy the property with all risks and all defects in the judgment debtor's title except as provided by Rule 91 and this rule[1] But this rule as well as Rule 91 will apply only to cases of *entire absence of interest* in the judgment debtor and not to cases where the judgment debtor has *some* interest in the property however small that may be[2]

Under Section 315 of the old Code the purchaser could *apply* for refund of the purchase money even where it was found in a *separate suit* that the judgment debtor had no saleable interest in the property sold[3] The omission of the words where it is found that the judgment debtor has no saleable interest in the present rule,

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Order 21 Rule 93

1 (33) AIR 1933 All 63 (64)
(38) AIR 1938 Pat 447 (4
auction purchaser on finding judgment debtor had no saleable interest to apply for refund arises only after setting aside sale under O 21 R 91—Where such procedure is not followed Court cannot order refund under its inherent powers)
(38) AIR 1938 Pesh 66 (67) (Execution sale confirmed and application by auction purchaser to be put in possession—Possession not given on account of decree passed in favour of another in regular suit claiming property as his own—Auction purchaser cannot apply under this rule for refund of purchase money)
(36) AIR 1936 Mad 50 (55) 59 Mad 202 (F B) (Finding in another suit in which decree and

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Note 2a

1 (15) AIR 1915 Cal 297 (298) (12 Cal 252, Followed)

firmation of the sale)
2 (14) AIR 1914 Cal 210 (211)
(15) AIR 1915 Cal 297 (298)
(38) AIR 1938 Nag 54 (54) I L R (1938) Nag 456

Note 3

on

O. 21 R. 93
Notes 3-4

now makes it clear that the purchaser is not entitled to apply for refund of purchase money unless the sale is set aside *under Rule 92*.[4]

Where a court sale is set aside on an application under Rule 91 *ante* and the auction purchaser thereupon withdraws the money but the sale is subsequently confirmed by the Appellate Court the Court can under its inherent powers compel the auction purchaser to refund the money so withdrawn.[5]

4 Suit for purchase-money in such cases. — Where it is found that the judgment debtor has no saleable interest in the properties sold, can the purchaser institute a suit for refund of purchase money?

Under the Code of 1859 there was no provision for the return of the purchase money in cases where the judgment debtor was found to have no saleable interest. It was therefore, held applying the general principle of *caveat emptor* that a purchaser could not claim to recover the purchase money on the ground that the judgment debtor had no saleable interest.[1] Section 315 of the Code of 1882 gave the purchaser the right to set aside the sale and recover the purchase money where the judgment debtor had no saleable interest in the property sold. That Section also provided that such right may be enforced under the rules provided by this Code for the execution of a decree for money. It was held, however, that the purchaser's remedy was not limited to the procedure prescribed in the execution department but that he could file a separate *suit* for the purchase money.[2]

Material alterations have been made in this rule and there is a conflict of opinion under this Code as to whether a separate suit will lie. The words 'may be enforced etc' have now been omitted and the words the purchaser shall be entitled to an order for repayment of his purchase money have been substituted. It has been held in several decisions that the auction purchaser's right of *suit* has been taken away under this Code and that his only remedy is the one prescribed in Rule 91 *ante* and in this rule.[3] The result according to this view is that where a purchaser finds after the expiry of thirty days from the date of the sale that the judgment debtor has no saleable interest in the property sold he has no remedy whatever. Where however the purchaser is

4 (18) AIR 1918 Mad 1286 (1287)
5 (17) AIR 1917 Pat 495 (497) 2 Pat L Jour 301 (Section 144 does not apply to such a case)

Note 4

1 (80) 2 All 780 (783 784)
(80) 2 All 828 (830)
(74) 6 N W P H C R 168 (170)
(71) 9 Bom H C R 92 (97)
(69) 6 Bom H C R 253 (262)
(67) 4 Bom H C R A C 114 (118)
(69) 12 Suth W R 8 (10) (F B)
(71) 15 Suth W R 196n (196n)
(69) 2 Beng L R A C 82 (83)
[illegible]
tion maintainable Note —This case is dissented from in 2 All 780 above)
(78) 2 All 107 (111)
(67) 2 Agra 50 (51))

ably distributed)
(06) 3 All L Jour 819 (8[illegible]) (Suit *held* maintainable when there has been a total failure of consideration)
(10) 7 Ind Cas 955 (956) 35 Bom 29 (Such suit cognizable by Small Cause Court)
(98) 22 Bom 783 (785)
(06) 8 Bom L R 309 (3[illegible]0) (Suit is cognizable by Court of Small Causes)
(09) 2 Ind Cas 459 (500) 37 Cal 67
(06) 10 Cal W N 274 (275 276)
(03) 7 Cal W N 105 (107)
(01) 5 Cal W N 240 (241)
(96) 1 Cal W N 140 (141) (Suit cognizable by Small Cause Court)
(83) 12 Cal L Rep 331 (332)
(10) 6 Ind Cas 291 (291) (Mad) (Can recover [illegible]
[illegible] cogn[illegible]
5 Lo[illegible]
[illegible]
3 (21) AIR 1921 All 377 (381 384) 43 All 60.

induced to buy the property on account of fraud or misrepresentation or gross neglect of duty on the part of the decree holder he can maintain a suit for the recovery of purchase money[4] The High Court of Lahore and the Chief Court of Oudh have taken the view that Rule 92 *ante* and this rule have no application to a case where the auction purchaser has been deprived of the property purchased by him after the confirmation of the sale owing to the action of a person having paramount title to it and on the ground that the judgment debtor had no saleable interest in it and that in such cases he obtains a right under the *substantive law* for refund of the purchase money and not under this rule[5] A Full Bench of the Madras High Court has also held that where a sale turns out to be futile by a finding in another suit the auction purchaser can sue the decree holder for refund of the purchase money but that his remedy is not by *application* The decision proceeds on the ground that there *is* an implied warranty in court sales to the extent that there is *some* title in the judgment debtor though there is no warranty as to the *extent* of the title of the judgment debtor[6]

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(18) AIR 1918 All 325 (3 6)
(17) AIR 1917 All 363 (364) 39 All 114
(22) AIR 1922 Bom 205 (206) 46 Bom 833
(26) AIR 1926 Cal 971 (9 3 974) 53 Cal 58
(24) AIR 1924 Cal 172 (172)
(20) AIR 1920 Cal 791 (791)
(18) AIR 1918 Cal 148 (149)
(18) AIR 1918 Cal 505 (506)
(23) AIR 1923 Cal 85 (88 89) 50 Cal 115 (Suit der for damages is maintainable)
[*See* (38) AIR 1938 Cal 263 (270) I L R (1938) 1 Cal 512 (Where invalidity of proceeding is due to fraud or negligence of decree holder auction purchaser is entitled to sue him for

ing the sale there might be some remedy by way of damages against the person responsible)]

(19) AIR 1919 Low Bur 99 (101) 10 Low Bur Rul 76
(37) AIR 1937 Nag 140 (142)
(38) AIR 1938 All 593 (601) I L R (1938) All 922 (F B)
(35) AIR 1935 All 470 (473) 57 All 690

sale is not set aside there is no inherent power to order refund of purchase money)
(37) AIR 1937 All 18 (19) (No inherent power to grant refund)]
[But see (14) AIR 1914 All 252 (253) 36 All

cription of extent of property in sale proclamation —Suit by auction purchaser against decree hol

5 (32) AIR 1932 Lah 401 (411 412) 13 Lah 618 (F B)
(24) AIR 1924 Lah 115 (115) 4 Lah 354
(30) AIR 1930 Oudh 148 (153 159) 5 Luck 552 (F B)
(37) AIR 1937 Oudh 145 (146) 12 Luck 626 (Decree-holder purchaser losing property under decree obtained by third party — Decree holder can sue for refund from another decree holder to whom payment had been made by way of rateable distribution)
(37) AIR 1937 Oudh 286 (287) 13 Luck 138

to belong to the surety—Decree finally passed in favour of the decree-holder and latter trying to execute the decree — Judgment debtor is entitled to credit for the amount lost by him

6 (36) AIR 1936 Mad 50 (55) 59 Mad 207 (FB) (Overruling 17 Ind Cas 437 and A I R 1919 Mad 498)

O. 21 R. 93
Notes 4–10

See also the undermentioned case[7]

The right of the auction purchaser to maintain a suit for refund of purchase-money in cases where the sale took place while the old Code was in force, must be determined with reference to the provisions of that Code[8]

Where certain properties are sold in execution of a mortgage decree and, in a separate suit by a defendant, it is declared that the *decree* and the sale in execution are not binding on him and the auction purchaser is deprived of the property, he is entitled to apply for refund of the purchase money under Section 47[9]

5. Sale set aside for irregularity. — Where a sale is set aside on account of material irregularity, the auction purchaser is entitled to sue and recover from the decree holder the amount of poundage which was deducted from the purchase-money deposited by him, as well as interest on such deposit[1] The reason is that the right of suit in such a case exists *independently of the Code* and the words "shall be entitled to an order for repayment" do not take away the right of suit to enforce the same.

6. What the purchaser is entitled to under this Rule. — See Notes 7 to 10 below

7. Interest. — When a sale is set aside and a refund of purchase-money is ordered under this rule, the Court has got power to award interest on the amount of the purchase money[1]

8. Value of improvements effected by him. — Where the auction purchaser gets into possession of the properties sold to him and effects improvements thereon, he is entitled to compensation for such improvements, upon the sale being set aside[1]

9. Poundage fee. — Where a sale is set aside under Rule 92, the purchaser is entitled to a refund of the poundage fee paid by him, but is not entitled to recover it from the judgment debtor[1] The High Court of Madras[2] has held that there is no means of obtaining a refund of the poundage fee and that the most that could be done would be to give a certificate to the party that the case is a fit one for refund and leave it to the revenue authorities to comply with it

As to a suit for recovery of poundage fee, see Note 5 above.

10. Liability for mesne profits. — When an order for refund of purchase money is made under this rule, the purchaser must account to the judgment-debtor for the rents and profits realized by him, if he has been in possession of the property purchased[1]

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7 (33) AIR 1933 All 218 (222) 55 All 221 (Entitled to refund)
8 (23) AIR 1923 Cal 85 (90) 50 Cal 115
9 (23) AIR 1923 All 394 (396) 45 All 363 (FB) [*See also* (78) 1 All 568 (573)]

Note 5

1 (16) AIR 1916 Mad 230 (232) 39 Mad 803

Note 7

1 (21) AIR 1921 P C 27 (27) 48 Ind App 24 [illegible] (P C) (Even though [illegible] security bond [illegible] did not provide [illegible] interest, Court can [illegible] interest.)
(18) All [illegible] Cal 511 (512)
(8[illegible]) 1 [illegible] (256)
([illegible]) All [illegible] Punj Rec 617 (618)
(85) 8 Mad 101 (103) (If the purchaser himself has contributed to the loss he has incurred, interest may be refused.)
(91) 13 All 383 (386) (Where a person claims more than what he is entitled to, the Court may refuse interest.)
[*See* (83) 5 All 564 (565, 566) (FB)]

Note 8

1 (75) 23 Suth W R 393 (394)
(26) AIR 1926 Nag 160 (161)

Note 9

1 (12) 13 Ind Cas 305 (306) (Cal).
2 (34) AIR 1934 Mad 409 (410)

Note 10

1 (75) 23 Suth W R 393 (394).
(12) 14 Ind Cas 406 (407) (Cal).

11. Limitation.— The period of limitation for an application under this rule is three years under Article 181 of the Limitation Act, 1908, from the date of the order setting aside the sale [1] Article 120 of the Limitation Act will apply to cases where it has been held that a *suit* lies for the refund of purchase money [2] O. 21 R. 93 Notes 11-13

12. Order under this Rule — Executability of. — A purchaser who has obtained an order for refund of purchase money under this rule can execute the order as if it were a decree [1]

13. Appeal and revision. — No appeal lies against an order under this rule, granting, or refusing refund of the purchase money to the purchaser [1] But where the executing Court ordered refund in a case where the judgment debtor had *some* saleable interest, it was held that the order was without jurisdiction and should be set aside in revision [2]

R. 94. [S. 316.] Where a sale of immoveable property has become absolute, the Court shall grant a certificate[2] specifying[5] the property sold and the name of the person[4] who at the time of sale is declared to be the purchaser. Such certificate shall bear date the day on which the sale became absolute. O. 21 R. 94

Certificate to purchaser.

[1877, S 316; 1859, S. 259]

Local Amendment

NAGPUR

Add a comma after the word "sold" and *insert* the words "the amount of the purchase money" between the word "sold and the word "and"

Synopsis

1. Legislative changes.
2. "The Court shall grant a certificate."
   3. Certificate, if transfers title.
4. To whom certificate should be granted.
5. Contents of certificate of sale.
   6. Construction of sale certificate.
   7. Amendment of certificate.
8. What passes at a court sale.
   9. Variance between proclamation of sale and sale certificate.
10. Effect of new interpretation of law on sale.
11. Effect of certificate of sale.
    12. Certificate, if operates as res judicata.
13. Limitation.
14. Registration of sale certificate.
15. Court fee on application for sale certificate
16. Appeal.

Note 11

applies.)

(37) AIR 1937 Oudh 286 (287) 13 Luck 138 (Auction purchaser s suit for refund of purchase money—Suit is governed by three years rule of limitation either under Art 97 or 62 and not by Art 120 Limitation Act))

Note 12

1. (19) AIR 1919 Mad 894 (895)

Note 13

1. (90) 12 All 397 (399)
(84) 1884 All W N 178 (178)
(17) AIR 1917 Mad 217 (217 218)
(86) 9 Mad 437 (439)
(39) AIR 1939 Mad 740 (742) (Reversing on Letters Patent Appeal A I R 1937 Mad 779 — S 47 does not apply to such order)
2. (86) 9 Mad 437 (439)

Other Topics (miscellaneous)

Absence of certificate—Title See Note 3
Legal representative entitled to certificate See Note 4

1. Legislative changes. — This rule corresponds with the first part of Section 316 of the old Code The latter part of that Section has been re enacted under the present Code in Section 65

The only important alteration under the present rule is the addition of the words 'such certificate shall bear date the day on which the sale became absolute

2. "The Court shall grant a certificate." — The provisions of this rule are mandatory and impose a positive and imperative duty on the Court to grant a sale certificate[1] In granting such certificate it is the duty of the Court, not to determine what property is to pass by the sale but merely to record the already accomplished fact of a transaction that has taken place and to state what has been sold Its action in granting the certificate is *ministerial* and not judicial[2]

The provisions of this Order do not apply to sales by receivers and the Court neither confirms nor grants certificates in the case of such sales[3]

This provision applies to sales under the Chota Nagpur Tenancy Act, VI of 1920 See Section 50 of the Act

3. Certificate if transfers title. — The title of the court auction purchaser becomes complete on the confirmation of the sale under Rule 92,[1] and under Section 65 the property vests in the purchaser *from the date of sale*[2] The certificate of sale does not, by itself, create title but is merely evidence of title[3] As already observed in the previous Note, the certificate simply records an accomplished fact and states what has been sold[4] Hence a mere omission to obtain the certificate does not destroy or take away the title of the purchaser[5] He can prove his title and purchase by evidence

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Order 21 Rule 94 — Note 2
1 ('17) AIR 1917 Pat 697 (697) 1 Pat L Jour 446
('71) 9 Bom H C R A C 64 (65)
('36) AIR 1936 Bom 137 (138)
2. ('25) AIR 1925 Pat 615 (616) 4 Pat 760
3. ('26) AIR 1926 All 124 (126) 48 All 209

Note 3
1 ('10) 5 Ind Cas 263 (264) (All)
('11) 9 Ind Cas 25 (25) (All)
('09) 2 Ind Cas 81 (82) (All)
('87) 1887 All W N 217 (218)
('83) 9 Cal 842 (843)
('07) 30 Mad 214 (215)
('15) AIR 1915 Lah 9 (9) 1915 Pun Re No 81

(Limitation starts from date of sale and not from date

of certificate See the following cases
(1900) 22 All 168 (174)
('97) 19 All 189 (190)
('93) 17 Bom 375 (382)
('87) 11 Bom 588 (590)
('86) 10 Bom 453 (455, 456)
('85) 9 Bom 10 (14)
('86) 12 Cal 597 (601)
('08) 2 Cal W N 589 (591)
('08) 7 Cal L Jour 1 (28)
('15) AIR 1915 Mad 805 (806) (Case decided

('72) 18 Suth W R 157 (158)

of title)]
[But see ('11) 12 Ind Cas 360 (361) 7 Nag L R 134]
4 ('16) AIR 1916 Cal 319 (321) 43 Cal 124
5. ('83) 7 Bom 254 (255 256)
('86) 10 Bom 444 (448)
('81) 6 Bom 139 (142)
('76) 25 Suth W R 493 (494)
('93) 1893 Pun Re No 92 page 364
('14) AIR 1914 Oudh 306 (306)
('82) 5 Mad 54 (60)
('94) 1894 All W N 54 (54)

aliunde[6] The production of the order of confirmation of sale is sufficient to prove his title[7] O 21 R.94 Notes 3-6

4. To whom certificate should be granted. — The person who is declared to be the purchaser after the bids are concluded is the person in whose name the certificate should be granted[1] If there are joint purchasers the certificate should be issued in the names of all of them[2] If the purchaser is dead, his legal representative is entitled to the certificate[3] But the Court cannot issue the certificate in favour of an undisclosed principal[4]

It has been held by the Bombay High Court[5] that a sale certificate can be granted to an assignee from the auction purchaser But the contrary view has been held by the Allahabad High Court[6]

5. Contents of certificate of sale. — What is sold at a judicial sale is nothing but the property attached and that property is conclusively described in, and by, the schedule to the order of attachment The certificate should be granted only in respect of the property attached and proclaimed for sale, and not in respect of some other property treating the case as one of misdescription It was so laid down in *Raja Thakur Barmha v Jiban Ram Marwari*[1] In that case, *A* mortgaged a ten annas share of a *mouza* belonging to him *B*, in execution of a simple money decree against *A*, attached a six annas share which was described in the sale proclamation as being subject to a mortgage and got the same sold in court auction The auction purchaser, in applying for the sale certificate contended that the property sold to him was the unencumbered six annas share and the word 'not' was omitted in the sale proclamation It was held by the Judicial Committee that the Court had no jurisdiction to issue the certificate describing the property as unencumbered If in the above illustration no mention is made of the existence of any encumbrance in the sale proclamation the *prima facie* presumption would be that it is the *unencumbered* six annas share that is sought to be attached and sold and the purchaser would be entitled to the share purchased free from encumbrance[2]

The encumbrances existing on the property subject to which the property is sold should be entered in the sale certificate[3] It is incumbent on the Court to see that the certificate is clear and does not furnish materials for fresh litigation[4]

The sale certificate should bear the date of the confirmation of the sale[5]

6. Construction of sale certificate. — Certificates of sale are documents of title which ought not to be lightly regarded or loosely construed Where there is *no ambiguity* in the words of the certificate, the object of the certificate would be defeated if it were possible to change its plain meaning by reference to other documents[1] The

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6 [illegible]

Note 4

5 ('36) AIR 1936 Bom 137 (138)
6 ('38) AIR 1938 All 471 (473)

Note 5

[illegible] by parties or established by decree should be entered)
('85) 9 Bom 47 (49) (Do)
4 ('32) AIR 1932 Bom 210 (212)
5 ('36) AIR 1936 Mad 733 (735)

Note 6

1 ('22) AIR 1922 P C 252 (253) 44 Mad 483 48 Ind App 155 (PC)
(1900) 2 Bom L R 533 (535)

O. 21 R. 94
Notes 1-3

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Note 3
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(09) 2 Ind Cas 81 (8?) (All)
(87) 1887 All W N 217 (218)
(83) 9 Cal 842 (843)
(07) 30 Mad 214 (215)
(15) AIR 1915 Lah 9 (9) 1915 Pun Re No 81
2 (18) AIR 1918 Oudh 9 (10)
(32) AIR 1932 Pat 80 (83) 10 Pat 670
(75) 7 N W P H C R 310 (312)
(85) 11 Cal 341 (342)
(1864) 1864 Suth W R Gap 279 (279) (Limitation starts from date of sale and not from date of confirmation)

of certificate See the following cases
(1900) 22 All 168 (174)
(97) 19 All 188 (190)

(93) 17 Bom 375 (382)
(87) 11 Bom 588 (590)
(86) 10 Bom 453 (455 456)
(85) 9 Bom 10 (14)
(86) 12 Cal 597 (601)
(98) 2 Cal W N 589 (591)
(08) 7 Cal L Jour 1 (28)
(15) AIR 1915 Mad 805 (806) (Case decided under the old Code)
(05) 8 Oudh Cas 202 (205)

(?) AIR 1933 All 471 (473)

of title)]
[**But see** (11) 13 Ind Cas 360 (361) 7 Nag L R 134]
4 (16) AIR 1916 Cal 319 (321) 43 Cal 174
5 (83) 7 Bom 254 (255 256)
(86) 10 Bom 444 (446)
(81) 6 Bom 139 (142)
(76) 25 Suth W R 433 (434)
(93) 1893 Pun Re No 3? page 304
(14) AIR 1914 Oudh 306 (30?)
(82) 5 Mad 54 (60)
(94) 1894 All W N 54 (54)

aliunde[6] The production of the order of confirmation of sale is sufficient to prove his title[7]

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It has been held by the Bombay High Court[5] that a sale certificate can be granted to an assignee from the auction purchaser But the contrary view has been held by the Allahabad High Court[6]

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The encumbrances existing on the property subject to which the property is sold should be entered in the sale certificate[3] It is incumbent on the Court to see that the certificate is clear and does not furnish materials for fresh litigation[4]

The sale certificate should bear the date of the confirmation of the sale[5]

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6 ('88) 11 Mad 296 (300)

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5 ('36) AIR 1936 Bom 137 (138)
6 ('38) AIR 1938 All 471 (473)

Note 5

1 ('14) 41 Cal 590 (598 599) 41 Ind App 38 (PC)

entered)
('85) 9 Bom 47 (49) (Do)
4 ('32) AIR 1932 Bom 210 (212)
5 ('36) AIR 1936 Mad 733 (735)

Note 6

1 ('22) AIR 1922 P C 252 (253) 44 Mad 483 49 Ind App 155 (PC)
(1900) 2 Bom L R 533 (535)

O. 21 R. 94
Notes 6-8

Court ought not to embark upon an enquiry as to what was intended to be sold and must be deemed to have been sold, by reference to surrounding circumstances and other documents[2] Thus, where, in execution of a mortgage decree, the sale certificate was issued in respect of "the whole of the *pannai* lands belonging to and enjoyed by the sons of the first defendant," the certificate cannot by reference back to the mortgage deed be construed as limiting, in any way, the extent of the *pannai* lands to which it referred or to exclude any portion of the *pannai*[3] Where, however, the terms of the certificate are *ambiguous* and stand in need of explanation, evidence may be adduced to clear the ambiguity[4] Evidence may also be let in to *identify* the property described in the sale certificate[5] The Court can thus for this purpose look into the decree[6] and even into the suit document[7]

The boundaries of the property sold as given in the certificate prevail over the areas mentioned therein[8] But where the certificate contains only a general description of the boundaries of the whole area sold without specifying the boundaries of the plots sold, the *paimash* and survey numbers should be taken as far more correct description of what is sold than the boundaries[9]

7. Amendment of certificate.—The Court has inherent jurisdiction to amend a sale certificate incorrectly describing the property actually sold[1] Thus, the Court can rectify a mistake in the description of the boundaries[2] or correct an apparent error therein as, for instance, where the certificate includes properties which were not sold but advertised for sale[3] But the Court has no jurisdiction to amend the certificate so as to show the purchase of a larger share of the property than what is stated in the proclamation of sale[4]

A sale certificate should not be amended without notice to the judgment debtor[5]

Where the same error has crept into the decree as well as the sale certificate, both should be amended and it would not be proper to amend the sale certificate alone[6]

8. What passes at a court-sale. — The general rule in the case of all private sales is that there is an implied warranty of title, in the absence of a contract to the

('35) AIR 1935 Oudh 304 (305) (Sale certificate not including grove — Mere mention of it in details of incumbrances—Grove is not included in sale)
[*See also* ('23) AIR 1923 Mad 48 (49)]
2. ('27) AIR 1927 Mad 311 (312)
('70) 14 Suth W R 435 (436)

App 155

ertificate

[*See also* ('17) AIR 1917 Pat 576 (576) 2 Pat

('67) 7 Suth W R 245 (245) (Misdescription of property sold — Intention of parties must be looked to)

(Mere

('02) 15 C P L R 163 (166)
9. ('12) 13 Ind Cas 324 (325) (Mad)
[*See also* ('20) AIR 1920 Cal 922 (924) (51) (Boundaries not mentioned in sale certificate—Estate described by name — Purchaser takes estate as it stood at date of sale)]

endment

contrary[1] This rule however does not apply to sales *in invitum* The principle applicable to such sales is *caveat emptor*[2] What is sold in such sales is nothing but the *right title and interest* of the judgment debtor all that is guaranteed is that the purchaser shall have the right and interest whatever they may be of the judgment debtor and that the judgment debtor shall not recover back the properties sold[3] The purchaser gets the property with all the risks and defects in the judgment debtor s title.[4] In the absence of fraud he has no remedy of suit against the judgment debtor or the decree holder for any defect in the property sold It is only in cases where the judgment debtor is proved to have *no saleable interest at all* that the purchaser has got the remedy provided for in Rule 91 *viz* to apply to set aside the sale[5] If the sale is set aside he would be entitled to a refund of the purchase money under Rule 93 The purchaser gets the property subject to the same restrictions and equities to which the judgment debtor himself was subject[6] Thus if the property is subject to any valid

Note 8

1 See Section 55 of the Transfer of Property Act 188

('09) 13 Cal W N 270 (272 273)
('23) AIR 1923 Cal 166 (168)
('75) 24 Suth W R 109 (109)
('72) 17 Suth W R 511 (512)
('68) 9 Suth W R 118 (119)
(1865) 3 Suth W R 65 (65)

('79) 4 Cal 142 (146) (FB) (*A* a Mahomedan mortgaged his property — Death of *A* — Decree upon mortgage against some of *A* s heirs — The interest of other heirs does not pass in execution sale)
('82) 11 Cal L Rep 268 (272) (4 Cal 142 (FB) followed)
('76) 2 Cal 395 (398) (Sale in execution of decree against some heirs of deceased Mahomedan—

('36) 38 Pun L R 539 (541)
('37) AIR 1937 Lah 29 (32) (Where by a formal order of the Court certain portion of the property is released from execution the judgment debtor ceases to be the judgment-debtor in respect of such and therefore the auction purchaser cannot resist the claim of the judgment debtor in res-

('01) 28 Cal 235 (237)

of area of
n quantity
of land — No compensation to the purchaser

('24) AIR 1924 Cal 172 (172) (Suit by auction purchaser for refund of purchase-money on ground that judgment debtor had no saleable interest is not maintainable)
(1900) 27 Cal 264 (267)
('94) 17 Mad 228 (230 231)
('20) AIR 1920 Mad 316 (317 318) 43 Mad 309

valid—Such restrictive covenant runs with land —Right of treating transferee as trespasser enures not only to lessor but also to purchaser in rent execution sale)
('81) 3 All 12 (14)
('68) 3 Agra 194 (195)

O. 21 R. 94
Note 8

encumbrance, the purchaser gets it subject to the same,[7] although, if the encumbrance turns out to be invalid, the benefit of it goes exclusively to the purchaser [8] Similarly, if the property is subject to a lease or liable for arrears of revenue, the purchaser is also bound by the same [9] So also where any plea of limitation could have been successfully urged against the judgment debtor, it can also be availed of against the purchaser [10] If the judgment debtor had sold the property *benami* in the name of his wife and she as ostensible owner mortgaged it to a third person, the subsequent purchaser in court sale cannot acquire any superior right to that of the mortgagee [11] But a mere omission on the part of the judgment debtor to take an objection as to want of jurisdiction to execute the decree in another execution proceeding against him will not operate as an estoppel so as to defeat the rights of the purchaser [12] The court sale would also be affected by *lis pendens* if the sale is held during the pendency of a suit relating to the same property [13]

The words "right, title and interest of the judgment debtor" are ambiguous words and, in order to determine what passes to the purchaser at a court sale, regard must be had to the circumstances under which the suit was brought and the true meaning of the decree under which the sale took place [14] In the absence of any limitation, they mean all the interest which the judgment debtor could have honestly disposed of in the property [15] The question to be decided in each case is, as pointed out

(25) AIR 1925 Cal

(84) 18 Cal 188 (198)
(76) 1 Cal 337 (353)

(98) 3 Cal W N 323 (325)
(84) 10 Cal 567 (571)
(26) AIR 1926 Cal 859 (860)
(74) 21 Suth W R 270 (271)
(68) 10 Suth W R 384 (384)
(68) 9 Suth W R 243 (245 246)
(93) 16 Mad 201 (211 213) (Statement in sale certificate that purchase is subject to charge —

8. (09) 31 All 583 (589) 26 Ind App 203 (P C)
(09) 1 Ind Cas 106 (108) 33 Bom 311
(37) AIR 1937 Oudh 159 (164) 12 Luck 540 (Where property has been sold subject to a mort-

9 (81) 6 Cal 389 (391)
(68) 10 Suth W R 325 (325)
(64) 1864 Suth W R 207 (207)
[*See also* (04) 31 Cal 380 (383)]
10. (86) 6 Bom H C R 220 (223)
11. (95) 22 Cal 909 (919) 22 Ind App 129 (PC)

(05) 2 Cal L Jour 202 (214, 215)
(1900) 28 Cal 23 (27)
(99) 26 Cal 966 (970)
(88) 15 Cal 94 (99)
('86) 12 Cal 299 (301, 302)
('79) 4 Cal 789 (792)
(09) 9 Cal L Jour 96 (98, 103)
(03) 26 Mad 230 (236)
(16) AIR 1916 Oudh 232 (233) 18 Oudh Cas 303
14 (02) 29 Cal 813 (819)
(89) 15 Bom 13 (18, 19)
(27) AIR 1927 Lah 685 (687) (Purchaser not bound to look behind the decree)
(74) 22 Suth W R 56 (59) 1 Ind App 321 (PC) (Do)
(87) 14 Cal 18 (25) 13 Ind App 106 (P C) (Do)
15 (81) 6 Bom 193 (202) (F B)
(81) 6 Bom 490 (493)
(80) 5 Bom 14 (19 20)
(17) AIR 1917 Cal 19 (20)
(18) AIR 1918 Cal 923 (925)
(75) 24 Suth W R 263 (264)
('13) 12 Ind Cas 444 (446) 36 Mad 194
(1863) Marsh 647
(74) 22 Suth W R 209 (209)
(90) 13 Mad 15 (16) (Right to growing crops also passes)

by the Judicial Committee what did the Court intend to sell and what did the purchaser understand that he bought [16] and this is a mixed question of law and fact in each case [17]

Where a right to receive royalty is attached and sold only the right to the money which has already become due on the date of the sale is sold as money which has not become due is not an existing debt [18]

Sale in execution of mortgage decree — In the case of a sale in execution of a mortgage decree the purchaser acquires the interest of the mortgagor and the mortgagee as *on the date of the mortgage* [19] whereas in a sale in execution of a simple money decree the purchaser gets the interest of the judgment debtor as it stood on the date of the attachment freed from all subsequent private alienations [20] See also Note 56 to Section 11

Sale in execution of decree against member of Hindu family — In a sale in execution of a decree against an undivided member of a joint Hindu family the purchaser buys only an uncertain and fluctuating interest with the right of converting

('74) 22 Suth W R 522 (522) (Right to easement also passes)
('70) 2 N W P H C R 251 (252) (Trees on the land not severed also pass)
('72) 18 Suth W R 32 (39) (Right of decree holder to question validity of any transaction does not

Sales in execution of rent decree
('78) 3 Cal L Rep 561 (566 568) 6 Ind App 47 (P C)

('98) 2 Cal W N 251 (253 254)
('99) 26 Cal 677 (690 691 699)
('79) 4 Cal 814 (815)
('87) 9 All 136 (139)
('23) AIR 1923 Pat 592 (595)
('18) AIR 1918 Pat 412 (412)
Revenue sales
('12) 16 Ind Cas 210 (212) 40 Cal 89 39 Ind App

App 131

(P C)

('86) 9 Mad 188 (197 200)
('99) 22 Mad 110 (112)
('90) 13 Mad 480 (483 484)
('97) 21 Bom 539 (543)
16 ('87) 10 Mad 241 (248 251) 14 Ind App 84 (PC)
('23) AIR 1923 Nag 383 (384)
[*See also* (1900) 27 Cal 407 (413) 27 Ind App 93 (P C)
('74) 22 Suth W R 408 (408)]
17 ('13) 36 Mad 325 (330)
('15) AIR 1915 Mad 203 (203) 37 Mad 22
('14) AIR 1914 Cal 305 (306)
18 ('36) AIR 1936 Pat 572 (577)
19 ('98) 22 Bom 945 (948)
('80) 5 Bom 8 (12 13)
('86) 10 Bom 224 (226)
('80) 5 Bom 2 (5)
('80) 5 Bom 614 (618)

('95) 18 Mad 153 (157) (Mortgagee purchasing with leave of Court is not a trustee for the mortgagor)]
20 ('81) 7 Cal 107 (118) 8 Ind App 65 (PC)
('70) 2 N W P H C R 33 (40 41)
('82) 4 Mad 1 (65)
('95) 19 Bom 226 (232 235)
('66) 6 Suth W R 223 (224 225)
('68) 3 Agra 15 (15)

O. 21 R. 94
Note 8

it at any moment after the purchase, by partition into definite property[21] If the purchaser buys certain specific properties as belonging to the share of the judgment debtor, and in a subsequent partition between the members of the family some of the items purchased are allotted to the share of the other members, the purchaser cannot compel the judgment debtor to give him other properties which the judgment debtor got in substitution The reason is that in sale *in invitum* there is *no privity of contract* between the judgment debtor and the purchaser, there being no act or representation on the part of the former, he is not bound by any rule of estoppel[22] If the judgment debtor is the *manager* of the undivided family and if he is sued substantially in his capacity as manager, the sale of the right, title and interest of the judgment debtor will pass the entire interest of all the members of the family, provided the debt in respect of which the decree is obtained was incurred for a *legal necessity or for the benefit of the family*[23] In a joint Hindu family, the father has a disposing power over the ancestral family property to pay off his antecedent debts not tainted with illegality or immorality. If, therefore, a decree is obtained against a *Hindu father* in respect of a debt which is neither illegal nor immoral, and his right, title and interest is sold in execution without any limitation, the sale has the same effect as a private conveyance by the father and the purchaser gets the entire interest in the family property including that of the sons[24] "All the sons can claim is that, not

[See ('17) AIR 1917 Cal 2 (4) 45 Cal 294 (Sale in execution of rent decree)

21 ('78) 3 Cal 193 (209) 4 Ind App 247 (PC)
('91) 14 Mad 403 (418) (FB)
('84) 10 Cal 626 (635, 636) 11 Ind App 26 (PC)
('74) 11 Bom H C R 76 (80, 82, 83)
('74) 11 Bom H C R 72 (73, 74)
('84) 10 Cal 244 (246)
('15) AIR 1915 All 111 (112) 37 All 120 (123)
[See ('16) AIR 1916 Mad 430 (431 432)]

('82) 5 Mad 125 (126 129) (FB)
('84) 6 All 362 (365)
('84) 7 Mad 136 (138) (Seems to be of doubtful authority in view of 15 Cal 70 (PC))
('82) 5 Mad 12 (14)
Decree against karnavan in a Malabar tarwad
('87) 10 Mad 357 (361) (Decree passed against a person not in his capacity of karnavan — Property of tarwad does not pass)
('82) 5 Mad 201 (207)
('95) 18 Mad 451 (453) (Tarwad property—Partition of tarwad ... karnavan on

mortgage

al property

not pass.)
(1900) 25 All 214 (226 228) (FB)
('11) 33 All 436 (439 440)
('92) 14 All 190 (192)
('92) 14 All 179 (182) (FB).
('86) 8 All 205 (218)
('81) 3 All 72 (74)
('75) 7 N W P H C R 110 (112, 113)
('11) 8 All L Jour 922 (924)

('85) 8 Mad 353 (393)
('88) 15 Cal 70 (81, 82) 14 Ind App 187 . 1888 Pun Re No 1 (PC)
See however the following cases
('87) 11 Bom 700 (702)
('83) 7 Bom 91 (94 95)
('89) 12 Mad 325 (329, 330)

being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own . . . If the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the execution proceedings[25] There are only two cases in which the sons' interests do not pass in a sale in execution of a decree against the father —

(1) when the father's interest in the property is alone sold excluding that of the sons, and

(2) when the debt is proved to be not binding on them[26]

As to what are antecedent debts and as to how far a decree against a father can be executed against the sons, see the undermentioned cases[27]

Sale in execution of decree against Hindu limited owner — In order to determine the interest that passes to a purchaser in execution of a decree against a limited owner such as a *Hindu widow*, the test to be applied is whether the suit in respect of which the sale was directed was brought against the widow upon a cause of action *personal* to herself or one which affected the *whole inheritance* of the property in suit[28] Where it appears that the decree against the widow is in respect of the

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(81) 3 All 294 (297) (Suit against father on hypothecation bond—In execution father s rights and interest only sold—*Held* that such interest only passed)

execution entire family property, only interest of

by him — Whether the whole of family estate passes at execution sale is a question of fact)
(83) 9 Cal 495 (504)
(82) 8 Cal 898 (907)
(83) 9 Cal 389 (393, 394)
(82) 11 Cal L Rep 263 (264)
(93) 20 Cal 328 (337, 348)
(80) 5 Cal 855 (863) (FB)
(80) 5 Cal 845 (853)
(82) 9 Cal L Rep 350 (352)
(81) 7 Cal L Rep 218 (220) (Money decree against father—Only the right, title and interest of father passes)
(80) 5 Cal 425 (435 436)

Jour 309
ability as surety for a stranger s crime—In execution sale father s interest only passes)

(88) 12 Bom 625 (631, 632)
(83) 12 Cal L Rep 104 (113, 118)
('83) 9 Cal 503 (510)
(80) 5 Cal L Rep 36 (40)
(81) 6 Cal 135 (140 141)

(87) 14 Cal 572 (579, 580) 14 Ind App 77 (PC) (*Held* father s interest alone sold)

27. (33) AIR 1933 All 235 (238) 55 All 283. (Nature of debt)
(32) AIR 1932 Bom 522 (523)
(32) AIR 1932 Bom 483 (483) (Decree against father can be executed against sons)
(32) AIR 1932 Bom 433 (439) (Antecedent

(33) AIR 1933 Oudh 102 (104) (Antecedent debts.)
(32) AIR 1932 Pat 12 (14) (Pious duty to discharge all debts of father is limited to the extent of assets in his hands.)

28. (34) AIR 1934 Cal 163 (164, 165, 169) 60 Cal 1236

inheritance and binds the reversionary heirs, the purchaser of her right, title and interest takes the estate absolutely No inference can be drawn from the circumstance that the certificate describes the property sold as the right, title and interest of the widow [29] The matters for consideration in such cases are, as pointed out by Sir Lawrence Jenkins, C J,

(1) What property could have been brought to sale in properly constituted suit

(2) What property was actually intended to be sold and bought

(3) Has there been such an error in the constitution of the suit or the conduct of the proceedings, that effect cannot be properly given to the intention, or to state it conversely, has there been a substantial representation of those interested in the property intended to be sold and bought [30]

Where there is record available other than the judgment and the sale certificate to show whether the limited owner represented the inheritance or not, the nature of the debt will determine what passed at the sale [31]

9. Variance between proclamation of sale and sale certificate. — When there is a variance between the description of the property as given in the proclamation of sale and as given in the sale certificate, the description in the former should be taken as conclusive and correct [1] The description in the sale proclamation follows the description of the property attached and, as pointed out by the Judicial Committee "what is sold in a judicial sale is the property described in the schedule to the order of attachment [2]

A obtains a decree against five brothers and takes out execution against them all The proclamation of sale describes that the interests of all the brothers are to be sold *B* purchases in court auction But the order of confirmation of sale as well as the sale certificate by mistake mentioned only the share of the eldest brother *as being*

('71) 7 Beng L R 213 (216) 16 Suth W R 49 (If the debt by widow was incurred for legal necessity it would bind the reversioner)
(1862) 1862 Suth W R 119 (121) (FB)
('73) 20 Suth W R 30 (31)
('75) 24 Suth W R 3 (4) (Decree declaring sale of widow s interest only — *Reversioners not* affected)
('75) 24 Suth W R 306 (308) 1 Cal 133 2 Ind App 275 (PC)
('79) 3 Cal L Rep 530 (532, 533) (Decree against

(Decree

('94) 17 Mad 208 (209) (Do)
('11) 34 Mad 188 (204 205)
('03) 30 Cal 550 (555) 30 Ind App 81 (PC) (Decree against daughter — *Held* only limited interest passed)
[*See* ('76) 25 Suth W R 285 (289, 290) 1 Cal 226 3 Ind App 7 (PC) (Decree against widows of undivided member of Hindu family for debts incurred for personal benefit of such member— Surviving member can recover the interest sold in execution of such decree from auction purchaser)
('96) 23 Cal 374 (388, 389)
[*See also* ('93) 17 Bom 398 (399, 400) (Widow s right of residence vanishes)
('89) 12 Mad 260 (265, 267, 272) (FB) (Decree

in execution of such decree her right of residence vanishes.)
[**But see** ('34) AIR 1934 Cal 162 (169) 60 Cal 1236 (Property of so and so as widow sold means sale of only limited interest)
('74) 8 Mad H C R 186 (188) (Widow *held* not to be her husband s representative)]

30. (1900) 24 Bom 135 (146 147)

31. ('32) AIR 1932 Mad 23 (31)

Note 9

('33) AIR 1933 Mad 232 (233) (Property not included in proclamation of sale but included in sale certificate —Purchaser does not get title to such property)

purchased In such a case, it has been held that the entire interest of all the brothers as described in the sale proclamation nevertheless passes to *B*[3]

10. Effect of new interpretation of law on sale. — The rights of the parties in an execution sale are fixed with reference to the state of the law *at the time of sale* and any subsequent interpretation of the law will not operate so as to affect the result of that sale[1] In *Abdul Aziz* v *Appayasami*,[2] a purchase was made in court auction, of the right, title and interest of a *zamindar* in an impartible *zamindari* By the law as it stood at the time of the sale, the zamindar took only a life estate But subsequent to the sale, the law was changed by the Judicial Committee holding that the zamindar took an absolute estate Taking advantage of the subsequent change in the interpretation of the law the purchaser contended that the entire absolute estate passed to him under the court sale The Judicial Committee negatived this contention holding that "The reversal of the previously accepted interpretation of the law does not displace its application to the construction of the contracts contained in the certificate of sale under consideration and that the "parties must be taken to be bound by the law as it was at the time understood."

11. Effect of certificate of sale. — The irregularities if any in the execution proceedings are cured by the certificate of sale[1] The purchaser's title becomes complete on the issue of the certificate and he is entitled to apply for possession of the property[2]

12. Certificate if operates as res judicata. — A sale certificate does not operate as *res judicata* inasmuch as there cannot be said to have been any *litigation* as to the title of the property purchased But persons who are parties to the suit under which the sale took place or their representatives in interest cannot, by virtue of Section 47, question the title of the purchaser[1] The rights of third parties are, however, not affected by the court sale[2]

13. Limitation. — The provisions of the Limitation Act do not apply to an application for the issue of a sale certificate The reason is that there is no duty imposed on the purchaser to apply for the certificate The Court is bound as a matter of course to grant the certificate on the sale becoming absolute, and its function in granting the certificate is *ministerial* and not judicial[1]

14. Registration of sale certificate. — Under Section 17, clause (12) of the Registration Act a certificate of sale is not compulsorily registrable[1] Under Section 89,

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3. ('03) 27 Bom 334 (339, 341)

Note 10

1. ('18) *AIR 1918 Pat 73 (76) 2 Pat L Jour 725*
2. ('03) 27 Mad 131 (142, 143) 31 Ind App 1 (PC)

Note 11

1. ('82) 5 All 142 (157) 9 Ind App 182 (PC) [*See also* ('81) 7 Cal 91 (95, 96) ('85) 11 Cal 376 (378)]
2. ('93) 17 Bom 228 (229) ('79) 3 Bom 433 (436) ('02) 24 All 475 (476) [*See* ('93) 17 Bom 718 (721) ('32) AIR 1932 Rang 11 (12) 9 Rang 565]

Note 12

[illegible]

('19) AIR 1919 Pat 309 (310) (Purchaser not bound by statement in sale certificate as to situation of property purchased)

('16) AIR 1916 Pat 362 (362) (Purchaser suing for possession—Defendant pleading that decree was tainted by fraud—Onus is on the defendant)

[illegible]

Note 13

[illegible]

Note 14

[illegible] e sale)

[illegible] of certificate purchaser does not acquire priority as

3CPC 147.

O.21 R.94
Notes 14-16

clause (2) of the same Act the Court should send a copy of the sale certificate to the registering officer [2]

15. Court-fee on application for sale certificate. — It has been held in the undermentioned cases[1] that an application by the purchaser for the certificate need bear no court fee stamp as the rule does not even require the application to be in writing

16. Appeal. — No appeal lies against an order amending or refusing to amend a sale certificate [1] In the undermentioned case[2] it was held that an order refusing to grant a certificate in favour of the decree holder purchaser was not a matter coming under Section 47 and was not appealable

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Local Amendment

RANGOON

The following shall be *inserted* as Rules 94A and 94B

O 21 R 94A (Rangoon)

Copy of sale certificate to the Sub Registrar

94A A copy of every sale certificate issued under Rule 94 shall be sent forthwith to the Sub Registrar within whose sub district the land sold or any part thereof is situate

O 21 R.94B (Rangoon)

Certification of name and address of purchaser to Superintendent of Land Records

94B If in execution of a decree any interest in land is sold, the names and addresses of the purchaser or purchasers and the interest thereby acquired shall be certified to the Superintendent of Land Records as soon as the sale has been confirmed under Rule 92 (1)

O.21 R.95

Delivery of property in occupancy of judgment-debtor

R. 95. [S 318] Where the immoveable property sold is in the occupancy of the judgment-debtor or of some person on his behalf or of some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery to be made by putting such purchaser or any person whom he may

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against a mortgagee whose *mortgage is optionally registrable*)]
(84) 7 Mad 418 (419) (Do)

The following cases under the old and repealed Registration Act are no longer law
(70) 6 Mad H C R App 39 (40) (Proceedings 18th November 1871)
(70) 7 Bom H C R A C 136 (137)
(81) 3 Mad 37 (41) (FB)
(73) 10 Bom H C R 435 (439)
(80) 2 All 392 (393)
[*See also* (83) 5 All 568 (573)]

2 (82) 1882 All W N 51 (51)
(08) 1908 Pun Re No 142, page 652

Note 15

1 (89) 13 Bom 670 (671)
As for the stamp requisite for the certificate see the following cases
(30) AIR 1930 Bom 392 (393) (FB) (*Purchaser to bear stamp expenses*)
(84) 10 Cal 92 (96) 13 Cal L Rep 164 ... ect to
(
(
of mortgage)
stamp duty)

Note 16

1 (97) 20 Mad 487 (489)
(01) 23 All 476 (478)
(99) 26 Cal 529 (530, 531)
2 ('08) 7 Cal L Jour 436 (438)

appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same. **O. 21 R. 95 Note 1**

[1877, S. 318; 1859, S. 263. See S. 74 and O. 21 R. 35.]

Synopsis

1. Delivery of possession to purchaser. — See Note 8, *infra.*

The *holder of a decree* for possession of immovable property may obtain possession of the property under Rules 35 and 36. An *auction-purchaser* to whom a sale certificate has been granted under Rule 94 has to apply under this rule or under Rule 96 to obtain delivery of possession [1]

If the property is in the possession of the judgment debtor, or of some person on his behalf the purchaser is entitled to *actual* possession under this rule [2] If it is in the possession of tenants or other persons entitled to occupy the same, the purchaser is only entitled to *symbolical* possession under Rule 96 The Code thus prescribes two modes of delivery of possession based upon the nature of the property concerned In respect of the *same* property there cannot be two modes of giving possession, one symbolical and the other actual [3]

Unless the delivery of possession through Court to the auction purchaser is effected in one of the modes prescribed under Rules 95 and 96, no possession can be deemed to be given [4] Therefore if a person is dispossessed otherwise than in due course of law as provided by these rules, he may institute a summary suit under Section 9 of the Specific Relief Act to recover possession [5]

But when once the amin puts the auction purchaser in possession and the formalities of law are complied with, the delivery is complete,[6] and thereafter the possession of the judgment debtor or any person becomes that of a trespassor [7] Therefore if the auction purchaser is subsequently dispossessed, it will be a cause of action for a regular suit, but no application under these rules is thereafter maintainable [8] When a

Order 21 Rule 95 — Note 1

1 ('92) 15 Mad 203 (209) (Delivery of possession follows peremptorily from grant of sale certificate)
('17) AIR 1917 All 312 (312) 39 All 460 (462)
2. ('72) 17 Suth W R 60 (60)
('39) AIR 1939 Pat 151 (153) (In case of zamindari property or tank or mineral rights physical removal of judgment debtor is not possible and mode of delivery in such cases is by proclaiming that decree holder or auction purchaser has been put in possession—Such delivery is actual and not symbolical)
[*See* ('03) 5 Bom L R 977 (978)]
3. ('32) AIR 1932 Pat 145 (147) 11 Pat 65.
[*See also* ('34) AIR 1934 Pat 119 (120) (Mode of delivery of possession does not depend on discretion of Court but depends on nature of property)]
4. ('20) AIR 1920 Lah 30 (32)
5. ('05) 12 Cal W N 694 (696)
6. ('66) 6 Suth W R Misc 108 (108)
('23) AIR 1923 Mad 25 (26)
7. ('22) AIR 1922 Pat 197 (199)

O. 21 R. 95
Notes 1-5

purchaser is put in possession of a field with crops on it, he is entitled to such crops[9]

As to whether the judgment debtor can file a *suit* where a wrong property is delivered to the auction purchaser or should only apply under Section 47, see Section 47 Note 19 Rules 95 to 103 are applicable to proceedings under the Chota Nagpur Tenancy Act, VI of 1920 See Section 50

As to whether a question relating to the delivery of possession to the auction purchaser or decree holder falls under Section 47 of the Code, see Note 19 to Section 47, *ante*

2. Purchase of undivided share. — See Note 1 to Rule 96, *infra*

3. Effect of formal possession on limitation. — See Note 4 to Rule 35, *ante*

3a. "Immoveable property." — It is only upon a sale of immovable property that delivery of possession of that property can be ordered under this rule A usufructuary mortgage is not immovable property and a purchaser cannot proceed under this rule[1]

4. Successive applications for delivery of possession. — See Note 4 to Rule 97 *infra*

5. Limitation for application. — The period of limitation for an application for delivery of possession by a purchaser of immovable property at a sale in execution of a decree is three years from the date when the sale becomes *absolute* see Article 180 of the Limitation Act[1] As to when the sale becomes *absolute*, see O 21 R 92

suit for possession, see Note 19 to Section 47, *ante*

An order for delivery of possession is not a decree for possession and therefore cannot be kept alive by periodical applications[3] Where an application for delivery was made within three years of the date when the sale became absolute, but delivery was not effected by reason of laches on the part of the purchaser, a second application under this rule more than three years after confirmation of sale will be barred. Article 181 does not apply to such a case[4] But if the delivery could not be effected owing to causes beyond the control of the purchaser and the application had been 'closed," it has been held that the second application should be considered to be a revival of the first and consequently is not barred under Article 180[5]

('97) 1 Cal W N 192 (194)
('28) AIR 1928 Lah 910 (911)
9 ('36) AIR 1936 Cal 157 (158) (He is entitled to cut the crop)

Note 3a

1 ('32) AIR 1932 Mad 283 (284)

Note 5

1. ('08) 30 All 390 (392)
('33) AIR 1933 Cal 311 (311)
('32) AIR 1932 Cal 75 (75)
('12) 1912 Mad W N 1136 (1137)
('30) AIR 1930 Cal 86 (89) 56 Cal 608
('09) 5 Ind Cas 89 (90) (Cal)
('35) AIR 1935 Mad 803 (808) 58 Mad 893 (FB)
[But see ('27) AIR 1927 Nag 294 (235)]
The view that the period is to be reckoned from the date of issue of the sale certificate adopted in the undermentioned cases under the Limita

Pat 165
session is
by O 21.

('33) AIR 1933 Mad 745 (748)

6. Application, if a step-in-aid of execution. — Where the decree holder himself purchases the property in execution, and applies under this rule for delivery of possession of the property, the question arises whether such an application is a step in aid of execution within the meaning of Article 182, clause (5) of the Limitation Act That question depends again upon another question, *viz*, whether the purchase by the decree holder is *pro tanto* satisfaction of the decree For, unless the decree is satisfied, a fresh application for execution will lie It has been held by the High Courts of Allahabad and Patna that there is no difference between an application by decree-holder purchaser and by a third party purchaser to obtain delivery of *possession* of the property purchased by him and therefore such an application is *not* a step in aid of execution,[1] the ground of the decisions being that execution comes to an end as soon as the property is sold and the failure to obtain possession does not affect the satisfaction of the decree But it has been held by the High Courts of Calcutta,[2] Bombay[3] and Madras[4] that an application by a decree holder purchaser under this rule is still an application in execution and therefore a step in aid of execution of the decree within the meaning of Article 182, the ground of those decisions being that until possession is secured to the decree holder purchaser, the decree cannot be said to be satisfied The same view has been taken in the Judicial Commissioner's Court of Nagpur [5]

7. Separate suit for possession. — See Note 8 below and Note 19 to Section 47, *ante*

8. Procedure under this Rule. — It is not obligatory on the purchaser to apply for delivery of possession under this rule, it is open to him to obtain possession out of Court [1] If he is a stranger purchaser the remedies by way of an application under this rule and by way of suit are concurrent [2] He may bring a suit for possession in the first instance,[3] or may apply under this rule, and if unsuccessful[4] or if the summary remedy is barred[5] he may institute a regular suit for possession If, however, the decree holder himself is the purchaser, there is a conflict of decisions as to whether a *suit* for possession will lie see Note 19 to Section 47 *ante*, and the undermentioned case [6] See also Note 5 to Rule 97, *infra*

The jurisdiction of the Court to order delivery under this rule exists only if the property is in the occupancy of judgment debtor, or of some person on his behalf or of some person claiming under a title created subsequent to the attachment of such

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('19) AIR 1919 Mad 1001 (1004) (Per Oldfield, J) [*See also* ('35) AIR 1935 Mad 803 (808) 58 Mad 893 (FB)]

Note 6

1. ('28) AIR 1928 All 368 (370) 50 All 670 AIR 1919 All 390, Dissented from)
('23) AIR 1923 Pat 22 (22, 24) 2 Pat 249
('08) 31 All 82 (97, 104, 107) (FB) (19 All 477, Dissented from)

tion of auction purchaser is different from that of decree holder)]
2. (1900) 27 Cal 709 (712 713)
('09) 13 Cal W N 694 (695)
3. ('11) 11 Ind Cas 957 (959) 35 Bom 452
4. ('27) AIR 1927 Mad 288 (288). 50 Mad 403.
5. ('33) AIR 1933 Nag 369 (370)

Note 8

1. ('30) AIR 1930 Cal 586 (587) [*See also* ('36) AIR 1936 Mad 733 (739) (Attempted delivery of actual possession—No objection by judgment-debtor—Objection only by tenants—Delivery as far as the former is concerned must be held to be complete]
2. ('26) AIR 1926 All 120 (121).
('16) AIR 1916 Mad 430 (431, 432).
('87) 14 Cal 644 (648)
3. ('16) AIR 1916 Mad 430 (432)
4. ('86) 12 Cal 169 (173)
5. ('26) AIR 1926 All 120 (121)
('07) 29 All 463 (466)
6. ('32) AIR 1932 Nag 140 (141) 28 Nag L R 250 (Suit for possession by decree holder purchaser is not barred)

O. 21 R. 95 Notes 8–9

property.[7] Therefore, if the Court is satisfied on *prima facie* evidence that the person in possession of the property is holding it on his own account, it has no option but to dismiss the application under this rule.[8] Thus a prior mortgagee who purchased property in execution of his own mortgage decree and who is in possession, is not a judgment debtor and cannot be dispossessed by the auction purchaser under this rule.[9]

In the undermentioned case[10] it was held by the High Court of Calcutta that where possession was ordered to be delivered under this rule, the decree holder was entitled to get possession without the property being burdened with huts, etc., erected on the property by the judgment-debtor and that it was not necessary that the order should specifically mention the removal of such burden. A contrary view has, however, been taken in a later case by the same High Court.[11]

Where possession is delivered under this rule, no proclamation by beat of drum is necessary.[12] Where a house sold in auction is ordered to be delivered to the purchaser under this rule but is found locked, the Court can direct the breaking open of the lock in order to put the purchaser in possession.[13]

It has been held in the undermentioned case[14] that when an application is made under this rule for *actual* delivery, the Court cannot order symbolical delivery.

As regards the extent of the inquiry to be made in proceedings for delivery of possession under this and the succeeding rules, the same considerations apply to such an inquiry as are applicable to proceedings under O. 21 R. 58 and a thorough inquiry into questions of title is not contemplated.[15]

9. Appeal. — See Note 19 to Section 47, *ante*.

O. 21 R. 96

R. 96. [S. 319.] Where the property sold is in the occupancy of a tenant or other person entitled to occupy the same and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery to be made by affixing a copy of the certificate of sale in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, that the interest of the judgment-debtor has been transferred to the purchaser.

Delivery of property in occupancy of tenant.

[1877, S. 319; 1859, S. 264.]

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7. ('37) AIR 1937 Cal 301 (303) (Mo[illegible]
against executors in their representa[illegible]
— Sale of property — Purchaser ca[illegible]
ceeding under Rr. 95 and 97 obtai[illegible]
against beneficiaries under will —
possession is not 'on behalf' of exe[illegible]
('37) AIR 1937 Mad 582 (584) (Mo[illegible]
against Hindu father — Decision in partition suit that father fully represented the sons and that the decree was binding on them — They must be treated as parties to mortgage decree and delivery of possession can be ordered against [illegible] First

1[illegible]
1[illegible]
1[illegible]
however, does not seem to be sound. (See AIR 1935 Mad 547.)

15. ('35) AIR 1935 Rang 159 (159)

Synopsis

1. Legislative changes. — The words 'on the application of the purchaser" are new See Note 6 *infra*

2. Scope of the Rule.—This rule provides for cases where the judgment debtor himself is not entitled to actual possession of the property as where the property is in the occupancy of tenants or other persons entitled to occupy the same [1] The delivery of possession in such cases has to be made in the manner provided by this rule See Rule 35 *ante*, and Note 3 below When once the Court passes an order for delivery of possession under this rule it has thereafter no jurisdiction to stop the issue of the warrant for delivery and to order an enquiry into any objections subsequently raised in the matter [2]

3. Delivery of property in the occupancy of a tenant. — If the property is in the occupancy of a tenant or other person entitled to occupy the same, the auction purchaser is only entitled to *symbolical* delivery of possession under this rule [1] Therefore, where the auction purchaser *dispossessed* a tenant under a warrant for delivery of possession under Rule 95 *ante*, the tenant will be entitled to bring a suit for possession under Section 9 of the Specific Relief Act, as the dispossession could not be said to be in due course of law [2]

4. Purchase of undivided share. — The holder of a decree for possession of an undivided share in a property may obtain joint possession in the manner provided in Rule 35, *ante* There is no corresponding provision for delivery of joint possession to the *purchaser* of an undivided share in a property But in such cases possession should be delivered under the provisions of O 21 R 95, read with Rule 35 sub rule (2) this rule does not apply to such a case [1] Where the purchase is of an undivided share in a joint Hindu family, the remedy of the purchaser is only to institute a suit for partition and for possession of the share of the judgment debtor [2] Where the judgment-debtor is a cosharer and is himself in exclusive possession,[3] or where the entire rights of the joint family are sold in auction,[4] the purchaser is entitled to actual possession of the property under Rule 95, *ante*

5. Symbolical delivery.—See Rule 35, *ante* Symbolical possession is different from "paper possession" that is, the possession obtained by a party who being entitled *to actual possession, only obtains delivery of possession on paper, without getting* actual possession [1] See also Note 3 above

Delivery of symbolical possession is effective only as against the judgment debtor

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Order 21 Rule 96 — Note 2

1. See (89) 1889 Bom P J 92 (92) (Mortgagee in possession of property sold in auction)
2. (27) AIR 1927 Oudh 304 (304) 1 Luck 226

Note 3

1. (27) AIR 1927 Rang 127 (128)
(18) AIR 1918 Mad 207 (208)
(35) AIR 1935 Mad 547 (549) 58 Mad 936
2. (08) 12 Cal W N 694 (696)

Note 4

1. (14) AIR 1914 All 511 (511) 36 All 181 (182)
('16) AIR 1916 Mad 430 (430)
(27) AIR 1927 Sind 199 (201)
[*See* (35) AIR 1935 Rang 11 (12)]
2. (06) 29 Mad 294 (295)
(78) 2 Bom 676 (678)
(27) AIR 1927 Sind 199 (201)
(81) 5 Bom 499 (502 to 505)
[But see (81) 5 Bom 505n (506n)]
3. (17) AIR 1917 Cal 232 (233)
4. (93) 17 Bom 718 (721)

Note 5

1. (18) AIR 1918 Mad 207 (208)

O. 21 R. 96 Notes 5-7

and is of no effect against a third person who is in possession of the property. The possession of such third person continues to be undisturbed in spite of the delivery of symbolical possession[2]

6. Limitation. — See Note 5 to Rule 95 *ante*

Under Section 319 of the Code of 1882, it was held that it was the duty of the Court to order symbolical delivery of possession and that there was no period of limitation for delivery of possession under that Section[1] The insertion of the words *'on the application of the purchaser'* in this rule as well as in Rule 95, and the insertion of a new Article, *viz* Article 180 in the Limitation Act, 1908, has made it clear that such applications should be made within three years from the date when the sale becomes absolute

7. Appeal — See Note 19 to Section 47, *ante*

RESISTANCE TO DELIVERY OF POSSESSION TO DECREE-HOLDER OR PURCHASER

O. 21 R. 97

R. 97. [Ss 328, 334] *(1)* Where the holder of a decree for the possession of immoveable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction

Resistance or obstruction to possession of immoveable property

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same

[1877, S. 334; 1859, Ss 226, 268. See O 21 R. 35]

Local Amendment

PATNA

Add the following as sub rule (3)

'(3) The provisions of Section 5 of the Limitation Act 1908, shall apply to applications under this rule '

Synopsis

1 Applicability of the Rule
2 "Decree for possession" — Partition decree
2a 'Court "
3 Limitation
4 Fresh application for delivery, if can be made
5 Remedies of a person obstructed
6 Order 9 if applies to proceedings under this Rule See S 141 Note 2 and O 9 R 9 Note 1
7 Appeal
8 Revision

1 Applicability of the Rule — According to the High Court of Allahabad,[1] an application under this rule is not maintainable unless it is shown that the decree

2 (40) AIR 1940 Cal 16 (17) 70 Cal L Jour 111 (114) (Order for delivery of possession of land in actual possession of tenants made in favour of the decree holder purchaser under O 21 R 96 does not amount to dispossession)

(35) 39 Cal W N 1306 (1308) (When the purchaser who has got symbolical possession removes crops grown on the land by the third person in actual possession he is guilty of theft)

Note 6

1 (18) AIR 1918 Cal 545 (546)

Order 21 Rule 97 — Note 1

1 (24) AIR 1924 All 495 (498 500) 46 All 693 (F B)

holder or the auction purchaser has applied for delivery of possession or at least, he made an attempt to obtain possession *out of Court* and has been *obstructed or resisted* in obtaining it The High Court of Calcutta has dissented from the view that this rule has any application to resistance to obtain possession *out of Court*, and has held that in the absence of an attempt *on the part of the Court* to give delivery in execution, this rule has no application [2] There must be some *overt act* of opposition to delivery of possession,[3] though it is not necessary that the person resisting should be *actually present* at the obstruction [4] Thus, the locking of the house by the judgment debtor amounts to resistance within the meaning of this rule [5]

It is necessary, before an investigation is made under this rule, that an *application* should be made to the Court by the *decree holder or auction purchaser* [6] The Court cannot order investigation *suo motu*,[7] or on the Amin's or Nazir's report,[8] or on the application of the judgment debtor,[9] or of third parties [10] It has, however, been held that the Court may direct investigation under this rule on an *oral* application by the person obstructed [11] It has also been held that where the decree holder was present when the report of the bailiff was placed before the Court, it is reasonable to hold that the further proceeding was taken at the instance of the decree holder [12] The Court has to see *prima facie* whether there is any just cause for resistance and obstruction and need not investigate the question of title thoroughly,[13] though it may adjudicate upon questions of *title* between the contending parties in regard to their right to possession and pass orders under Rule 98, or Rule 99 [14] Where the auction-purchaser is present but does not adduce evidence with regard to one lot and one witness is examined by the opposite party and regarding another plot there is no opposition and the Court passes an order it has been held that there is sufficient investigation so as to bring it within Article 11A of the Limitation Act [15] The order passed on such investigation is final subject to the result of the suit under Rule 103, *infra*

The procedure under this rule is *permissive* and not *mandatory* [16] See Notes 3, 4 and 5 below

This rule applies also to decrees for possession under Section 9 of the Specific Relief Act,[17] and to proceedings under Section 78 of the Madras Hindu Religious Endowments Act, II of 1927,[18] but does not apply to proceedings for delivery of possession under the Provincial Insolvency Act[19] or the Mamlatdars Act[20] (Bombay Act III of 1876)

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2. ('33) AIR 1933 Cal 246 (250) 60 Cal 8 L R
3 ('24) AIR 1924 All 495 (500 501) 46 All 693 (FB)
[*See also* ('08) 7 Cal L Jour 98 (99) (Obstruction

[But see ('81) 3 Mad 104 (106, 107) (Decision prior to Amendment Act of 1879 — Enquiry limited to fact of possession)]
15 ('35) AIR 1935 Cal 267 (267)
16 ('19) AIR 1919 Pat 425 (430) 4 Pat L Jour 94 (F B)

9 ('06) 33 Cal 457 (459)
10 ('92) 14 All 417 (419)
('08) 12 Cal W N 115 (117)

O. 21 R. 97
Notes 2–4

2. "Decree for possession" — Partition decree. — A decree for partition of immovable property is a decree for possession within the meaning of this rule[1] The rule applies also to an *order* for delivery of possession[2]

2a. "Court." — It has been held that a Court to which a decree is sent for execution can entertain an application under this rule although the decree has not been passed by it or the property has not been sold by it[1]

3. Limitation. — The period of limitation for an application under this rule is thirty days from the date of the resistance or obstruction (Limitation Act, Article 167) The resistance or obstruction is not necessarily the *first* resistance or obstruction, and every time the decree holder or auction purchaser is obstructed, he obtains a fresh cause of action and he may apply within thirty days of such obstruction[1] See Notes 4 and 5 below

An application under this rule may be treated as an application in an execution proceeding but cannot be treated as an *application for execution* within the meaning of Section 15 of the Limitation Act[2]

For fuller discussion, see Notes to Article 167 in the Authors' Commentaries on the Limitation Act

4. Fresh application for delivery, if can be made. — If the holder of a *decree for possession* applies for delivery of possession, but is resisted or obstructed in obtaining possession it is not obligatory on him to proceed under this rule, he may either apply again for execution of the decree under Rules 35 and 36 *ante*,[1] or he may institute a regular suit for possession against the persons obstructing if they are third parties[2]

But if an *auction purchaser* is resisted or obstructed in the delivery of possession and he does not apply for an investigation under this rule within the period prescribed (thirty days), is it open to him to apply again under Rules 95 or 96, and if again resisted, to apply under this rule? If the first resistance was by the *judgment debtor or by any person on his behalf*, there is nothing to prevent the purchaser from applying again for delivery of possession under Rule 95, within the period of limitation prescribed and the resistance offered afresh will furnish a fresh cause of action for proceeding under this rule[3] But if the original obstruction was by *third* parties and not by the judgment debtor or any person claiming through him, it has been held

Note 2

1. ('93) 16 Mad 127 (129 130)
2. ('39) AIR 1939 Cal 494 (496) (Order for receiver to obtain possession — Application under O 21, R 97 made on his behalf is proper)

Note 2a

1 ('36) AIR 1936 Sind 11 (13) 30 Sind LR 290

Note 3

1. ('81) 5 Mad 113 (114)
('33) AIR 1933 Bom 457 (459) (F B)
('96) 18 All 233 (236)
('09) 13 Cal W N 724 (727 728)
('28) 1928 Mad W N 236 (236)
('39) AIR 1939 Cal 494 (497)
2. ('35) AIR 1935 Cal 333 (334) 62 Cal 66

Note 4

1 ('82) 5 Mad 113 (114)
('33) AIR 1933 Bom 457 (458) (F B)
('09) 13 Cal W N 724 (727, 728)
('28) 1928 Mad W N 236 (236)
('21) AIR 1921 Mad 559 (561)
('96) 18 All 233 (237)
[But see ('10) 6 Ind Cas 649 (649) (*Lah*)]
2 ('84) 8 Bom 602 (608)
[*See* ('35) AIR 1935 Mad 803 (808) *58* Mad 593 (F B) (Decree holder purchaser seeking delivery of possession obstructed by judgment-debtor — His remedy is under Order 21 R 97, C P C —If obstructed by judgment debtor and

('14) AIR 1914 Mad 117 (117)

O. 21 R. 97
Notes 4—5

that a second application for delivery of possession under Rule 95 is not maintainable [4] Where once possession has been effectively delivered to the purchaser a subsequent obstruction by the judgment debtor will not entitle the purchaser to apply under this Rule [5] See Note 5 below

After a final decree for foreclosure the decree holder obtained delivery of possession as against the judgment debtor but was unable to get it against a transferee *pendente lite* from the judgment debtor The decree holder then put in a second application for delivery of possession as against the transferee It was held that the second application must be treated as one under O 21 R 11 and not under this rule [6]

5. Remedies of a person obstructed — See Notes 3 and 4 above

It is not obligatory on the decree holder or auction purchaser to resort to the summary remedy provided under this rule [1] But if he applies under this rule and an order is made on investigation against him *i e under* Rule 99 his remedy is only to file a suit under Rule 103 within one year from the date of the order to establish his right to the property The following tabular statement will illustrate the various remedies open to the person obstructed —

Remedies of a person obstructed

Person obstructed	Obstruction by whom	Remedy
I Holder of a decree for possession	a On obstruction by *judgment-debtor* or by person claiming under him	i May proceed under Rule 97 ii May apply again in execution of the decree under Rules 35 and 36 and if obstructed again may apply under Rule 97 [2]
	b On obstruction by *third parties*	i May proceed under Rule 97 ii May apply again in execution of the decree under Rules 35 and 36 (Note 4) iii May institute a regular suit for possession (Note 4)
II Purchaser in sale in execution	a On obstruction by *judgment debtor* or any person claiming under him	i May proceed under Rule 97 ii May apply again for delivery under Rules 35 and 36 (See Note 4) iii May file a suit for possession But if the *decree holder* is the purchaser see Note 19 to Section 47
	b On obstruction by *third parties*	i May proceed under Rule 97 ii May file a suit for possession (Note 3) *Note* — There is a conflict of decisions as to whether a second application for delivery of possession will l e

4 (04) 26 All 365 (367)

Note 5

1 (19) AIR 1919 Pat 425 (4 0) 4 Pat L Jour 94 (F B)

2 (32) AIR 1932 Cal 241 (? 42) 59 Cal 739 (He is not necessarily bound to proceed under R. 97)

O.21 R.98
Notes 1–5

judgment debtor[2] inasmuch as, in such case, his obstruction cannot be said to be *without just cause*

By virtue of Section 146 *ante*, an application under this rule can be maintained against any person claiming under the judgment debtor and bound by the decree, such as a tenant,[3] or a transferee *pendente lite*,[4] or a subsequent purchaser from the judgment debtor in execution of a money decree against him[5] The Court can pass an order under this rule only on an application made to it under Rule 97 and cannot therefore pass an order under this rule on an application for possession under Rule 95[6]

2. Presidency Small Cause Court. — Under Section 48 of the Presidency Small Cause Courts Act, the provisions of the Code of Civil Procedure are made applicable to proceedings under Chapter VII of the Act, and, therefore, the Small Cause Court has power to direct removal of improper obstruction on the part of the judgment debtor under this rule[1]

3. Alienee from judgment-debtor pending attachment. — Under Rule 95, the Court may order delivery of possession against a person "claiming under a title created by the judgment debtor subsequently to the attachment of such property It has been held by the High Court of Madras[1] that this rule should be read along with Rule 95 and an order can be made under this rule against such a person, and further that such person is a representative of the judgment debtor within the meaning of Section 146 See Note 1 and also Note 2 to Rule 102

or a

and

and he resists delivery of possession, the Court cannot order delivery of possession under this rule[3] But the Court ought to decide the question of the existence or otherwise of just cause, on the evidence before it and not on a consideration that has no basis at all[3]

5. "Is still resisted or obstructed." — If the judgment debtor or any person acting at his instigation, again resists delivery of possession after an order for delivery is passed under this rule, the Court has the power to commit such person to prison, on an application by the person obstructed

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4 (25) AIR 1925 Cal 1243 (1244)
(10) 7 Ind Cas 418 (419) 34 Mad 450
[*See also* (21) AIR 1921 Mad 559 (561 562)]
5 (20) AIR 1920 Mad 943 (944)
6 (28) AIR 1928 Lah 215 (216)
[*See also* (37) AIR 1937 Mad 366 (366) (Order under this rule can be passed only after notice to the judgment debtor and investigation of the case as contemplated by R 97 (2))]

Note 2

1 (24) AIR 1924 Mad 74 (74)

Note 3

1 (10) 7 Ind Cas 418 (419) 34 Mad 450,

Note 4

1. (10) 8 Ind Cas 133 (133) (Mad)
(90) 13 Mad 504 (507, 508)
(20) AIR 1920 Mad 106 (107) 43 Mad 635 (Unmarried sisters are not bound by sale of the judgment-debtor s interest and cannot be removed from possession)
(39) AIR 1939 Nag 287 (293) (*Between date of mortgage and suit thereon, land declared sir under S 68 C P Tenancy Act 1920 and mortgagor becoming entitled to benefit of S 49 of Act—Mortgagor can claim such benefit in execution proceedings and although decree directs delivery of possession, decree holder will get only possession of proprietary rights subject to the occupancy rights that have accrued to the judgment debtor*)
2 (28) AIR 1928 Mad 806 (809)
(10) 1910 Mad W N 641 (642)
(90) 13 Mad 504 (507)
3. (20) AIR 1920 Pat 137 (133)

O. 21 R. 98 Notes 6-8

6 **"In obtaining possession," meaning of** — The word possession in this rule is not restricted to actual or *physical* possession but includes also constructive possession or possession in law by receipt of rent or otherwise [1]

7. **Renewal of resistance — Fresh cause of action** — See Order 21, Rule 97 Note 4

8. **Appeal** — See Section 47 Note 19 and Order 21 Rule 101

O. 21 R. 99

R. 99. [Ss 331, 335] Where the Court is satisfied that the resistance or obstruction was occasioned by any person (other than the judgment debtor) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application

Resistance or obstruction by bona fide claimant

[1877, Ss 331, 335, 1859, Ss 229, 269]

Local Amendments

ALLAHABAD

For the words in brackets (other than the judgment debtor) *read* the words in brackets (other than persons mentioned in Rules 95 and 98 hereof)

CALCUTTA

Insert the words to have a right after the words in good faith

MADRAS

For the words in brackets (other than the judgment debtor) *read* the words in brackets (other than those mentioned in Rule 98)

NAGPUR

For the word judgment debtor where it occurs in brackets *substitute* the words persons mentioned in Rule 95 or 98

N W F P

For the words (other than the judgment debtor) *substitute* the words (other than the persons mentioned in Rules 95 and 98)

OUDH

For the words in brackets (other than the judgment debtor) *read* the words in brackets (other than the persons mentioned in Rules 95 and 98 hereof)

PATNA

For the brackets and words (other than the judgment debtor) *substitute* the brackets and words (other than the persons mentioned in Rules 95 and 98)

RANGOON

Substitute the following

99 Where the Court is not so satisfied it shall make an order dismissing the application

Synopsis

Note 6

1 (01) 25 Bom 4 8 (49 493)

(06) 33 C 145 (491 493)

[*See also* (01) 27 Mad 67 (71) (F B)]

O. 21 R. 99
Notes 1–5

1. Procedure under the old Code. — This rule corresponds to Sections 331 and 335 of the Code of 1882 Section 331 related to the procedure to be adopted in the case of obstruction to delivery of possession to the *holder of a decree for possession* and Section 335 related to the case of obstruction to *auction purchaser*

Under Section 331, however, the Court had to register the application as a *suit* between the decree holder as plaintiff, and the claimant as defendant, and to investigate into the claim as if a suit for the property had been instituted by the decree holder against the claimant The undermentioned cases[1] which were decided under the old Code are no longer of any importance

2. Scope of the Rule. — When delivery of property in execution of a decree is resisted, the Court can only deal with the matter on application to remove the obstruction and only in the manner provided by law It cannot direct that unless the obstructor filed a suit within a certain time to establish his right, his title to the property should cease [1] The order passed under this rule is final subject to the result of the suit if any, under Rule 103 [2]

3 "Person other than the judgment-debtor." — See Note 2 to Order 21 Rule 100

4. "Claiming in good faith to be in possession." — The word possession in this rule is not restricted to *actual* possession, it includes also *constructive* possession [1] See Note 6 to Rule 98

The party resisting delivery of possession should satisfy the Court that he is in good faith in possession of the property on his own account or on account of a person not the judgment debtor [2] If the obstructor has a good and legal right to obstruct the fact that he acts at the instigation of the judgment debtor will not prevent an order being made under this rule in his favour [3] It has also been held in the undermentioned case[4] that the words claiming in good faith to be in possession do not mean 'claiming in good faith to *have a right to be in possession* but mean only that the claimant claims to be in possession as a matter of fact See Rule 101, *infra*

5 "On his own account." — The person in possession, resisting delivery of possession may claim to be in possession on his own account or as tenant of or on

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Order 21 Rule 99 — Note 1

1 (87) 14 Cal 234 (235)
(85) 8 Mad 548 (551) (F B) (Section 331 confers special jurisdiction to try claim below pecuniary value of Court)
(95) 22 Cal 830 (832) (Do)
(79) 4 Bom 123 (125) (Suit is only a continuation of original suit)

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register

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of title

(71) 15 Suth W R 327 (328) (Do)
(92) 18 Bom 37 (40)
(10) 6 Ind Cas 285 (285) (Mad)

Note 2

1 (23) AIR 1923 Lah 145 (146)
2 (20) AIR 1920 Lah 517 (520) 1 Lah 5

Note 4

1 (01) 25 Bom 478 (480 481)
2 (28) AIR 1928 Mad 909 (909)
(26) AIR 1926 Mad 78 (80 81) 48 Mad 76
(16) AIR 1916 Mad 820 (820)
(10) 5 Ind Cas 809 (810) 1910 Pun Re No 14
20

dismissal of application under O 21 R 99 proper)
4 (20) AIR 1920 Cal 706 (707) 47 Cal 907

account of some person *other* than the judgment debtor Therefore, in execution of a decree against a tenant, a tenant of the tenant, i e, a sub tenant cannot resist delivery of possession to the landlord [1] The Calcutta High Court[2] has held that if the lessee granted the sub lease against a covenant in the lease not to sub let, the sub lessee is a trespasser and therefore is a person claiming to be in possession on his own account and that the remedy of the landlord is to file a suit for possession against the sub lessee See Note 2 to Rule 101, *infra*

Under Hindu law, unmarried sisters are not bound by a decree against their brother, and as they have a right of residence in the family house they cannot be removed from possession in execution of a decree against their brother [3]

It has been held that a decree against executors does not bind the beneficiaries under the will and that their possession of the testator's estate is not on behalf of the executors [4]

6. **Transferee pendente lite.** — See Order 21 Rule 102, *infra*

7. **Inherent power to order delivery of possession.** — It has been held in the undermentioned case[1] that the Court can, under its *inherent* powers, order delivery of possession to a decree holder, where the property is in the possession of a *third* person who has no *bona fide* claim to the possession of the property on his own account.

8. **Appeal.** — See Note 19 to Section 47 and Order 21 Rule 101.

R. 100. [S. 332.] *(1)* Where any person other than the judgment-debtor is dispossessed of immoveable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.

Dispossession by decree holder or purchaser.

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

[1877, S. 332; 1859, S. 230.]

Synopsis

1. Scope of the Rule.
2. "Any person other than the judgment-debtor."
3. "Is dispossessed."
4. Dispossession under order of Collector.
4a. "By the purchaser thereof."
5. Nature of investigation under this Rule. See Rule 101.
6. Limitation.
7. Applicability of Order 9 to applications under this Rule See Rule 101

[illegible]

3. ('20) AIR 1920 Mad 106 (107) 43 Mad 635.
4. ('37) AIR 1937 Cal 301 (301, 303)

Note 7

1. ('10) 6 Ind Cas 120 (120, 121) (Cal).

O. 21 R. 100
Notes 1-2

1. Scope of the Rule. — Where, in obtaining possession of property the holder of a decree for possession or the auction purchaser, as the case may be, *dispossesses* any person other than the judgment debtor, such person may apply to the Court for a summary investigation of the matter under this rule[1] It is, however, not *obligatory* on such person to apply under this rule, he may bring a separate suit against the person who dispossessed him for possession of the property[2] The Court cannot, however, act under this rule unless there is an *application* of the party dispossessed[3]

Where an application is made under this rule, the Court should register the application,[4] make an investigation therein and should either dismiss the application or pass an order under Rule 101, *infra*[5] It has no jurisdiction to pass a declaratory order under this rule[6] The fact that the applicant's suit for declaration of *title* to the property has been dismissed is no bar to his application under this rule, the question involved in such application being only one of *possession*[7] As to the *scope of the investigation under this rule*, see Rule 101, *infra*

The remedy of the party against whom an order is made under Rule 101 is to file a suit under Rule 103 to establish his right to the possession of the property

A third person dispossessed in execution of a decree under Section 9 of the Specific Relief Act can also apply under this rule[8]

This rule applies to cases of exclusive as well as of joint possession[9]

Where after an application was filed under this rule, the opposite party filed a suit for an injunction restraining the applicant from proceeding with his application it was held that under Section 56 (a) of the Specific Relief Act the injunction could not be granted as the prosecution of the application could not be said to amount to a multiplicity of proceedings[10]

See also the undermentioned cases[11]

2. "Any person other than the judgment-debtor." — This rule has to be read along with Rule 101, *infra* A judgment debtor or his representative cannot apply under this rule[1] As to who are "representatives," see the undermentioned cases[3] and

Order 21 Rule 100 — Note 1

1. ('26) AIR 1926 Cal 377 (377)
('89) 13 Bom 218 (214)
('93) 3 Mad L Jour 258 (259) (Third party purchaser should apply under this rule and not by way of restitution)
('22) AIR 1922 Pat 210 (211) (Where possession has been effectively delivered by a Civil Court, the only course open to the aggrieved person (other than the judgment-debtor) is to apply under this rule, proceedings under S 145, Cr P C, are not proper)
[*See also* ('94) 18 Bom 522 (524)]
2. ('31) AIR 1931 Lah 686 (687)
('67) 1867 Beng L R Sup Vol 638 (642) (F B)
(1864) 1864 Suth W R 61 (61)
[*See also* ('35) AIR 1935 Oudh 462 (464) 11 Luck 283 (Tenant having alternative remedy of suit under S 108 (10), Oudh Rent Act — Right of making application under O 21 R 100, C P C is not barred on that account)]
3. ('31) AIR 1931 Lah 686 (687)
4. ('24) AIR 1924 Pat 698 (700)
5 ('26) AIR 1926 Cal 377 (377)
6. ('27) AIR 1927 Nag 300 (301)
7. ('37) AIR 1937 Oudh 400 (400, 401)
8. ('70) 12 Suth W R 25 (25) (FB)
[But see ('67) 7 Suth W R 171 (172)]
9. ('33) AIR 1933 Pat 132 (133)
10. ('33) AIR 1933 Pat 250 (254, 255) 12 Pat 727

[illegible]

tion 170, Ben Ten Act does not exclude [illegible] under O 21 R 100 C P C)

Note 2

1 ('23) AIR 1923 Pat 76 (82)
('17) AIR 1917 Pat 597 (597) 2 Pat L Jour 478
('95) 17 All 478 (481)
2. ('31) AIR 1931 Mad 534 (535) (Tenants and servants of judgment debtor are bound by decree.)
('07) 17 Mad L Jour 321 (321) (Mortgagee after attachment is a representative of judgment-debtor)
('29) AIR 1929 Pat 227 (228) (Purchaser of non transferable holding is representative of judgment debtor)
('26) AIR 1926 Cal 956 (956) (Do)
('18) AIR 1918 Mad 673 (674) (Do)
('18) AIR 1918 Pat 483 (484) 3 Pat L Jour 579 (Purchaser of the whole or part of an occupancy

Section 47 Notes 17 and 21, *ante* The Calcutta High Court[3] has, however, held that the word 'judgment debtor" in this rule does not include any person other than the *actual* judgment debtor, the question according to that Court is not whether the applicant is a *representative* of the judgment debtor but if he is in possession *on his own account*, and this should be investigated under Rule 101 See Rule 101, *infra*

A person who is a party to the suit, but against whom no decree has been passed, is not a judgment debtor and, therefore, can apply under this rule[4] If, however, the decree is binding on him, his remedy is to apply under Section 47[5]

Rules 100 and 101 are not exhaustive and do not include a case where the judgment debtor himself is in possession on account of some third person and not on his own account It has been held, however, that in such a case the *third person* is entitled to apply under this rule if the judgment debtor is dispossessed by the decree holder or auction purchaser[6]

Where the judgment debtor or his representative is dispossessed of property not included in the decree, his remedy is to apply under Section 47[7]

3. "Is dispossessed." — Unless the applicant is *dispossessed* of the property, he has no cause of action to apply under this rule[1] The dispossession should be in the *course of the delivery of possession*[2] and should be proved as a fact.[3] Thus, *mere* delivery of *symbolical* possession to the decree-holder or auction purchaser will not amount to dispossession of the party in possession, it must be shown that the applicant was *actually* dispossessed of the property[4]

Where dispossession does not take place in the course of the delivery of possession in execution but *subsequent* thereto, this rule has no application, and the remedy of the party aggrieved is to file a regular suit for possession[5]

Where a person is in possession of the property by receipt of rent or otherwise, and the tenant in actual possession is dispossessed of the property by the decree holder or auction purchaser, the landlord is a person who is *dispossessed* of the property

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holding not transferable by custom is a representative of the judgment debtor)

('35) AIR 1935 Pat 253 (253) (Sons of Hindu judgment-debtor are prima facie bound by decree
other

(Pur
repre
sentative of judgment-debtor)

3. ('28) AIR 1928 Cal 792 (794)
('30) AIR 1930 Cal 348 (348)

967)
('27) AIR 1927 Pat 404 (405)

5. ('28) AIR 1928 Mad 1270 (1270).

6. ('01) 25 Bom 478 (493)

7. ('16) AIR 1916 All 104 (106) 38 All 339
('33) AIR 1933 Mad 569 (570)

Note 3

1. ('69) 12 Suth W R 231 (232, 233)
('35) AIR 1935 Pat 253 (253 254)

2. ('29) AIR 1929 Pat 553 (554 555)

3. (1865) 3 Suth W R 205 (206)

4. ('04) 27 Mad 262 (268, 270)
('33) AIR 1933 Cal 144 (144)
('96) 20 Bom 351 (353) (FB)
('03) 30 Cal 710 (712)
('96) 1 Cal W N 343 (344)
('69) 11 Suth W R 191 (192) (Planting a bamboo and making proclamation to occupants is suffi-

formal delivery to decree-holder—He alternately praying that if legal effect of formal delivery to decree-holder be dispossession, he (objector) should be given possession — Application is

O.21 R.100 Notes 3-7

within the meaning of this rule,[6] even though the tenant is the judgment debtor[7] See Note 2 above

4. Dispossession under order of Collector. — This rule has no application to a case where the decree has been transferred to the Collector for execution under powers conferred on him by the Local Government under Section 70 of the Code The Court which passed the decree is for the time being *functus officio*, and has no jurisdiction to enquire into a complaint of dispossession under this rule,[1] but as soon as the Collector has *exhausted* all the powers conferred upon him, the Civil Court has jurisdiction to inquire into any matters requiring to be done in execution such as those provided in Rules 97 to 103 of the Code[2]

4a. "By the purchaser thereof." — Although the wording of this rule refers only to the auction-purchaser, it must be taken to be intended to include his legal representatives.[1]

5. Nature of investigation under this Rule. — See Rule 101, *infra*

6. Limitation. — The period of limitation for an application under this rule is thirty days from the date of dispossession[1] See Article 165 of the Limitation Act, 1908

7. Applicability of Order 9 to applications under this Rule. — See Order 21 Rule 101

O.21 R.101

R. 101. [Ss. 332, 335.] Where the Court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment-debtor, it shall direct that the applicant be put into possession of the property.

Bona fide claimant to be restored to possession.

Synopsis

1. Procedure under the old Code.
1a. Applicability of Rule to proceedings under the Madras Estates Land Act, 1908.
2. "On his own account."
3. Transferee pendente lite. See Rule 102
4. Transfer of decree to Collector. See Rule 100, Note 4
5. Nature of investigation under this Rule.
6. Applicability of the provisions of Order 9 to proceedings under this Rule.
7. Appeal.
8. Revision.

1. Procedure under the old Code. — Rules 100 and 101 correspond to Sections 332 and 335 of the Code of 1882. Section 332 related to the procedure to be

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6. ('00) 33 Cal 487 (491, 493) ('01) 25 Bom 478 (488, 493) (Posses- posses-

7. ('01) 25 Bom 478 (493)

Note 4

1. ('13) 37 Bom 488 (490) ('24) AIR 1924 Nag 309 (311).

2. ('14) AIR 1914 Bom 252 (253) 38 Bom 673 (676, 678)

Note 4a

1. ('33) AIR 1933 Cal 293 (293)

Note 6

1. ('16) AIR 1916 All 104 (106) 38 All 539. ('31) AIR 1931 Cal 335 (337) 58 Cal 55.

adopted in the case of a person dispossessed by the *holder of a decree, for possession*, and Section 335 related to the case of dispossession by the *auction purchaser* But under Section 332, the Court had to *examine* the applicant, and on being satisfied that there was probable cause for making the application, had to ascertain on investigation if the following grounds existed, *viz* —

(i) Whether the property was *bona fide* in the possession of the applicant on his own account or on account of some person other than the judgment debtor

(ii) Whether the property was not comprised in the decree and

(iii) If the property was comprised in the decree, whether the applicant was not a party to the suit in which the decree was passed

If the Court was satisfied that these grounds existed, it had to order re delivery of the property to the applicant—otherwise it had to dismiss the application

As to the nature of the investigation under this rule see Note 5 below

1a. Applicability of Rule to proceedings under the Madras Estates Land Act, 1908. — By virtue of Section 192 of the Madras Estates Land Act, 1908, this rule is applicable to proceedings under that Act [1]

2. "On his own account." — Rules 100 and 101 are not confined, in their application, to cases of *exclusive* possession, but are applicable also to cases where the person dispossessed was in *joint* possession [1] Therefore, if a co owner or a member of an undivided family is dispossessed in execution of a decree against another co owner or coparcener he may apply under Rule 100 to be put in joint possession with the decree holder or the auction purchaser [2] but he cannot claim to be put in possession of *specific portions* of the property as the Court cannot adjudicate on such questions of title under this rule [3]

A mortgagee in possession of the property[4] or an occupancy tenant,[5] if dispossessed, can get back the possession under this rule as he is in possession on his own account, but not a mortgagee or transferee *pendente lite* See Rule 102, *infra* It has been held by the High Court of Patna that a usufructuary mortgagee is *not entitled to object* under O 21 R 58 to the attachment of the property of his mortgagor, and that if such an objection is made and disallowed, Rule 63 will not operate to debar him from making an application under this rule when he is dispossessed by the purchaser in execution of a decree [6] It has been held by the High Court of Calcutta[7] that if the claimant was in possession on his own account or on account of some person other than the judgment debtor, he is entitled to succeed under this rule, though he is a trespasser or has no title to the property

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Order 21 Rule 101 — Note 1a

1 ('35) AIR 1935 Mad 309 (310)

Note 2

[illegible]

ment debtor s co owners on application under O 21 R 100 are not entitled to possession of entire set of fields but only to the extent of their share)]

4 ('14) AIR 1914 Cal 580 (581)

('76) 2 All 94 (95)

('95) 17 All 222 (224 225) (FB)

('28) AIR 1928 Rang 127 (127) 6 Rang 122

('39) AIR 1939 Pat 263 (263)

5 ('31) AIR 1931 Mad 534 (535)

6 ('22) AIR 1922 Pat 403 (405) 1 Pat 159

('37) AIR 1937 Pat 63 (64)

7 ('27) AIR 1927 Cal 339 (340)

[See ('20) AIR 1920 Cal 706 (705) 47 Cal 907

O 21 R 101
Notes 2-6

The Court is not entitled on an application under this rule to investigate into the question of *benami* in order to determine whether the applicant was in possession of the property on his own account [8]

3 Transferee pendente lite — See Order 21 Rule 102

4 Transfer of decree to Collector — See Order 21 Rule 100 Note 4

5 Nature of the investigation under this Rule — Where a third party applies for re delivery of property under this rule the question which the Court has to decide is whether the applicant was in possession on his own account or on account of some person other than the judgment debtor [1] It cannot reject the application on the ground that originally the applicant had not obtained possession in a lawful manner [2] The applicant has to prove that he was in possession and was dispossessed in the course of the delivery of possession to the decree holder or purchaser[3] (see Notes 2 and 3 to Rule 100 *ante*) The onus lies upon him to prove his right to possession [4] and it is a serious irregularity to ask the decree holder or auction purchaser to begin [5] The Court should dispose of the application only after allowing the parties to produce whatever evidence they desire oral or documentary [6] The investigation under this rule being a summary one the Court should confine itself to the question of possession and should not decide questions of title[7] or questions regarding the construction of the decree[8] or the equities of the parties [9] An unsuccessful applicant under O 21 R 58 is not competent to apply under O 21 R 100 inasmuch as the order against him will be conclusive against him subject to the result of a suit instituted under O 21 R 63 to set aside the order [10]

Where subsequent to the dispossession events have happened which disentitle the applicant to retain possession the Court cannot refuse to take notice of such events in passing an order under this rule [11]

6 Applicability of the provisions of Order 9 to proceedings under this Rule — See Section 141 Note 2 *ante* and Note 1 to Order 9 General. If the application under Rule 100 is dismissed for *default* or ordered *ex parte* it has been held by the High Court of Calcutta[1] that the Court may restore the application or set aside the *ex parte* order as the case may be

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8 (24) AIR 1924 Pat 506 (507)

Note 5

1 (01) 25 Bom 478 (488)
[*See* (17) AIR 1917 Nag 53 (54 55) 14 Nag L R 66]
2 (74) 22 Suth W R 406 (406)
3 (1865) 3 Suth W R 205 (206)
4 (67) 8 Suth W R 8 (9)
(69) 12 Suth W R 16 (17)
[*See also* (38) AIR 1938 Pat 90 (91)

But under the old Code if the application itself was registered as a suit it was held that

[illegible]
(98) 1898 Bom P J 56
(94) 1894 Bom P J 88
(80) 5 Cal 278 (280)
(78) 2 All 94 (95 96)
(70) 14 Suth W R 358 (359 360)
(70) 13 Suth W R 80 (81 82) (F B)
(73) 20 Suth W R 114 (115)
(03) 6 Oudh Cas 110 (112)
(69) 11 Suth W R 255 (256)
8 (30) AIR 1930 Pat 416 (417)
9 (26) AIR 1926 Mad 1127 (1128)
10 (33) AIR 1933 Cal 233 (234) 36 Cal W N 1034 (1035) (Claim case dismissed for default) (35) AIR 1935 Pat 122 (123) (Claim case dismissed summarily)
(35) 158 Ind Cas 398 (398) (Pat)
11 (33) AIR 1933 Cal 534 (535) 60 Cal 685.

Note 6

1 (28) AIR 1928 Cal 179 (180)

7. Appeal. — If the proceedings relating to delivery of possession under Rules 97 to 102 are "between the parties or their representatives," an order passed in such proceedings will fall under Section 47 according to the view of the High Courts of Calcutta and Madras and of the Judicial Commissioner's Court of Sind See Note 19 to Section 47 *ante* An order under Rule 98 against a *stranger* will not fall under Section 47 even according to this view and no appeal will, therefore, lie in such a case [1] But if the proceedings under this rule are between *parties* to the suit, and an order is passed under this rule, the High Court of Madras[2] has held that the aggrieved party will have only a right of *appeal* under Section 47, *ante* In the undermentioned case[3] Mr Justice Odgers observed as follows

> "It was not open to the plaintiffs to proceed at their option, either by a suit or by way of appeal It is also to be observed that Section 47 expressly bars a suit in contradistinction to Rule 103 which says that the order on obstruction proceedings shall be conclusive subject to the result of the suit if any It has as far as I know, never been suggested in any case that the procedure under Section 47 and under Rule 103 is cumulative "

See also Note 84 to Section 47

8. Revision. — As the remedy of the party against whom an order under Rules 98, 99 or 101 has been passed is to file a suit under Rule 103 *infra*, ordinarily orders passed under these rules are not open to revision [1] But if the lower Court refuses to order investigation,[2] or rejects the application on a misconstruction of the law,[3] or the lower Appellate Court erroneously entertains appeals from orders under those rules,[4] or if there are illegalities or material errors in the proceedings in the lower Court [5] the High Court may interfere in revision.

R. 102. [S. 333.] Nothing in rules 99 and 101 shall apply to resistance or obstruction in execution of a decree for the possession of immoveable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person.

Rules not applicable to transferee pendente lite

[1877, S. 333; 1859, S. 231.]

Note 7

is revisable)
[*See also* (35) AIR 1935 Mad 303 (310)]

O. 21 R. 101
Notes 2-6

The Court is not entitled, on an application under this rule, to investigate into the question of *benami* in order to determine whether the applicant was in possession of the property on his own account [8]

3. Transferee pendente lite. — See *Order 21 Rule 102*

4. Transfer of decree to Collector. — See Order 21 Rule 100 Note 4

5. Nature of the investigation under this Rule. — Where a third party applies for re delivery of property under this rule, the question which the Court has to decide is whether the applicant was in possession on his own account or on account of some person other than the judgment debtor.[1] It cannot reject the application on the ground that originally the applicant had not obtained possession in a lawful manner [2] The applicant has to prove that he was in possession and was dispossessed in the course of the delivery of possession to the decree holder or purchaser[3] (see Notes 2 and 3 to Rule 100, *ante*) The onus lies upon him to prove his right to possession,[4] and it is a serious irregularity to ask the decree holder or auction purchaser to begin [5] The Court should dispose of the application only after allowing the parties to produce whatever evidence they desire, oral or documentary [6] The investigation under this rule being a summary one, the Court should confine itself to the question of possession and should not decide questions of title[7] or questions regarding the construction of the decree[8] or the equities of the parties [9] An unsuccessful applicant under O 21 R 58 is not competent to apply under O 21 R 100 inasmuch as the order against him will be conclusive against him subject to the result of a suit instituted under O 21 R 63 to set aside the order [10]

Where subsequent to the dispossession events have happened which disentitle the applicant to retain possession, the Court cannot refuse to take notice of such events in passing an order under this rule [11]

6. Applicability of the provisions of Order 9 to proceedings under this Rule. — See Section 141, Note 2 *ante* and Note 1 to Order 9, General If the application under Rule 100 is dismissed for *default* or ordered *ex parte*, it has been held by the High Court of Calcutta[1] that the Court may restore the application or set aside the *ex parte* order, as the case may be, under its *inherent powers*

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8 ('24) AIR 1924 Pat 506 (507)

Note 5

1. ('01) 25 Bom 478 (488)
[*See* ('17) AIR 1917 Nag 53 (54, 55) 14 Nag L R 66]
2 ('74) 22 Suth W R 406 (406)
3 (1865) 3 Suth W R 205 (206)
4 ('67) 8 Suth W R 8 (9)
('69) 12 Suth W R 16 (17)
5 ('31) AIR 1931 Mad 534 (538)

But under the old Code, if the application itself was registered as a suit, it was held that the question of title should be gone into See the following cases
('70) 14 Suth W R 140 (141)
(1865) 3 Suth W R 213 (215)
('98) *1898 Bom P J 56*
('94) 1894 Bom P J 88
('80) 5 Cal 278 (280)
('78) 2 All 94 (95 96)
('70) 14 Suth W R 358 (359, 360)
('70) 13 Suth W R 80 (81, 82) (F B)
('73) 20 Suth W R 114 (115)
('03) 6 Oudh Cas 110 (112)
('69) 11 Suth W R 255 (256)
8 ('30) AIR 1930 Pat 416 (417)
9 [illegible] AIR 1926 Mad 1127 (1128)
11. [illegible]

Note 6

1. ('28) AIR 1928 Cal 179 (180)

The right of suit under this rule is a statutory one, and the mere fact that a party has failed to prefer a claim under Rule 58 *ante*, will not debar him from maintaining a suit under this rule[3] On the other hand, the failure to file a suit under this rule by a party against whom an order is made under the previous rules will render the order under those rules conclusive against him and his representatives[4] However, where subsequent to the adverse order against a person his right to the possession of the property is established in another suit between the parties it is not necessary to sue again under this rule to establish the right[5] It will be useful here to compare Rule 63, *ante*, with this rule A suit under the former is instituted for the purpose of establishing the right which the plaintiff claims to the *property* in dispute, while a suit under this rule is for the purpose of establishing the right which he claims to the *present possession* of the property[6] Such right to possession may be based on title even without showing that the plaintiff was in actual possession at the date of the order against him[7] Another point of distinction between Rule 63 and this rule is that while under the former even an order *without investigation* will be conclusive such an order will not be conclusive under this rule[8] The reason is that under Rule 63 the party against whom *any* order is made should institute a suit under that rule whereas under this rule only a party against whom an order is made *under Rules 98, 99 or 101* need institute a suit under this rule, and an order under Rules 98, 99 or 101 can only be made *where the Court is satisfied*," etc, which can only be on an *investigation* of the question[9]

The scope of a suit filed under this rule is not the mere determination of the question of *possession* of the parties concerned, but the establishment of the right or title by which the plaintiff claims the present possession of the property[10] It has been held that a suit under this rule is by way of *defence* of one s rights and pleas available only by way of defence can be urged by the plaintiff in such suit Thus the plaintiff can rely on Section 53A of the Transfer of Property Act (doctrine of part

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('84) 8 Mad 82 (83) (It is unnecessary to sue to have the order cancelled)
('22) AIR 1922 Mad 63 (63) (Decree holder s own property sold by mistake—Obstruction by him for delivery to auction purchaser—Application by latter allowed for delivery — Decree holder must sue under this rule)]

3 ('31) AIR 1931 Lah 598 (598)

4 ('24) AIR 1924 Sind 97 (99) 17 Sind L R 63
('32) AIR 1932 All 703 (704)
('17) AIR 1917 Cal 5 (5 6)
('20) AIR 1920 Lah 517 (520) 1 Lah 57
('87) 10 Mad 357 (361)
('15) AIR 1915 Mad 586 (587) (Claim for sole possession—Joint possession ordered—Suit must be filed by claimant)
('24) AIR 1924 Mad 602 (602) (The pendency of another suit will not prevent the order from becoming conclusive)
('88) 12 Bom 6?? (633)

5 ('37) AIR 1937 Mad 582 (583 584) (What makes order conclusive is not failure to institute suit but failure to have the right established)

6 ('29) AIR 1929 Bom 379 (380) 53 Bom 668
('20) AIR 1920 Lah 517 (520) 1 Lah 57 (It is not sufficient to show that the summary order is erroneous)

7. ('21) AIR 1921 Mad 317 (318) 44 Mad 227
('29) AIR 1929 Bom 379 (380) 53 Bom 668
[*See* ('36) AIR 1936 Lah 530 (532)]
[*See also* ('32) AIR 1932 All 703 (704) (Suit [illegible]

was in possession when he obstructed the deli [illegible]

9 ('26) AIR 19?6 Nag 423 (424, 425) 22 Nag [illegible]

[illegible] (Policy underlying this rule is to have a speedy settlement of the questions of title raised in execution sales)]

O. 21 R. 103
Note 1

performance) in such suit although that Section is available only by way of defence[11] A suit under this rule is not one under Section 9 of the Specific Relief Act, inasmuch as the dispossession on which it is based is not one *otherwise* than in due course of law[12] It is not open to a defendant in a suit by the decree holder under this rule to question the validity of the decree[13]

Where an order becomes conclusive under this rule, it will bar a suit as well as a defence by the party against whom the order is passed or his *representative*[14] Where however, the order also falls under Section 47 of the Code, this rule does not, according to the High Court of Allahabad, operate as a bar to an appeal under that Section[15]

The provisions of Rules 97 to 103 are of a restrictive nature and strict compliance with them is necessary If, in a particular case, it is shown that the provisions of any of these rules have not been strictly complied with, the penal consequence of barring the right of suit cannot legally flow therefrom[16]

A suit instituted under this rule is not a continuation of the summary application but an independent proceeding governed by the relevant provisions of

al limits of whose jurisdiction the

ng subsisting title is *prima facie* on

and it has been held that the mere fact that the other party has been driven to institute a suit under this rule cannot shift that burden on to that party[19]

Where the plaintiff in a suit under this rule succeeds the order complained of must be set aside and the parties must be restored to the *status quo ante* and where the plaintiff has been removed from possession of the property, he must be put back in possession[20]

Where an auction purchaser of an undivided share of a co owner gets delivery of possession in execution but, on objection by a *party* to the suit, re delivery is ordered in his favour and the auction purchaser thereupon sues for partition of the share

11 ('40) AIR 1940 Oudh 1 (7) 184 Ind Cas 401 (408)
12 ('32) AIR 1932 All 703 (704)
13 ('37) AIR 1937 Cal 88 (91) (Contention that decree was passed without jurisdiction not all[illegible]

nd L R 63

if order is
remains in

ut the order is not conclusive as to questions which could not have been raised in the prior proceeding) (*See also* ('37) AIR 1937 Oudh 401 (402) 13

Cal 8 (Application not falling under Rule 97—Dismissal—Suit for possession thereafter is not one under Rule 103)
('34) AIR 1934 Lah 457 (458) (Objections not falling under Rule 100—Dismissal—Suit under

purchased by him, such a suit is not governed by either this rule or by Article 11A of the Limitation Act, inasmuch as the re delivery proceedings fall within Section 47[21]

1a. Applicability of Section 42 of the Specific Relief Act to suit under this Rule. — In a suit under this rule to establish the plaintiff's right to the present possession of the property, it is not necessary to ask for the further relief of possession the proviso to Section 42 of the Specific Relief Act, 1877, does not take away the special right conferred by this rule of merely asking for a declaration of the plaintiff's right[1] But the plaintiff is not precluded from claiming consequential relief in such a suit[2]

2. Suit by decree-holder or auction-purchaser under a different right. — The cause of action for a suit under this rule is the *adverse order passed under* Rules 98, 99 or 101, *ante* This rule does not therefore apply where the auction purchaser or the claimant institutes a suit relating to the property in *any other capacity* or based on a cause of action *different* from the adverse order under Rules 98, 99 or 101, *ante*[1]

Illustrations

1 *A* purchased certain property in execution of a decree and took delivery of possession of the property through Court *B* filed an application under Rule 100 but the Court dismissed it on the ground that *B* was not dispossessed and had, therefore, no cause of action under Rule 100 *B* was *subsequently* dispossessed, and he brought a suit for possession, alleging as the cause of action the *subsequent dispossession*, more than one year after the date of the order under Rule 100 It was held that the suit was not barred[2]

2 In execution of a decree for possession *A* was obstructed by *B*, and an order under Rule 98 was passed against *B* *B* filed a suit to set aside *the decree* on the ground of *fraud* and for delivery of possession as a consequential relief It was held that since the basis of the claim was distinct and different and the possession claimed was not present possession but only by way of consequential relief the suit was not barred[3]

3 *A* dispossessed *B* in execution of a decree *B* filed an application under Rule 100 and the same was granted Subsequently *A* became aware of the fact that the judgment debtor a tenant, of a non transferable holding had transferred the holding to the defendants He thereupon filed a suit in ejectment against the defendant in the *capacity of a landlord* It was held that the suit was not barred and that the cause of action was not the loss of possession but the fact that the tenant had unlawfully transferred a non transferable holding to the defendants[4]

Inasmuch as an order under Rules 98, 99 or 101 is conclusive under this rule only so far as the *present right to possession* is concerned, this rule will not operate so as to bar a party against whom an order has been passed under those rules, from maintaining a suit for *redemption* of property[5] or for enforcing a mortgage lien over the property[6] See also the undermentioned case[7]

3. "Any party against whom an order is made." — As has been observed in Note 1 *ante*, an order cannot be said to have been made against any party, within

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21 (27) AIR 1927 Mad 952 (953)

Note 1a

lish the plaintiff s right)

Note 2

1 (26) AIR 1926 Mad 683 (684) 49 Mad 596 (Suit for partition by a purchaser from a Hindu co parcener is not barred by a prior decision against him in a suit by him for declaration of his right to possession under O 21 R 103)

party claiming a share — Claim of applicant dismissed under O 21 R 99 — Suit by applicant for partition and possession of his share not barred)

O. 21 R. 103
Notes 3–4

the meaning of this rule, unless it was made after *investigation* into the matter[1] It is also necessary that the Court should have come to a *definite conclusion* on the matter under enquiry, if it declines to give any decision at all on the matter, it will not be conclusive so as to bar a suit instituted more than one year from the date of the order[2] The mere fact, however, that the investigation is not a *complete* one will not detract from the conclusiveness of the order[3] Nor, where an application has been rejected *after investigation*, will the mere fact that the Court refers the parties to a regular suit, detract from the conclusive character of the order[4] It has been held in the following cases that there is no order *against a party* within the meaning of this rule—

(1) Where the applicant *withdraws* his application and the Court makes an endorsement on the application that no investigation was made by reason of the withdrawal[5]

(2) Where the application is dismissed for default of appearance[6] or for non prosecution[7] without inquiry But where the Court fixes a day for the enquiry and, on the plaintiff's failure to *produce evidence* in support of the case, dismisses the application in the presence of the parties, it cannot be said to be a dismissal for default without inquiry[8]

(3) Where the application of the claimant is allowed for default of appearance of the decree holder[9]

(4) Where the application is simply dismissed without investigation[10]

(5) Where the application is rejected on the ground that it has been filed beyond time[11]

(6) Where the party was a minor and was not properly represented in the proceedings[12]

Where *A* files an application and the same is decided against him, he cannot be said not to be a party "against whom an order has been passed' merely because he is a *benamidar* for another person[13]

Although Rule 101 speaks of an order *directing* the applicant to be put *in* possession of property, it has been held that an order dismissing an application under Rule 100 to be put in possession is nevertheless an order against the applicant *under* Rule 101 for the purposes of this rule, and that the applicant would be bound to file a suit under this rule within one year from the date of the order[14]

4. Order dismissing application under Rule 95. — An order on an application under
so on
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Pun Re
o direct

5 ('61) 5 Bom 440 (441)
6. ('17) AIR 1917 Nag 53 (54, 55) 14 Nag LR 66

9 ('28) AIR 1928 Cal 179 (180),
10 ('16) AIR 1918 Mad 554 (554)
('16) AIR 1916 Cal 755 (756)
11 ('82) 4 All 131 (134)
12 ('05) 32 Bom 404 (409)
13. ('10) 8 Ind Cas 264 (266, 267) (Mad)
14. ('17) AIR 1917 Bom 133 (134) 42 Bom 10.

this rule will not apply to such orders[1] Nor will this rule apply where the decree holder applying under Rule 95 gets possession without any resistance on the part of any one, and the party dispossessed is not bound to sue the auction purchaser within one year under this rule[2] **O. 21 R. 103 Notes 4-6**

4a. Parties to suit. — See the undermentioned cases[1]

5. Limitation. — A suit under this rule is governed by Article 11A of the Limitation Act and should be brought within one year of the date of the order *against* the plaintiff[1] It has been held in the undermentioned case[2] that where an order against a person in possession has remained unexecuted, he is, in a suit against him for possession, not estopped from pleading that plaintiff has no title to the properties As has been seen in Note 3 above, where an order is passed without investigation, or where a suit is filed on a cause of action other than that of dispossession or of resistance or obstruction to delivery of possession, this rule does not apply and consequently Article 11A of the Limitation Act also does not apply[3]

In computing the period of one year prescribed by *Article 11A*, the time taken in revision proceedings cannot be excluded under Section 14 of the Limitation Act[4]

6. Court-fee. — A plaint in a suit under this rule is chargeable with a fixed fee under Article 17 of Schedule II of the Court fees Act, 1870[1]

Local Amendments

ALLAHABAD

The following rules shall be *added* to Order XXI

"104 When the certificate prescribed by Section 41 is received by the Court which sent the decree for execution it shall cause the necessary details as to the result *of execution to be entered in its register of civil suits before the papers are trans* mitted to the record room **O 21 R 104 (Allahabad)**

105 Every attachment of moveable property under Rule 43, of negotiable instruments under Rule 51, and of immovable property under Rule 54, shall be made through a Civil Court Amin, or bailiff, unless special reasons render it necessary that **O 21 R. 105 (Allahabad)**

Note 4

1 ('24) AIR 1924 All 495 (499 500) 46 All 693 (FB)

2. ('24) AIR 1924 Rang 261 (262)

N 4a

1 [illegible]

not a necessary party)

('35) AIR 1935 Sind 129 (131) (Suit against obstructor — Judgment-debtor is not necessary party)

Note 5

1. ('22) AIR 1923 All 403 (404) 44 All 607.

('17) AIR 1917 All 426 (427)

('86) 10 Bom 604 (609 610)

('02) 26 Bom 146 (149)

('02) 26 Bom 730 (734)

('25) 90 Ind Cas 827 (828) (Cal)

('20) AIR 1920 Lah 517 (520) 1 Lah 57

('20) 9 Mad L Jour 131 (133)

('16) AIR 1916 Lah 293 (293)

('38) AIR 1938 Cal 577 (577 578) (Revision [illegible]

Note 6

1. (1900) 22 All 384 (386)

[*See also* ('85) 9 Bom 20 (22)

('38) AIR 1938 Nag 300 (302) I L R (1939) Nag 422 (Suit under is in substance suit for setting aside executing Court s order — Relief for possession is implicit and, if prayed for does not necessitate levy of court fee on *ad valorem* basis)

('35) AIR 1933 Pat 321 (321) (No court-fee payable on prayer for possession)]

O. 21 R. 105 (Allahabad) any other agency should be employed, in which case those reasons shall be stated in the handwriting of the presiding Judge himself in the order for attachment

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O. 21 R. 106 (Allahabad) 106 When the property which it is sought to bring to sale is immovable property within the definition of the same contained in the law for the time being in force relating to the registration of documents, the decree holder shall file with his application for an order for sale a certificate from the Sub Registrar within whose sub district such property is situated, showing that the Sub Registrar has searched his book Nos I and II and their indices for the twelve years preceding the mortgage or attachment as the case may be and stating the encumbrances, if any, which he has found on the property.

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O. 21 R. 107 (Allahabad) 107 Where an application is made for the sale of land or of any interest in land, the Court shall, before ordering sale thereof, call upon the parties to state whether such land is or is not ancestral land within the meaning of Notification No 1887 I—238 10, dated 7th October, 1911, of the Local Government, and shall fix a date for determining the said question

On the day so fixed, or on any date to which the enquiry may have been adjourned, the Court may take such evidence, by affidavit or otherwise, as it may deem necessary, and may also call for a report from the Collector of the district as to whether such land or any portion thereof is ancestral land

After considering the evidence and the report, if any, the Court shall determine whether such land, or any, and what part of it, is ancestral land

The result of the enquiry shall be noted in an order made for the purpose by the presiding Judge in his own handwriting

O. 21 R. 108 (Allahabad) 108 When the property which it is sought to bring to sale is revenue paying or revenue free land or any interest in such land, and the decree is not sent to the Collector for execution under Section 68, the Court, before ordering sale, shall also call upon the Collector in whose district such property is situate to report whether the property is subject to any (and, if so, to what) outstanding claims on the part of Government

O. 21 R. 109 (Allahabad) 109 The certificate of the Sub Registrar and the report of the Collector shall be open to the inspection of the parties or their pleaders, free of charge, between the time of the receipt by the Court and the declaration of the result of the enquiry

No fees are payable in respect of the report by the Collector

O. 21 R. 110 (Allahabad) 110 The result of the enquiry under Rule 66 shall be noted in an order made for the purpose by the presiding Judge in his own handwriting The Court may in its discretion adjourn the enquiry, provided that the reasons for the adjournment are stated in writing and that no more adjournments are made than are necessary for the purposes of the inquiry

Note It is necessary that the result of the enquiry under O. 21 R 66, should be drawn up by the Judge *in his own handwriting* [1]

O. 21 R 105 (Allahabad)
1. ('35) AIR 1935 All 490 (491)

O. 21 R. 106 (Allahabad)
1. ('30) AIR 1930 All 188 (189).

O. 21 R. 110 (Allahabad)
1. ('32) AIR 1932 All 55 (56)

111 If after proclamation of the intended sale has been made any matter is brought to the notice of the Court which it considers material for purchasers to know, the Court shall cause the same to be notified to intending purchasers when the property is put up for sale **O. 21 R. 111 (Allahabad)**

112 The costs of the proceedings under Rules 66, 106 and 108 shall be paid in the first instance by the decree holder, but they shall be charged as part of the costs of the execution, unless the Court, for reasons to be specified in writing, shall consider that they shall either wholly or in part be omitted therefrom **O. 21 R. 112 (Allahabad)**

113 Whenever any Civil Court has sold, in execution of a decree or other order, any house or other building situated within the limits of a military cantonment or station, it shall, as soon as the sale has been confirmed, forward to the Commanding Officer of such cantonment or station for his information and for record in the Brigade or other proper office, a written notice that such sale has taken place, and such notice shall contain full particulars of the property sold and of the name and address of the purchaser **O. 21 R. 113 (Allahabad)**

114 Whenever guns or other arms in respect of which licenses have to be taken by purchasers under the Indian Arms Act (Act No XI of 1878) are sold by public auction in execution of decrees by order of a Civil Court, the Court directing the sale shall give due notice to the Magistrate of the district of the names and addresses of the purchasers, and of the time and place of the intended delivery to the purchasers of such arms, so that proper steps may be taken by the police to enforce the requirements of the Indian Arms Act **O. 21 R. 114 (Allahabad)**

115 When an application is made for the attachment of live stock or other moveable property, the decree holder shall pay into Court in cash such sum as will cover the costs of the maintenance and custody of the property for fifteen days If within three clear days before the expiry of any such period of fifteen days the amount of such costs for such further period as the Court may direct be not paid into Court, the Court, on receiving a report thereof from the proper officer, may issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid **O 21 R. 115 (Allahabad)**

116 Live stock which has been attached in execution of a decree shall ordinarily be left at the place where the attachment is made either in custody of the judgment debtor on his furnishing security, or in that of some landholder or other respectable person willing to undertake the responsibility of its custody and to produce it when required by the Court **O 21 R. 116 (Allahabad)**

117 If the custody of live stock cannot be provided for in the manner described in the last preceding rule, the animals attached shall be removed to the nearest pound established under the Cattle Trespass Act, 1871, and committed to the custody of the pound keeper, who shall enter in a register **O 21 R. 117 (Allahabad)**

(a) the number and description of the animals,

(b) the day and hour on and at which they were committed to his custody,

(c) the name of the attaching officer or his subordinate by whom they were committed to his custody, and shall give such attaching officer or subordinate a copy of the entry

Note See the undermentioned case [1]

118 For every animal committed to the custody of the pound keeper as aforesaid a charge shall be levied as rent for the use of the pound for each fifteen or part of fifteen days during which such custody continues according to the scale prescribed under Section 12 of Act No I of 1871 **O 21 R 118 (Allahabad)**

And the sums so levied shall be sent to the Treasury for credit to the Municipal

O. 21 R 117 (Allahabad)

1. (36) AIR 1936 All 555 (556). (Supurdar in good faith handing over property to third person is liable to pay its price.)

O. 21 R. 118 (Allahabad) or District Board, as the case may be, under whose jurisdiction the pound is All such sums shall be applied *in the same manner as fines levied under Section 12 of the said* Cattle Trespass Act

O. 21 R. 119 (Allahabad) 119 The pound keeper shall take charge of, feed and water, animals attached and committed as aforesaid until they are withdrawn from his custody as hereinafter provided and he shall be entitled to be paid for their maintenance at such rates as may be, from time to time prescribed under proper authority Such rates shall, for animals specified in the Section mentioned in the last preceding rule, not exceed the rates for the time being fixed under Section 5 of the same Act In any case, for special reasons to be recorded in writing, the Court may require payment to be made for maintenance at higher rates than those prescribed

O 21 R. 120 (Allahabad) 120 The charges herein authorized for the maintenance of live stock shall be paid to the pound keeper by the attaching officer for the first fifteen days at the time the animals are committed to his custody, and thereafter for such further period as the Court may direct, at the commencement of such period Payments for such maintenance so made in excess of the sum due for the number of days during which the animals may be in the custody of the pound keeper shall be refunded by him to the attaching officer

O. 21 R 121 (Allahabad) 121 Animals attached and committed as aforesaid shall not be released from custody by the pound keeper except on the written order of the Court or of the attaching officer, or of the officer appointed to conduct the sale, the person receiving the animals on their being so released, shall sign a receipt for them in the register mentioned in Rule 118

O. 21 R 122 (Allahabad) 122 For the safe custody of moveable property other than live stock while under attachment, the attaching officer shall, subject to approval by the Court, make such arrangements as may be most convenient and economical

Notes See Note 2 to Section 122, *ante*

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case [3]

O 21 R. 123 (Allahabad) 123 With the permission of the Court the attaching officer may place one or more persons in special charge of such property

O 21 R. 124 (Allahabad) 124 The fee for the services of each such person shall be payable in the manner prescribed in I
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but if it do so,

Note See the undermentioned case [1]

O. 21 R. 125 (Allahabad) 125 When the services of such person are no longer required the attaching officer shall give him a certificate on a counterfoil form of the number of days he has served and of the amount due to him , and on the presentation of such certificate to the Court which ordered the attachment, the amount shall be paid to him *in the* presence of the presiding Judge

Provided that where the amount does not exceed Rs 5, it may be paid to the

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O 21 R. 122 (Allahabad)

: 54 All 263

mmissioner appointed to attach moveables—He appointing supurdar without permission of Court for convenience — Act approved by Court — Supurdar is liable)

O 21 R. 124 (Allahabad)

1. (37) 169 Ind Cas 634 (635) (All) (It is the execution Court only which can settle the fee which is to be paid to the custodian under the rule , and it is only the decree-holder, as the

sahna by money order on requisition by the amin, and the presentation of the certificate may be dispensed with **O. 21 R. 125 (Allahabad)**

Note There is no provision in this rule or in any other part of Order 21 authorizing the executing Court to adjudicate on a dispute between the decree holder and his *sahnas* (persons employed to watch crops and to see that they are not taken away) [1]

126 When in consequence of an order of attachment being withdrawn or for some other reason, the person has not been employed or has remained in charge of the property for a shorter time than that for which payment has been made in respect of his services, the fee paid shall be refunded in whole or in part, as the case may be **O. 21 R. 126 (Allahabad)**

127 Fees paid into Court under the foregoing rules shall be entered in the Register of Petty Receipts and Repayments **O. 21 R. 127 (Allahabad)**

128 When any sum levied under Rule 119 is remitted to the treasury, it shall be accompanied by an order in triplicate (in the form given as Form 9 of the Municipal Account Code), of which one part will be forwarded by the Treasury Officials to the District or Municipal Board, as the case may be A note that the same has been paid into the treasury as rent for the use of the pound, will be recorded on the extract from the pass book **O 21 R. 128 (Allahabad)**

129 The cost of preparing attached property for sale, or of conveying it to the place where it is to be kept or sold, shall be payable by the decree holder to the attaching officer In the event of the decree holder failing to provide the necessary funds, the attaching officer shall report his default to the Court, and the Court may thereupon issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid **O. 21 R. 129 (Allahabad)**

130 Nothing in these rules shall be deemed to prevent the Court from issuing and serving on the judgment debtor simultaneously the notices required by O 21, Rr 22, 66 and 107 **O. 21 R. 130 (Allahabad)**

GARNISHEE ORDERS

131 The Court may, in the case of any debt due to the judgment debtor (other than a debt secured by a mortgage or a charge or a negotiable instrument, or a debt recoverable only in a Revenue Court), or any moveable property not in the possession of the judgment debtor, issue a notice to any person (hereinafter called the garnishee) liable to pay such debt, or to deliver or account for such moveable property, calling upon him to appear before the Court and show cause why he should not pay or deliver into Court the debt due from or the property deliverable by him to such judgment debtor, or so much thereof as may be sufficient to satisfy the decree and the cost of execution **O 21 R 131 (Allahabad)**

Notes — Where an objection is raised to a notice issued under this rule and the objections are disallowed, the Court should pass an order under Order 21 Rule 133 [1]

Money left with the mortgagee for payment to the creditors is not a debt within the meaning of this rule and cannot be attached [2]

132 If the garnishee does not forthwith or within such time as the Court may allow pay or deliver into Court the amount due from or the property deliverable by **O 21 R. 132 (Allahabad)**

133 If the garnishee disputes his liability the Court, instead of making such order, may order that any issue or question necessary for determining his liability be **O. 21 R. 133 (Allahabad)**

person who has got the property attached that can be called upon to pay the fee.)

O. 21 R. 125 (Allahabad)

1. (35) AIR 1935 All 102 (102)

O 21 R. 131 (Allahabad)

1. (34) AIR 1934 All 770 (771)
(34) AIR 1934 All 1056 (1057)
2. (34) AIR 1934 All 954 (956)

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O. 21 R 122 (Allahabad) 122 For the safe custody of moveable property other than live stock while under attachment, the attaching officer shall, subject to approval by the Court, make such arrangements as may be most convenient and economical

Notes See Note 2 to Section 122, *ante*

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O. 21 R. 125 (Allahabad) 125 When the services of such person are no longer required the attaching officer shall give him a certificate on a counterfoil form of the number of days he has served and of the amount due to him, and on the presentation of such certificate to the Court which ordered the attachment, the amount shall be paid to him in the presence of the presiding Judge

Provided that where the amount does not exceed Rs 5, it may be paid to the

O. 21 R. 122 (Allahabad)

1. ('31) AIR 1931 All 567 (571, 573) 54 All 263 (FB) *(AIR 1926 All 406, Overruled)*
2. ('34) AIR 1934 All 357 (358)
3. ('35) AIR 1935 All 737 (738) (Commissioner appointed to attach moveables—He appointing supurdar without permission of Court for convenience — Act approved by Court — Supurdar is liable)

O 21 R 124 (Allahabad)

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rule, and it is only *the decree-holder* ...

sahna by money order on requisition by the amin, and the presentation of the certificate may be dispensed with O. 21 R. 125 (Allahabad)

Note There is no provision in this rule or in any other part of Order 21 authorizing the executing Court to adjudicate on a dispute between the decree holder and his *sahnas* (persons employed to watch crops and to see that they are not taken away)[1]

126 When in consequence of an order of attachment being withdrawn or for some other reason, the person has not been employed or has remained in charge of the property for a shorter time than that for which payment has been made in respect of his services, the fee paid shall be refunded in whole or in part, as the case may be O. 21 R. 126 (Allahabad)

127 Fees paid into Court under the foregoing rules shall be entered in the Register of Petty Receipts and Repayments O 21 R. 127 (Allahabad)

128 When any sum levied under Rule 119 is remitted to the treasury it shall be accompanied by an order in triplicate (in the form given as Form 9 of the Municipal Account Code), of which one part will be forwarded by the Treasury Officials to the District or Municipal Board as the case may be A note that the same has been paid into the treasury as rent for the use of the pound, will be recorded on the extract from the pass book O 21 R. 128 (Allahabad)

129 The cost of preparing attached property for sale, or of conveying it to the place where it is to be kept or sold, shall be payable by the decree holder to the attaching officer In the event of the decree holder failing to provide the necessary funds, the attaching officer shall report his default to the Court, and the Court may thereupon issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid O 21 R. 129 (Allahabad)

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liable to pay such debt, or to delivei . . .
upon him to appear before the Court
into Court the debt due from or the property deliverable by him to such judgment debtor, or so much thereof as may be sufficient to satisfy the decree and the cost of execution

Notes — Where an objection is raised to a notice issued under this rule and the objections are disallowed, the Court should pass an order under Order 21 Rule 133[1]

Money left with the mortgagee for payment to the creditors is not a debt within the meaning of this rule and cannot be attached[2]

132 If the garnishee does not forthwith or within such time as the Court may allow pay or deliver into Court the amount due from or the property deliverable by O 21 R. 132 (Allahabad)
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person who has got the property attached that can be called upon to pay the fee)

O 21 R. 125 (Allahabad)
1. (35) AIR 1935 All 102 (102)

O 21 R. 131 (Allahabad)
1. (34) AIR 1934 All 770 (771)
(34) AIR 1934 All 1056 (1057)
2. (34) AIR 1934 All 954 (956)

O. 21 R. 133 (Allahabad) tried as though it were an issue in a suit, and upon the determination of such issue shall pass such order upon the notice as shall be just.

O. 21 R. 134 (Allahabad) 134 Whenever in any proceedings under these rules it is alleged, or appears to the Court to be probable that the debt or property attached or sought to be attached belongs to *some third person*, or that any *third person* has a *lien or charge upon*, or an interest in it, the Court may order such third person to appear and state the nature of his claim, if any, upon such debt or property and prove the same, if necessary

O. 21 R. 135 (Allahabad) 135 After hearing such third person, and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing when ordered, the Court may pass such order as is hereinbefore provided or make such other order as it shall think fit, upon such terms in all cases with respect to the lien, *charge or interest, if any, of such third or other person as to such Court* shall seem just and reasonable.

O. 21 R. 136 (Allahabad) 136 Payment or delivery made by the garnishee whether in *execution of an* order under these rules or otherwise shall be a valid discharge to him as against the judgment debtor, or any other person ordered to appear as aforesaid, for the amount paid, delivered or realised although such order or the judgment may be set aside or reversed

O. 21 R. 137 (Allahabad) 137 Debts owing *from a firm carrying on business within the juris*diction of the Court may be attached under these rules, although one or more members of such *firm may be resident out of the jurisdiction Provided that any person* having the control or management of the partnership business or any member of the firm within the jurisdiction is served with the garnishee order An appearance by any member pursuant to an order shall be a sufficient appearance by the firm

O. 21 R. 138 (Allahabad) 138 The costs of any application under these rules and of any proceedings arising therefrom or incidental thereto, or any order made thereon, shall be in the discretion of the Court

***O. 21 R. 139* (Allahabad)** 139 (1) Where the liability of any garnishee has been tried *and determined* under these rules, the order shall have the same force and be subject *to* the same conditions as to appeal or otherwise as if it were a decree

(2) Orders not covered by clause (1) shall be appealable as orders made in execution

Illustration — An application for a garnishee order is dismissed either on the grou [illegible] t there is no *prima facie* evidence of de[illegible] execution [illegible] of a decree which virtually becomes part and parcel [illegible] lements the decree passed in the original suit [1]

O. 21 R. 140 (Allahabad) 140 All the rules in this Code relating to service upon either plaintiffs or defendants at the address filed or subsequently altered under Order 7 or Order 8 shall apply to all proceedings taken under Order 21 or Section 47

The following form shall be used under the provisions of Rule 131 of Order 21

Suit No of 19

Plaintiff,

Versus

Defendant

To

WHEREAS it is alleged that a debt of Rs is due *from* you to the judgment-debtor

---

O. 21 R 139 (Allahabad)

1 (34) AIR 1934 All 1056 (1057) [*See also* (38) AIR 1938 All 254 (255, 256) (Application for garnishee order allowed and liability of garnishee *held* to exist — Order has force of decree — *Ad valorem* court fee is payable on appeal from such order)]

Or that you are liable to deliver to the abovenamed judgment debtor the property set forth in the schedule hereto attached **O. 21 R. 140 (Allahabad)**

Take notice that you are hereby required on or before the day of 19 to pay into this Court the said sum of Rs or

Dated this day of 19
Munsif Sub-Judge,
at ,

CALCUTTA

Insert the following as Order XXI A

ORDER XXI A

1 Every person applying to a Civil Court to attach moveable property shall, in addition to the process fee, deposit such reasonable sum as the Court may direct, if it think necessary for the cost of its removal to the court house, for its custody, and if such property is live stock, for its maintenance according to the rates prescribed in Rule 2 of this Order If the deposit, when ordered be not made, the attachment shall not issue The Court may, from time to time, order the deposit of such further fees as may be necessary In default of due payment the property shall be released from attachment **O. 21A R. 1 (Calcutta)**

2 The following daily rates shall be chargeable for the custody and maintenance of live stock under attachment **O. 21A R. 2 (Calcutta)**

Goat and pig	...	Annas 2 to annas 4
Sheep		Annas 2 to annas 3
Cow and bullock		Annas 6 to annas 10
Calf		Annas 3 to annas 6
Buffalo		Annas 8 to annas 12
Horse		Annas 8 to annas 12
Ass	.	Annas 3 to annas 5
Poultry		Annas 2 to annas 3 pies 6

Explanation — Although the rates indicated above are regarded as reasonable, the Courts should consider individual circumstances and the local conditions and permit deposit at reduced rates where the actual expenses are likely to fall short of the minima or maxima If any specimen of special value in any of the above classes is seized a special rate may be fixed by the Court If any animal not specified is attached, the Court may fix the cost as a special case

3 Where the property attached consists of agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the proviso to Rule 43 Order 21, he may, unless the Court has otherwise directed, leave it in the village or place where it has been attached — **O. 21A R. 3 (Calcutta)**

(a) in the charge of the judgment debtor or decree holder or of some other

(b) in the charge of an officer of the Court if a suitable place for its safe custody be provided and the remuneration of the officer for a period of fifteen days paid in advance

4 If attached property (other than live stock) is not sold under the proviso to Rule 43 Order 21, or retained in the village or place where it is attached, it shall be brought to the court house at the decree holder's expense and delivered to the proper officer of the Court In the event of the decree holder failing to make his own arrangement for the removal of the property with safety, or paying the cost thereof in advance to the attaching officer, then unless such payment has previously been **O 21A R. 4 (Calcutta)**

O. 21A R. 4 (Calcutta) made into Court, the attachment shall at once be deemed to be withdrawn and the property shall be made over to the person in whose possession it was before attachment

O. 21A R. 5 (Calcutta) 5 When live stock is attached it shall not, without the special order of the Court, be brought to the Court or its compound or vicinity, but shall be left at the village or place where it was attached in the manner and on the conditions set forth in Rule 3 of this Order

Provided that live stock shall not be left in the charge of any person under clause (a) of the said rule unless he enters into a bond for the proper care and maintenance thereof as well as for its production when called for, and that it shall not be left in charge of an officer of the Court under clause (b) of the said rule unless in addition to the requirements of the said clause provision be made for its care and maintenance

O. 21A R. 6 (Calcutta) 6 When f [illegible] find it impossible to obtain compliance with [illegible] so as to entitle him to leave the attached live [illegible] s attached and no order has been made by the Court for its removal to the Court, the attaching officer shall not proceed with the attachment and no attachment shall be deemed to have been effected

O 21A R. 7 (Calcutta) 7 Whenever it shall appear to the Court that live stock under attachment are not being properly tended or maintained, the Court shall make such orders as are necessary for their care and maintenance and may, if necessary, direct the attachment to cease and the live stock to be returned to the person in whose possession they were when attached The Court may order the decree holder to pay any expenses so incurred in providing for the care and maintenance of the live-stock and may direct that any sum so paid, shall be refunded to the decree holder by any other party to the proceedings

O. 21A R. 8 (Calcutta) 8 If under a special order of the Court live stock is to be conveyed to the Court, the decree holder shall make his own arrangement for such removal and if he fails to do so, the attachment shall be withdrawn and the property made over to the person in whose possession it was before attachment

O. 21A R. 9 (Calcutta) 9 Nothing in these rules shall prevent the judgment debtor or any person claiming to be interested in attached live stock from making such arrangements for feeding, watering and tending the same as may not be inconsistent with its safe [illegible] order of the Court

O. 21A R. 10 (Calcutta) [illegible] from the sale proceeds of the attached property, if sold, or be paid by [illegible] declared entitled to delivery before he receives the same The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings

O. 21A R. 11 (Calcutta) 11 In the event of the custodian of attached property failing, after due notice, to produce such property at the place named to the officer deputed for the purpose, or to restore it to its owner if so ordered or failing in the case of live stock to maintain and take proper care thereof, he shall be liable to be proceeded against for the enforcement of his bond in the execution proceedings

O 21A R. 12 (Calcutta) 12 When property other than live stock is brought to the Court, it shall immediately be made over to the nazir, who shall keep it on his sole responsibility in such place as may be approved by the Court If the property cannot from its nature or bulk be conveniently stored, or kept on the court premises or in the personal custody of the nazir, he may, subject to the approval of the Court, make such arrangements for its safe custody under his own supervision as may be most convenient and economical If any premises are to be hired and persons are to be engaged for watching the property the Court shall fix the charges for the premises

and the remuneration to be allowed to the persons (not being officers of the Court) in whose custody the property is kept All such costs shall be paid into Court by the decree holder in advance for such period as the Court may from time to time direct **O. 21A R. 12 (Calcutta)**

13 When attached live stock is brought to Court under special order as aforesaid it shall be immediately made over to the nazir who shall be responsible for its due preservation and safe custody until he delivers it up under the orders of the Court **O. 21A R. 13 (Calcutta)**

14 If there be a pound maintained by Government or local authority in or near the place where the Court is held, the nazir shall, subject to the approval of the Court, be at liberty to place in it such live stock as can be properly kept there, in which case the pound keeper will be responsible for the property to the nazir and shall receive from the nazir the same rates for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description **O. 21A R. 14 (Calcutta)**

15 If there be no good pound available or if in the opinion of the Court it be inconvenient to lodge the attached live stock in the pound, the nazir may keep them in his own premises or he may entrust them to any person selected by himself and approved by the Court **O. 21A R. 15 (Calcutta)**

16 All costs for the keeping and maintenance of the live stock shall be paid into Court by the decree holder in advance for not less than fifteen days at a time as often as the Court may from time to time direct In the event of failure to pay the costs within the time fixed by the Court, the attachment shall be withdrawn and the live stock shall be at the disposal of the person in whose possession it was at the time of attachment **O. 21A R. 16 (Calcutta)**

17 So much of any sum deposited or paid into Court under these rules as may not be expended shall be refunded to the depositor **O 21A R. 17 (Calcutta)**

LAHORE

Add the following rule

104 For the purpose of all proceedings under this Order service on any party shall be deemed to be sufficient if effected at the address for service referred to in O 8, R 11, subject to the provisions of O 7 R 24, provided that this rule shall not apply to the notice prescribed by Rule 22 of this Order. **O. 21 R. 104 (Lahore)**

OUDH

Add the following rules

104 The Court may, in the case of any debt due to the judgment debtor (other than a debt secured by a mortgage or a charge or a negotiable instrument, or a debt recoverable only in a Revenue Court), or any moveable property not in the possession of the judgment debtor, issue a notice to any person (hereinafter called the garnishee) liable to pay such debt, or to deliver or account for such moveable property, calling upon him to appear before the Court and show cause why he should not pay or deliver into Court the debt due from or the property deliverable by him to such judgment debtor, or so much thereof as may be sufficient to satisfy the decree and the cost of execution **O. 21 R. 104 (Oudh)**

Note See the undermentioned cases [1]

105 If the garnishee does not forthwith or within such time as the Court may allow, pay or deliver into Court the amount due from or the property deliverable by him to the judgment debtor, or so much as may be sufficient to satisfy the decree and the cost of execution and does not dispute his liability to pay such debt or deliver **O 21 R. 105 (Oudh)**
er to the notice, then the
such notice, and on such
ee against him

O 21 R. 104 (Oudh)

1. (34) AIR 1934 Oudh 11 (13) 9 Luck 278
(39) AIR 1939 Oudh 86 (87, 89, 90) (Rule 104 and following rules do not involve question of attachment — Effect of notice under S 104 — Debt," meaning of—Ascertainment of accounts is not necessary)

O. 21 R. 106 (Oudh) 106 If the garnishee disputes his liability the Court instead of making such order may order that any issue or question necessary for determining his liability be tried as though it were an issue in a suit, and upon the determination of such issue shall pass such order upon the notice as shall be just

O. 21 R. 107 (Oudh) 107 Whenever in any proceedings under these rules it is alleged or appears to the Court to be probable that the debt or property attached or sought to be attached belongs to some third person or that any third person has a lien or charge upon or an interest in it the Court may order such third person to appear and state the nature of his claim, if any upon such debt or property and prove the same if necessary

Note See the undermentioned case [1]

O. 21 R. 108 (Oudh) 108 After hearing such third person, and any other person who may subsequently be ordered to appear or in the case of such third or other person not appearing when ordered the Court may pass such order as is hereinbefore provided or make such other order as it shall think fit upon such terms in all cases with respect to the lien charge or interest, if any of such third or other person as to such Court shall seem just and reasonable

O. 21 R. 109 (Oudh) 109 *Payment or delivery made by the*
order under these rules or otherwise shall be a
judgment debtor or any other person ordered to
paid delivered or realized although such order or the judgment may be set aside or reversed

O. 21 R. 110 (Oudh) 110 Debts owing from a firm carrying on business within the jurisdiction of the Court may be attached under these rules although one or more members of such firm may be resident out of the jurisdiction

Provided that any person having the control or management of the partnership business or any member of the firm within the jurisdiction is served with the garnishee order An appearance by any member pursuant to an order shall be sufficient appearance by the firm

O. 21 R. 111 (Oudh) 111 The costs of any application under these rules and of any proceedings arising therefrom or incidental thereto, or any order made thereon, *shall be* in the discretion of the Court

O. 21 R. 112 (Oudh) 112 (1) Where the liability of any garnishee has been tried and determined under these rules, the order shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree

(2) Orders not covered by sub rule (1) shall be appealable as orders made in execution

Illustration — An application for a garnishee order is dismissed either on the ground that the debt is secured by a charge or that there is no *prima facie* evidence of debt due This order is appealable as an order in execution

O. 21 R. 113 (Oudh) 113 All the rules in this Code relating to service upon either plaintiffs or defendants at the address filed or subsequently altered under Order 7 or Order 8 shall apply to all proceedings taken under Order 21 or Section 47

O. 21 R. 114 (Oudh) 114 The following form shall be used under the provisions of Rule *104 of* Order 21

EXECUTION CASE NO OF 19

Decree holder
Versus
Judgment debtor

To

WHEREAS it is alleged that a debt of Rs is due from you to the judgment debtor, or
Or that you are liable to deliver to the abovenamed

O 21 R 107 (Oudh)

1 (36) AIR 1936 Oudh 167 (168) (No second appeal lies from an order of a Civil Court under

schedule h n to attached take notice that you are hereby required on or before the day of 19 to pay into this Court the said sum of Rs to deliver or account to the nazir of this — O. 21 R 114 (Oudh)

Dated this day of 19 .

Munsif
Subordinate Judge.
At

PATNA

shall be — O 21 R 104 (Patna)

R 11, subject to the provisions of O 7 R 24 provided that this rule shall not apply to the notice prescribed by Rule 22 of this Order

SIND

Add the following as Rule 104

Address for service filed to hold good during execution proceedings.

104 (1) Subject to the provisions of sub rules (3) and (4) the address for service filed under Rule 19 of Order VII or Rule 11 of Order VIII, or, if the address has been subsequently altered under Rule 24 of Order VII or under Rule 12 of Order VIII, the amended address shall hold good during all execution proceedings — O 21 R 104 (Sind)

(2) Every application for execution shall state the address for service given by the opposite party in the Court which passed the decree or the Court to which the decree was last transferred for execution and notices and processes shall issue to such address

(3) Rules 22 23 24 and 25 of Order VII shall apply so far as may be to execution proceedings

(4) If an appeal or an application for review or revision against the decree or order sought to be executed is pending at the time when the application for execution is filed the provisions of Rule 38 of Order XLI shall so far as may be apply to such execution proceedings

(5) Nothing in sub rules (1) to (3) shall apply to the notice prescribed by Rule 22 of Order XXI

ORDER XXII.

DEATH, MARRIAGE AND INSOLVENCY OF PARTIES

General —Synopsis

1 Survey of the Order | 2. Scope and applicability of the Order

1. Survey of the Order — This Order deals with the creation assignment or devolution of interest during the pendency of suits Such creation assignment or devolution may be brought about by — **Order 22 General**

(*i*) the death of a party (Rules 1 to 6)
(*ii*) his marriage (Rule 7)
(*iii*) his insolvency (Rule 8) or
(*iv*) other circumstances such as transfer *inter vivos* etc (Rule 10)

Order 22 General Notes 1–2

Death of a party — If the suit is one in which the "right to sue' does not survive, the death puts an end to the suit If, on the other hand, it is a suit in which the *right to sue'* survives, the death will *not* put an end to the suit (Rule 1) In the latter class of suits, that is suits which are not put an end to on the death of a party, the following questions arise for consideration, viz What is the *procedure* to be followed in such suits? And what are the *consequences* of not following that procedure? The answer to the questions will depend upon *(i)* who is the party that died, and *(ii)* to whom or against whom does the right survive? From these standpoints the following six alternative cases are possible

(1) One of two or more plaintiffs may die and the right to sue may survive to the *surviving plaintiff or plaintiffs alone*

(2) One of two or more defendants may die and the right to sue may survive against the *surviving defendant or defendants alone*

(3) One of two or more plaintiffs may die and the right to sue may survive *either* to the surviving plaintiff or plaintiffs *along with third persons* or exclusively to third persons

(4) A sole plaintiff or sole surviving plaintiff may die in which case the right to sue must if at all, survive to *persons who are not plaintiffs*

(5) One of two or more defendants may die and the right to sue may survive *either* against the surviving defendant or defendants *along with third persons or* exclusively against third persons

(6) A sole defendant or sole surviving defendant may die in which case the right to sue must, if at all, survive against *persons who are not defendants*

Rule 2 provides for the *first two* of the above alternatives Rule 3 applies to the *third and fourth* and Rule 4 to the *fifth and sixth* alternatives Rule 5 provides for determining the question as to who is the person to whom or against whom the right to sue survives, in case there should be a dispute about it The provisions of Rules 3 and 4 do not apply when the death occurs between the conclusion of the *hearing* of the suit and pronouncement of judgment in it (Rule 6)

Marriage — See Rule 7

Insolvency — Rule 8 deals with the insolvency of a *plaintiff* The insolvency of a defendant does not fall within Rule 8, but comes under Rule 10

The effect of an abatement under the provisions of any of the previous rules is dealt with by Rule 9 and sub rule (2) thereof provides the remedy by the person aggrieved by the abatement *Other* cases of creation, assignment and devolution are dealt with by Rule 10 It will be noted that under this rule *there is no abatement* and even a substitution is within the discretion of the Court

2. Scope and applicability of the Order. — The provisions of this Order apply only to cases of creation, transfer or devolution of interest *during the pendency of suit* Thus there can be no substitution of legal representatives under this Order if the party is dead before the *institution* of the suit[1] Nor can the provisions of the Order apply if the death occurs *after the suit has been disposed of*[2] Rule 6 itself is an illustration of this principle

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Order 22 (General) — Note 2

1 ('20) AIR 19_0 Sind 82 (83)
('32) AIR 1932 Sind 2?0 (220) 26 Sind L R 262
2 ('39) AIR 1939 Lah 34 (34) (If a plaintiff sues

Order 22
General
Note 2

Applicability to appeals — By virtue of Rule 11 the provisions of this Order apply to appeals. But in so applying them the following points should be noted

(i) Since an appeal is but a continuation of the suit the provisions of the Order will apply even though the death may have occurred *between* the date of the lower Court's decree and that of the filing of the appeal (*vide* Notes under the several rules)

(ii) Though a suit on a personal action will abate on the death of a party during its pendency yet if the suit is decreed and pending an appeal from the decree the death occurs the appeal will not abate[3] The reasons for this distinction have been discussed under Rr 1 3 4 and 11

The word appeal in Rule 11 does not include appeals before the Privy Council and the provisions of this Order do *not* apply to such appeals The reason is that judgments and orders of the Privy Council are in effect orders of the Sovereign and are of full force and effect despite the death of parties[4] and Courts in India have no power to treat an order of the Sovereign as a nullity[5] However if a party dies after the grant of leave to appeal to the Privy Council and before the transmission of papers to England the High Court can order substitution of legal representatives to avoid technical objections But this power exists *not* by virtue of this Order and there is no limitation of time for such substitution[6]

Applicability to execution proceedings — By virtue of Rule 12 the provisions in Rules 3 4 and 8 of this Order do not apply to execution proceedings[7] As to whether an *appeal* against an order made in execution proceedings is itself a proceeding in execution of a decree or order within the meaning of Rule 12 see Note 1 to that rule

Applicability to miscellaneous proceedings — By virtue of Section 141 of the Code the provisions of this Order may be made applicable whenever possible to proceedings other than a suit or an appeal For proceedings arising out of a reference to arbitration see Schedule II Para 1 Note 17 *infra* A conciliation proceeding under the Dekkhan Agriculturists Relief Act (XVII of 1879) pending before a Sub Judge has been held to be a proceeding in a Civil Court to which the provisions of this Order are applicable[8] But they have been held to be inapplicable to proceedings in a Mamlatdar's Court under the Mamlatdars Act (Bombay Act III of 1876) on the ground that the said Act provides for a summary procedure in certain matters and that by implication the elaborate procedure contained in the Code was not intended to be applied to such proceedings[9] The provisions of the Order apply to proceedings under the U P Encumbered Estates Act (25 of 1934)[10] This Order is also applicable to proceedings under the Chota Nagpur Tenancy Act VI of 1908 see Section 265 (3) of that Act

Applicability to revision proceedings — There is a conflict of decisions as to the applicability of this Order to applications for revision It has been held by the High Courts of Madras and Calcutta that this Order applies to such applications[11] But

8 (95) 19 Bom 202 (204)

9 (93) 17 Bom 645 (647 648) (Act III of 1876 (Bombay) has been repealed by Act II of 1906

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as the defendant)

11 (38) AIR 193 Mad 115 (116 117)
(13) 21 Ind Cas 407 (407) (Cal)

Order 22 General Note 2

a contrary view has been held by the Sind Judicial Commissioner's Court and the Oudh Chief Court [12]

Applicability to applications for leave to appeal — This Order does not apply to applications for leave to appeal to the Privy Council [13]

Death of person against whom insolvency petition has been filed—Proceedings if can be continued against the estate — It has been held in the undermentioned cases[14] that a person against whom a petition in insolvency has been presented can be declared insolvent in spite of the fact that he dies before the application is decided

Effect of abatement — Where an action fails under this Order, all reliefs or claims incidental to the action also fail Thus if an appeal abates as regards an injunction sought for the appellant cannot press the appeal so far as the costs incurred by him in the lower Court are concerned [15]

O. 22 R. 1

No abatement by party's death if right to sue survives

R. 1. [S 361] The death of a plaintiff or defendant shall not cause the suit to abate[17] if the right to sue[3] survives [4]

[1877, S 361; 1859, S 99 See S 146]

Synopsis

1 Legislative changes
2 Scope of the Rule
3 "Right to sue," meaning of
4 When right to sue survives
5 Right to sue in personal actions
6 Suit to establish right to personal office
7 Right to sue in respect of torts
8 Right to sue on contracts
9 Right to sue for pre emption
9a Right to sue for partition
10 Application for leave to sue in forma pauperis
11 Claim to guardianship
12 Right to letters of administration
13 Right to sue in representative actions.
14 Suit under Section 92 of the Code See Section 92 Note 30
15 Suit by or against limited owners or reversioners
16 Suit under Sections 14 and 18 of the Religious Endowments Act
17 Partial abatement
18 Death of either party pending appeal
19 Suit or appeal against a dead person
20 No abatement by reason of death after decree
21 Appeal and revision

Other Topics (miscellaneous)

Death of defendant in account suit — Right to sue whether survives See Note 4
Death of defendant in an injunction suit — Abatement See Note 7
Death of plaintiff — Suit when abates See Notes 5 6 and 7
Hindu widow or daughter suit for possession whether survives See Note 4

1 Legislative changes — This rule corresponds to Section 361 of the old Code without any change except that the four illustrations which had been given under the old Section have been omitted as being unnecessary [1]

2 Scope of the Rule. — Where during the pendency of a suit a party dies the first question to be decided is whether th

does 495

12 (33) AIR 1933 Sind 200(202) 28 Sind L R 167
(39) AIR 1939 Oudh 277(278) 184 Ind Cas 81 (82) (Hence no rule of limitation governs the application for substitution of parties in a revision application)
[*See also* (20) AIR 1920 Sind 120 (121)]
13 (34) AIR 1934 Sind 36(37) 28 Sind L R 150
14 (32) AIR 1932 Lah 264 (264)
15 (24) AIR 1924 Rang 217 (218) 2 Rang 91 [*See also* (37) AIR 1937 *Nag* 216 (217) I L R (1938) Nag 280]

Order 22 Rule 1—Note 1
1 See the Report of the Special Committee

Note 2
1 (12) 17 Ind Cas 101(105 106) 8 Nag L R 113

not, there is an end of the suit If it does, the suit can be continued, though the *trial* of the suit cannot be proceeded with immediately and without anything more The reason is, that on the death of a party, the suit is in a state of suspense[2] and its trial cannot be taken up without following the procedure laid down in Rules 2, 3 or 4 as the case may be

3. "Right to sue," meaning of. — The words 'right to sue' must be interpreted to mean 'right to *seek relief*'[1]

Illustrations

1 A files a suit against *B* for damages A dies during the pendency of the suit Here A's right to sue as to the survival of which a question might arise is the *right to claim damages from B* which A had at the time of his death

2 In the above suit, suppose A gets a decree for damages and *B* appeals against the decree and during the pendency of the *appeal B* dies Here *B's* right to sue about the survival of which a question might arise is to *have the decree of the lower Court set aside* which is a very different thing from A's right to *sue*[2]

3 Suppose in the above case *B's* appeal is allowed and A prefers a second appeal and during the pendency thereof A dies Here A's right to sue,' about the survival of which a question might arise is the right *to have restored the benefit of the first Court's decree in his favour*, and not his *original right* to claim damages against *B*[3]

4 Suppose A's suit in the first Court is *dismissed* and A appeals and during the pendency thereof he dies The right to sue will remain the same as the one on which he instituted the suit[4]

In each of the above cases a person claiming that the right to sue of the deceased plaintiff or appellant has survived to him must show that he asserts the right to the same relief which the deceased plaintiff or appellant asserted at the time of his death

4. When right to sue survives — The general rule is that all rights of action and all demands whatsoever existing in favour of or against a person at the time of his death survive to and against his representatives For illustrations see the undermentioned cases[1] There are however, exceptions to this general rule Rights intimately

2 ('29) AIR 1929 Mad 802 (803) 52 Mad 933

Note 3

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3 ('17) AIR 1917 Upp Bur 14 (14) 2 Upp Bur Rul 105

4 ('07) 26 Bom 597 (601, 602)

5 ('09) 3 Ind Cas 995 (996) 36 Cal 799

Note 4

1 ('26) AIR 1926 Cal 490 (494) 53 Cal 132 (Suit to enforce the right to a *pala* or worship)

('34) AIR 1934 Mad 448 (451) (Cause of action for breach of trust survives against legal repre

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the right to sue will survive)

('04) 27 Mad 112 (116) (Reference to arbitration about matters in respect of which the right to sue will survive—Rights in property survive)

('16) AIR 1916 Mad 611 (612 613) 39 Mad 382 (Suit by a daughter to recover possession as her father's heir — Right to sue survives to her father's brother's heirs)

('96) 23 Cal 636 (638 639) (Suit by the reversionary heir of a Hindu to recover property from *trespassers*)

('01) 1901 Pun Re No 12 p 44 (Suit to set aside a gift of land)

('15) AIR 1915 Mad 655 (656) (Suit for possession of property)

('03) 5 Bom L R 1041 (1044 1046) (Suit by a minor who on attaining majority sued to have his rights declared respecting property which by a consent decree and conveyance to which he was no party his grandmother father and uncle conveyed to the defendants)

('19) AIR 1919 All 189 (190) 41 All 515 (Suit for specific performance of contract to sell immovable property)

('68) 10 Suth W R 59 (59) (Suit for money received and for account against an agent — Cause of action survives on death of defendant)

('72) 17 Suth W R 475 (476) (Suit by a Hindu widow to recover possession of her husband's estate)

('16) AIR 1916 All 34 (35 36) 38 All 111 (Suit for possession)

O. 22 R. 1
Notes 4-5

connected with the *individuality* of the deceased will not survive[2] One aspect of this exception is expressed by the maxim *actio personalis moritur cum persona* — a personal right of action dies with the person

The general rule and the exception abovementioned have also been recognized by the Legislature in the following enactments dealing with particular classes of cases and they may be usefully referred to as illustrating the principles applicable to the generality of cases

(1) Section 37 of the Contract Act lays down that "promises bind the legal representatives of the promisor in case of the death of such promisor before performance *unless a contrary intention appears from the contract*" Such a contrary intention will be presumed when the contract is of a nature involving *special skill* or *personal confidence, etc.*

(2) Section 306 of the Succession Act of 1925 provides that 'all demands whatsoever and all rights, to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators except causes of action for defamation, assault, as defined in the Indian Penal Code, or other *personal* injuries not causing the death of the party, and except also cases where, after the death of the party, the relief sought could *not* be enjoyed or granting it would be nugatory."

It is the *original party s* rights and disabilities that have to be considered and the mere fact that the legal representative could not, in his individual capacity, have brought a suit for the relief claimed does not cause abatement of the pending suit[3]

5. Right to sue in personal actions. — In cases of *personal* actions that is in actions where the relief sought is *personal* to the deceased, the right to sue will not survive to his representatives[1] Thus, a suit for damages for breach of a contract of betrothal (except to the extent of the actual expenses incurred when the betrothal was in force)[2] and a suit for dissolution of marriage together with the claim for damages against the co respondent[3] are suits involving claims of a personal nature which will not survive on the death of either party to his representative A suit by a Hindu widow under the Dayabhaga Law for partition in lieu of her maintenance will not survive on her death,[4] but if, by an award or a compromise, a fixed sum has been awarded to her in lieu of her interest a suit to recover the sum will be a suit to recover *property* and will survive to her legal representatives[5] Similarly, if what was once a personal claim has matured into a *decree*, the benefit of the decree will survive to the legal representatives[6]

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(38) AIR 1938 Nag 298 (299) I L R (1939) Nag 526 (Suit for accounts of dissolved partnership —Death of plaintiff—Right to sue survives)

2 Holland s Jurisprudence 3rd Edn , page 271

(39) AIR 1939 Lah 492 (494) (Right to get compensation for malicious prosecution)

3 (24) AIR 1924 Lah 45 (46) 4 Lah 72

Note 5

1. (08) 30 All 49 (51)

(35) AIR 1935 All 106 (107) (Suit by members of a Municipal Board to restrain the defendant from recording his vote in arbitration — The claim is personal one)

(01) 25 Bom 574 (579, 582)

(19) AIR 1919 Lah 18 (18) 1919 Pun Re No 67

(28) AIR 1928 Lah 119 (119) 9 Lah 306

(18) AIR 1918 Mad 379 (380) 41 Mad 442 (Suit for partition by minor—Claim by *minor* is personal to the minor)

2. (20) AIR 1920 Bom 225 (225) 44 Bom 446

3. (09) 1906 Pun Re No 60 page *221*

4 (07) 5 Cal L Jour 310 (315)

5 (01) 28 Cal 155 (162, 163)

6 (27) AIR 1927 All 762 (763)

(10) 5 Ind Cas 758 (759, 763) 33 Mad 102

(21) AIR 1921 Lah 52 (53) 2 Lah 169

(87) 9 All 131 (134) (FB)

(95) 19 Mad 345 (346, 347, 348) (After decree

6. Suit to establish right to personal office. — A right to a *personal office* does not survive on the death of the claimant and a suit to establish such a right abates on the death of the plaintiff [1] But if *emoluments* are attached to the office the right to sue will, on the principles mentioned in Note 1 above, survive and the suit will not abate [2]

7. Right to sue in respect of torts. — The maxim *actio personalis moritur cum persona* is, as a general rule, applicable to actions in respect of torts and therefore on the death of either party to such action the right to sue will be extinguished [1] Thus, the maxim will apply to the following cases —

(1) Suits for damages for injury to reputation such as defamation [2] malicious prosecution [3] malicious arrest[4] and malicious search [5]

(2) Suits for damages for obstruction to plaintiff s right of way over defendant s land [6]

(3) Suits for damages for illegal distraint for cess [7]

(4) Suits for damages for refusal to deliver the keys of a temple and to allow worship being performed [8]

(5) Suit by A for recovery of custody of his minor daughter left in the defendant s custody [9]

(6) Suit for an injunction restraining defendant from preventing the plaintiff s standing at a particular place in a temple [10]

Where however the tort is one relating to or affecting the *estate* of the deceased the maxim does not apply and the right to sue will survive to his representatives [11] Thus it will survive where the tort committed has injured the estate of the deceased[12] or benefited the estate of the wrongdoer [13] But the injury or the benefit must be the *direct* result of the wrong[14] and the damage caused by the injury must be liquidated

for partition in minor s suit for partition right survives.)
(39) AIR 1939 Lah 492 (494) (Person after

Note 6

1 (95) 22 Cal 92 (99)
(30) AIR 1930 Lah 703 (705) 12 Lah 1
2 (26) AIR 1926 Cal 490 (494) 53 Cal 132

Note 7

1 (1909) 1909 App Cas 383, United Collieries Limited v Simpson
2 (15) AIR 1915 Lah 378 (378) 1915 Pun Re No 62
3 (22) AIR 1922 Upp Bur 7 (7 8) 4 Upp Bur Rul 73

Pat 841 and A I R 1926 All 610]
4 (89) 13 Bom 677 (679 680)

5 (18) AIR 1918 Mad 1100 (1101)
6 (22) AIR 1922 Upp Bur 7 (7 8) 4 Upp Bur Rul 73
7 (11) 12 Ind Cas 716 (717) 36 Bom 174
(12) 17 Ind Cas 226 (227) (Mad)
8 (93) 8 Mad L Jour 180 (181 182)
9 (01) 25 Bom 574 (579 582)
10 (10) 5 Ind Cas 937 (939) 34 Mad 76
11 (1878) 4 C P D 40 (44 45 47) Twycross v Grant
(21) AIR 1921 Mad 1 (9) 44 Mad 357
12 See case in Foot Note (11) above
13 (32) AIR 1932 Oudh 165 (166 167) 8

(1878) L R 6 H L 377 Peak v Gurney (Referred to in 13 Bom 677 9 Bom 373 8 Cal 837 and

(22) AIR 1922 Upp Bur 7 (7 8) 4 Upp Bur Rul 73
14 (1883) 24 Ch D 439 (454) Phillips v Hamfrey
(21) AIR 1921 Mad 1 (8) 44 Mad 357

O 22 R. 1
Notes 7-9

and certain[15]

8. Right to sue on contracts.—A right to sue in respect of a contract will on the general principles referred to in Note 4, survive to the representatives of the promisee Thus in a suit on a bond or to enforce specific performance of a contract to sell or recover property, if the plaintiff dies, the right to sue will survive to his legal representatives[1] The right to sue will survive against the *promisor's representatives* unless a contrary intention appears from the contract such as the contract being incapable of being performed by persons other than the deceased See Section 37 of the Contract Act and the illustrations thereto

9. Right to sue for pre-emption. — Rights of pre emption are of two different kinds *viz* —

(1) those incidental to the *ownership* of *property* and

(2) those which are purely *personal*

Rights of the former kind will survive while those of the latter kind will not In deciding the question whether the right to sue in pre emption suits survives or not it is necessary to see whether the right claimed is one incidental to the *ownership* of property or only a *personal* right The answer to the question will in turn depend upon the origin of the right It may be founded on Mahomedan law or on custom or it may have been given by statute

Pre emption under Mahomedan law — Under the law applicable to the *Sunni* Mahomedans the right of pre emption does not survive on the death of the pre emptor before decree[1] Under the law applicable to the *Shafis* the right would appear to survive to the heirs of the pre emptor on his death before decree[2] Under the law applicable to other sects of Mahomedans there is a conflict of authority between the Allahabad and Bombay High Courts The Allahabad High Court[3] *holds* that the right in such cases is incidental to and arising out of ownership of land and that it therefore survives to the heirs of the pre emptor though it cannot be transferred The same view prevails in the Punjab[4] But according to the Bombay High Court the right is a *personal* one and does not survive to the heirs or other legal representatives of the pre emptor[5] except in so far as it falls within the provisions of Section 306 of the Indian Succession Act[6] In Madras where the principle of an absolute transfer of all rights under a sale prevails, a right of pre emption is not recognized,[7] except as a matter of custom in some places such as Malabar[8]

Pre emption under customary law — Where the right claimed is one based on a custom the question of its survival will have to be decided on evidence as to the custom[9] Generally speaking a right of pre emption based on *wajib ul arz* is an incident of proprietary possession and will survive unless such survival is expressly

All 209)

Note 8

1 (16) AIR 1916 All 159 (159) (On bond)
(19) AIR 1919 All 189 (190) 41 All 515 (Specific performance)
(26) AIR 1926 Bom 97 (100 102) 49 Bom 862 (Do)

Note 9

1 [*See* (97) 20 All 68 (89)]
2. [*See* (12) 12 Ind Cas 720 (720) 36 Bom 144

7 (10) 6 Mad H C R 0 (00 0
8 (97) 20 Mad 305 (306 312) (Not 1 puted before High Court)
9 (08) 35 Cal 575(592 593 594)
(97) 20 Mad 305 (306 312)

excluded by local usage or other specific provisions[10] In Bombay however even a customary right of pre emption has been held to be a personal one[11]

Pre emption under statute — Where the right claimed is one conferred by statute, the question whether it survives or not will be governed by the provisions of the particular statute conferring the right Thus under the Oudh Laws Act (XVIII of 1876) the right of pre emption survives to the pre emptor s heirs[12] It can also be devised though not alienated to a stranger[13]

9a. Right to sue for partition. — In the case of a Hindu Mitakshara joint family, the filing of a suit for partition by one of the coparceners effects a severance of the joint status so far as he is concerned and if he dies during the pendency of the suit his legal representatives can be brought on the record and can continue the suit[1]

10. Application for leave to sue in forma pauperis — The right to apply for leave to sue in *forma pauperis* is purely a personal one depending upon the pauperism of the petitioner On his death therefore the right does not survive[1] Further, the legal representative may or may not be a pauper If he is he may file a fresh application in his own right[3] If he is not he has no right to sue in *forma pauperis*[4]

Where the leave is granted, the plaint gets registered as a suit and if the plaintiff dies thereafter, his legal representative can no doubt continue the suit if the right to sue survives He can further continue the suit *as a pauper* if he is himself a pauper[5] If he is not a pauper he should pay the court fee otherwise the suit will be struck off[6] This power to enquire into the pauperism of a legal representative is no doubt not contained in Order 22 but exists in a Court by virtue of its power to dispauper the original plaintiff himself at any stage of the suit In making an order for or against the legal representative however the Court should first see whether he is a legal representative in the capacity of an heir entitled personally or beneficially to the estate of the deceased or whether he is only coming in in a representative capacity having no personal or beneficial interest In the former case his own property can be taken into account[8] In the latter case only the estate of the deceased should be considered and not his individual property[9]

If a *defendant* in an application for leave to sue in *forma pauperis* dies there being no suit Order 22 does not apply Nor can Section 141 or Section 146 of the Code be invoked for imposing the penalties contained in Order 22 without express provision to

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Note 9a

1 (36) AIR 1936 Mad 155 (156) 59 Mad 693 (In this case it was held that the same principle will apply to a suit for partition filed by a tavazhi in a joint Marumakkatayam family)

Note 10

(AIR 1925 Mad 765 Distinguished—Since death after registration as suit)

(11) 11 Ind Cas 724 (725) 36 Bom 279 (Death

[illegible]

7 (11) 11 Ind Cas 724 (725) 36 Bom 279

8 (31) AIR 1931 Mad 324 (324 325)

9 [illegible] utor

O. 22 R. 1
Notes 10-15

that effect Consequently, the legal representatives of the deceased defendant can be brought in at any time[10] *Vide also* Notes under Rules 3 and 4, *infra*

11. Claim to guardianship. — An application under the Guardians and Wards Act (VIII of 1890) or otherwise for the appointment of a guardian for the person or property or both of a minor, is not a proceeding *inter partes* It is the Court's duty to look after the interests of the minor and the parties simply set the Court in motion The policy of the law therefore is not to allow such applications to lapse by the death of parties[1]

Where
guardianship,
which was ba
minor's father, was held to abate on the petitioner's death on the ground that the claim was a matter of personal preference and trust and would not therefore survive to the representatives of the petitioner[3]

12. Right to letters of administration. — A right to the grant of letters of administration is a *personal* right and does not survive[1] The heir can, however, apply afresh[2] Where pending an application by an executor for the probate of a will, the executor dies, his widow
administration instead[3]
tative must be the *same* a

13. Right to sue in representative actions. — See Order 1 Rule 8, Note 24 for a full discussion See also Order 30 Rule 4

14. Suit under Section 92 of the Code. — See Section 92, Note 30

15. Suit by or against limited owners or reversioners. — *Suit by or against limited owners* — A limited owner under the Hindu law is not a mere life estate holder[1] but represents the entire inheritance in certain circumstances[2] A suit relating to the estate by or against such limited owner is, therefore, not one on any cause of action *personal* to herself and if she dies pending such suit, the right to sue will survive to the reversioners[3] See also Note 63 to Section 11, and also Note 5 above

Suit by or against reversioners — A suit by or against a reversioner in respect of the estate of a Hindu widow is one brought or defended in a *representative capacity* and on behalf of all the reversioners[4] Consequently, on the death, pending suit, of

(18) AIR 1918 Mad 362 (363, 364) 41 Mad 624 (Liquidator)
('94) 18 Bom 237 (241)
10 (83) 7 Bom 373 (376)
(29) AIR 1929 Sind 136 (136)

Note 11

1. ('24) AIR 1924 Mad 484 (484) 47 Mad 459
('17) AIR 1917 Lah 385 (386)
2. (28) AIR 1928 Lah 456 (457, 458)
3 (99) 23 Bom 719 (720, 721, 722)

Note 12

1. (19) AIR 1919 Cal 197 (197) 45 Cal 862
(09) 36 Cal 799 (801)
[*See* (32) AIR 1932 Cal 206 (207) (Appeal from order refusing grant of probate — Where the judgment appealed against may operate as

2.
3.

Note 15

Mad 634

[See however ('31) AIR 1931 Lah 675 (676) (Suit by a Hindu widow for partition of her estate from co sharers *held to be a suit to enforce only her personal rights*)]
4 See for full discussion Note 63a to S 11
[*See also* ('16) AIR 1916 PC 117 (118) 39 Mad 634 43 Ind App 207 (PC)]

such reversioner, the next reversioner will be entitled to continue the suit or to defend it and there is no abatement[5] Where, however, on the death of the reversioner, events happen, such as the death of the limited owner, which change the *nature of the relief* to be granted, there can be no continuation of the suit[6]

Under certain statutes or customary law prevailing in certain places, the right to control or question the alienation made by a collateral is given to the person who will become immediately interested on the death of such collateral A suit based on such a right can, on the death of the plaintiff, be continued by the person who becomes so interested on such death[7] But where the right to question an alienation is, by law, given only to the *descendants* of the alienor, a suit by a descendant cannot be continued by collaterals other than those who can show themselves to be descendants of the person whose acts are questioned[8]

16. Suit under Sections 14 and 18 of the Religious Endowments Act. — A suit under Section 14 of the Religious Endowments Act (XX of 1863) is a representative suit and on the death of the *plaintiff* any one of the persons interested may get himself substituted and continue the suit without fresh leave[1] But a suit under Section 14 of the Act against the defendant who is a sole surviving member of a committee for his removal *for neglect of duty* is purely a *personal* claim against the defendant and on the death of the latter the right to sue will not survive against his heir[2]

17. Partial abatement. — An abatement may be total or partial It may be partial either as regards the *parties* to the suit (Rules 3 and 4) or as regards the *subject matter* or reliefs

The latter kind of partial abatement will arise where there are two or more reliefs claimed in the suit and on the death of a party the right to sue survives with respect to some of them but does not survive with respect to the others

Illustrations

1 *A* files a suit against *B* a trustee under Section 92 of the Code for the removal of *B* and for the settlement of a scheme Pending the suit *B dies* The suit will abate as regards the former relief but may be continued as regards the latter[1]

2 *A* files a suit against *B* a trustee under Section 92 of the Code for his removal and for setting aside an alienation of trust property by him to a stranger Pending the suit *B* dies The suit abates as regards the first relief but continues as regard the second[2]

18. Death of either party pending appeal. — A 'right to sue' which would have survived had the death of a party occurred during the pendency of a suit will survive on such death taking place during the pendency of an appeal from the decree in the suit (*Vide* Notes under Rule 4)

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(14) AIR 1914 Mad 481 (482) 15 Ind Cas 213 (213 214) 37 Mad 406
(12) 16 Ind Cas 839 (841 842) 36 Mad 540 (*Overruled in AIR 1919 Mad 911 (FB)*)
(12) 16 Ind Cas 865 (865) (Mad)
(04) 27 Mad 588 (591)
(12) 15 Ind Cas 461 (462 463) (Mad)

6 (13) 18 Ind Cas 329 (330 331) 1913 Pun Re No 65 p 247
(86) 1 Agra 49 (49)
7 (05) 1905 Pun Re No 58 page 199
(96) 21 Cal 997 (1004) 21 Ind App 163 (PC)
8 AIR 1931 Lah 293 (294) 13 Lah 116

Note 16

1 (18) AIR 1918 Mad 560 (562) 41 Mad 237
2 (12) 16 Ind Cas 908 (909) 40 Cal 323

Note 17

17

O. 22 R. 1
Notes 18-19

In cases where it would not have so survived had the death occurred pending the *suit*, the question whether it survives or not if the death occurs pending appeal, will depend upon the *result* of the suit If the suit has resulted in a *decree in favour of the plaintiff s claim*, then the claim will have become perfected by the decree and attached to the estate Thereafter, it becomes a question of benefit to the estate of the plaintiff which his legal representatives are entitled to uphold, or a detriment to the estate of the defendant which his legal representatives are entitled to try and get rid of, consequently, the "right to sue' survives[1] In such cases the fact that the lower Court's decree has already been executed will not affect the question, since the legal representative can get restitution if he succeeds[2]

But if in the first Court the result was a *dismissal of the suit*, the plaintiff, in appealing against it is only seeking to enforce the very claim which he unsuccessfully sought to enforce in the suit The appeal, therefore, partakes of the character of the suit and the "right to sue" will not survive on the death of either party[3] The appeal cannot be continued even in respect of costs or other reliefs which are merely incidental to the main relief[4] (See also Order 22, General, Note 2) If the first Court has decreed the suit in part, then an appeal by the plaintiff in respect of the part disallowed will partake of the nature of an appeal from a dismissal of the suit[5]

If the "right to sue" in an appeal does not survive, then the memorandum of cross objections filed by the respondent cannot be heard and must also be dismissed[6]

19. Suit or appeal against a dead person. — It has been seen in Note 3 to Order 22, General that this Order applies only to cases of death during the *pendency of the suit* and not to cases of death occurring *before the institution* of the suit A suit against a person who is dead at the time of the institution thereof is void and of no legal effect[1] and it is immaterial whether the death was *known* at the time or not[2] Such a suit cannot be amended into one against his legal representatives[3] *But an appeal* filed against
Lahore, be amended
to the Sind and Upp

respect of costs)
4 ('10) 5 Ind Cas 937 (938, 939) 34 Mad 76

62, p 273
6 ('21) AIR 1921 Mad 405 (406) 44 Mad 873
('29) AIR 1929 Lah 807 (808) 11 Lah 1

Note 19

1. ('33) AIR 1933 Mad 454 (455)
('08) 31 Mad 86 (89).
[*See also* ('32) AIR 1932 Lah 592 (594)]
2 ('08) 31 Mad 86 (86, 89)
3. ('08) 31 Mad 86 (89)
('33) AIR 1933 Mad 454 (455)
('24) AIR 1924 Bom 109 (111)
('19) AIR 1919 Cal 257 (258)
4 ('25) AIR 1925 Mad 1210 (1210) 49 Mad 13 (FB)
('32) AIR 1932 Lah 305 (306)

no jurisdiction to bring in the legal representative in such a case[5] although, if the legal representative is already on record in another capacity, the memorandum of appeal can be amended so as to describe him as the legal representative of the deceased [6] **O. 22 R. 1 Notes 19-21**

The principle of the rule that a suit against a dead person is a nullity does not apply to execution proceedings Thus where an execution application is presented against a judgment debtor who is dead at the time of the presentation of the application the application can be amended by the substitution of the heirs of the deceased [7]

Where the legal representative of a party dying subsequent to decree is allowed *to file an appeal against the decree without notice to the respondent the latter can at* the hearing raise the objection that the appellant is not really the legal representative and the appeal will be dismissed if there is no application to bring the right legal representative on record [8]

20 No abatement by reason of death after decree—When a suit is decreed, the decree determines and settles the claims of the parties The claim is perfected by the judgment[1] and the decree is properly capable of transfer devolution or inheritance like any other property [2] Hence, there is no abatement by death subsequent to the decree [3] But this principle does not apply to the case of death after a decree dismissing a suit on a *personal* claim *vide* Note 17

21. Appeal and revision.— An order refusing an application to add a person as a legal representative and directing abatement of the suit *on the ground that the right to sue does not survive* is appealable as a decree [1]

An order *adding* or refusing to add a person as a legal representative of a deceased party may be open to revision under Section 115 of the Code [2]

R. 2. [S 362] Where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants **O. 22 R 2**

Procedure where one of several plaintiffs or defendants dies and right to sue survives

[1877, S 362, 1859, S 100]

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5 [illegible]
6 [illegible]
7 (33) AIR 1933 Cal 684 (687)
8 (23) AIR 1923 Mad 367 (368)

Note 20

1 (87) 9 All 131 (134) (FB)
(02) 26 Bom 597 (607 608)
(02) 26 Mad 499 (500)
(04) 28 Bom 201 (208) (In a partition suit a decree granting partition effects a division in status and puts an end to survivorship so that on the death of the plaintiff his heirs get the property by inheritance and can come on record as his legal representatives)
(96) 19 Mad 345 (347 348)
(24) AIR 1924 Mad 309 (310)
2 *(20) AIR 1920 Pat 809 (810)*
(34) AIR 1934 All 1029 (1030)
3 (87) 9 All 131 (134)
(02) 26 Bom 597 (605 607 608)
(27) AIR 1927 Oudh 156 (157 158) 2 Luck 464
(94) 18 Bom 224 (226) (No abatement by death during execution proceedings)

Note 21

1 (28) AIR 1928 Oudh 362 (364 365) 3 Luck 628 (FB)
(16) AIR 1916 Mad 1068 (1069)
(19) AIR 1919 Mad 479 (480 481)
2 (19) AIR 1919 All 189 (190) 41 All 515
(16) AIR 1916 All 34 (36) 38 All 111

O. 22 R. 2
Note 1

Synopsis

1. *Scope.*
2. Right to sue surviving to surviving plaintiffs
3. *Right to sue surviving against surviving defendants.*
4. "Suit" includes appeal

1. Scope. — In order that this rule may apply, it is necessary that —

(1) there should be *more than one* plaintiff or *more than one* defendant in the suit, and

(2) on the death of one of the plaintiffs or one of the defendants the right to sue should survive to the surviving plaintiffs *alone* or against the surviving defendants *alone*, respectively, even though they might have been on the record in *another capacity*[1]

The word "survive" has not been used in any technical sense It has been used in its ordinary sense of "outlive" This rule, therefore, applies to cases of every kind of devolution on death[2] It is not necessary that the survival should be by reason of any circumstance antecedent to the suit[3]

The word "alone" in the rule means "exclusively," *i e*, to the exclusion of other persons[4] It, however, does not mean that no one else should be entitled to sue or be liable to be sued it only means that the survivor or survivors should be entitled to sue or be liable to be sued independently of others, *i e*, without joining others[5]

No application is necessary for making the necessary entry under this rule. It is the duty of the Court to do so[6]

The following points of distinction between this rule and Rules 3 and 4 may be noted —

(i) There can be no abatement if the facts come within the provisions of this rule,[7] whereas if the facts fall within the provisions of Rules 3 or 4 and the procedure laid down therein is not adopted, the suit will abate

(ii) If the conditions of this rule are satisfied, the suit can be proceeded with even if it had been filed against a dead person along with others who are his legal representatives,[8] whereas Rules 3 and 4 will not apply if the party was dead at the time of institution of the suit

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Order 22 Rule 2 — Note 1

1. ('21) AIR 1921 Oudh 209 (213) 24 Oudh Cas 374
('34) AIR 1934 Pat 427 (428)
('08) 30 All 49 (51). (Right to sue not surviving—Suit abates)
('31) AIR 1931 All 349 (349, 350) 53 All 521 (But the rule does not apply if the survival is to one in the opposite array—Thus, one of several defendants preferred second appeal the other [illegible]

they were *pro forma* respondents in the second appeal, that the right to sue survived to them and that there was no abatement — *Held* that the co defendants were not appellants, that O 22 R 2 did not apply and that the appeal abated)

2. ('29) AIR 1929 Sind 225 (226) 24 Sind L R 167

3 ('06) 4 Cal L Jour 568 (571, 572)
('27) AIR 1927 Lah 501 (503) (If the right to sue survives against the surviving respondents, even [illegible]

4 [illegible]

5 [illegible]

[illegible] viving defendant, it was held that [illegible] not apply)]

[illegible]

8 ('29) AIR 1929 Lah 440 (440)

O 22 R. 2
Notes 1-2

(iii) The application of this rule or of Rules 3 and 4 *infra* depends on whether the right to sue fully vests in the surviving plaintiffs or is fully available against the surviving defendants Thus in all cases where the right to sue is fully represented by the surviving plaintiff or defendant already on record this rule will apply and when it would not be fully represented unless some person not already on record is added as a party, Rules 3 or 4 *infra* will apply [9]

Suppose, there are several defendants to a suit One of them dies His legal representatives are already on the record as defendants in another capacity Can it be said that in such cases the right to sue survives against the surviving defendants alone within the meaning of this rule so that it is not necessary to make an application to bring them on the record as legal representatives under Rule 4 *infra?* It has been held by the Bombay High Court[10] that where the interest of a defendant in the subject matter of the suit does not *cease* on his death and his legal representatives *as such* have an interest in the subject matter an application to bring them on the record is necessary On this question, however, there is a conflict of decisions for which see Note 12 to Rule 4 *infra*

2. Right to sue surviving to surviving plaintiffs — Where joint purchasers of property sue for possession and pending the suit one of them dies the right to sue will survive to the others if the purchase is joint and indivisible but not if it is of *distinct* though undivided shares [1]

As to the survival of the right to sue on the death of a partner in suits by a firm see O 30 R 4 and as to the survival of such right on the death of plaintiff in a suit under Section 92 of the Code see Section 92 Note 30 See also the undermentioned cases [2]

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(33) AIR 1933 All 291 (291)
(32) 1932 Mad W N 491 (493) (Hindu joint

1

subject matter would cease — The rule does not contemplate any defence being made by the legal representatives of a deceased defendant)

Note 2

1 (06) 3 All L Jour 30 (35 3")
2

of all the legatees so that on the death of one of the legatees the other is entitled to continue the suit)
(33) AIR 1933 Lah 654 (655) (Suit by some landlords that certain tenancy had extinguished and for declaration that certain person has no occupancy right—Death of some plaintiffs pending suit — Legal representatives not brought on record — Suit is for benefit of all landlords and does not abate either wholly or in part)
(34) AIR 1934 Cal 328 (333) 61 Cal 80 (Suit by committee appointed by Government under S 7 of Act XX of 1863 — Death of member of com

(81) 1881 Pun Re No 109 page 252
(34) AIR 1934 Pat 559 (561) (Suit for ejectment

Pat 250 Distinguished)
(35) AIR 1935 Cal 413 (415) (In an appeal by the defendants against a decree in a representative

O.22 R.2 Notes 3-4

3 Right to sue surviving against surviving defendants — Where the defendants are jointly and severally liable to the plaintiff and one of them dies his legal representatives need not be brought on record [1] Thus in the following cases no legal representatives of a deceased defendant need be brought on record —

(1) Suit against several joint tort feasors [2]

(2) Suit on a mortgage executed by the members of a joint Hindu family [3]

The legal representatives of a defendant who has before his death assigned his rights to another defendant need not be brought on record [4]

As to the right to sue surviving against the surviving defendants in cases coming under O 1 R 8 see Note 24 to that rule

4 "Suit" includes appeal — The word suit includes an appeal (See Rule 11 *infra*) This rule will therefore apply also where the right to appeal survives to the surviving appellants *alone* or against the surviving respondents *alone* [1]

For cases where the right to appeal survives to surviving appellants alone see the undermentioned cases[2] and for cases where the right survives against the surviving respondents alone see the cases cited below [3]

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suit by several plaintiffs instituted with the permission of the Court under O 1 R 8 C P C no substitution of a legal representative is necessary if one of plaintiffs respondents dies pending h nn)

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his legal representatives not brought on record — Surviving reversioner *held* solely entitled to prosecute appeal)

(39) AIR 1939 Oudh 196 (203) (*A* transferring his property to *B*—Then both *A* and *B* suing *C* for declaration — *A* dying during pendency of suit — As *A* has transferred all his rights in the subject matter of the suit to *B* he is not a necessary party to the suit and his death does not cause the suit to abate)

Note 3

1 (20) AIR 1920 Pat 801 (802)
(24) AIR 1924 Rang 127 (128) 1 Rang 618
[But see (22) AIR 1922 Cal 403 (409) 49 Cal

(—)

2 (16) AIR 1916 Lah 133 (135) 1915 Pun Re No 106
(27) AIR 1927 Cal 182 (189) 53 Cal 992

4 (66) 6 Suth W R Ref 2 (3)
(88) 1888 Bom P J 191

Note 4

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Application after eight months by son

2 (03) 25 All 27 (28) (Dissenting from 24 All 222)
(03) 27 Bom 284 (287)

— Ap-

O. 22 R. 3

R. 3. [Ss. 363, 365, 366.] *(1)* Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone,[5] or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application[7] made in that behalf, shall cause the legal representative[10] of the deceased plaintiff to be made a party[9] and shall proceed with the suit.

Procedure in case of death of one of several plaintiffs or of sole plaintiff.

(2) Where within the time limited[8] by law no application is made under sub-rule *(1)*, the suit shall abate[18] so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs[24] which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

[1877, Ss. 363, 364, 365, 366; 1859, Ss. 101, 102.]

Synopsis

1. Legislative changes
2. Scope and applicability of the Rule.
3. Rule applies to appeals
3a. Applicability of Rule to revision proceedings. See Order 22, General, Note 2
4. Rule does not apply to execution proceedings. See Rule 12 and Notes thereto
5. Where right to sue survives to persons other than the surviving plaintiff or plaintiffs alone.
6. Death of a pauper applicant.
7. "On an application made in that behalf"
8. Limitation for application under this Rule.
9. "Shall cause the legal representative of the deceased plaintiff to be made a party."
10. Legal representative.
11. Two or more legal representatives.
12. Wrong person as legal representative
13. Joint Hindu family and legal representatives
14. Legal representatives of deceased plaintiff or appellant already on record in another capacity.
15. Determination of the question as to who is the legal representative.
16. What pleas may be taken by a legal representative.
17. Minor as legal representative.
17a. Insolvent legal representative.
18. "The suit shall abate so far as the deceased plaintiff is concerned"
19. Death after preliminary and before final decree.
20. Death after final decree. See Notes to Rule 12
21. Suits under Section 92 of the Code. See Note 30 to Section 92
22. Suits under O. 1 R 8 of the Code.
23. Effect of abatement on the rights of parties.
24. Award of costs
25. Revision
26. Appeal.

Other Topics (miscellaneous)

Application after time See Note 8
Death of pro forma plaintiffs See Note 2
Order of abatement if necessary See Note 18
Survival to defendant See Note 5
Who can apply See Notes 7 and 11

1. Legislative changes. —

1 Section 363 of the old Code dealing with the case of death of *one of several plaintiffs* provided that the Court "*may* cause the legal representative" *of* the

O. 22 R. 3 Notes 1–3

deceased plaintiff to be made a party, Section 365 which dealt with the death of a *sole* plaintiff provided that the legal representative may apply to be brought on the record and "the Court *shall* thereupon enter his name" Under the present rule the Court, in all cases, on an application made in that behalf, *shall* cause the legal representative of the deceased plaintiff to be made a party See Note 7, *infra*

2 The words the Court may pass an *order* that the suit shall abate which occurred in Section 366 of the old Code have been substituted by the words "the suit shall abate"

3 After the words "the suit shall abate' the words "so far as the deceased plaintiff is concerned' have been newly added in order to make it clear that the abatement shall, in the first instance, be only so far as the deceased plaintiff is concerned and not of the whole suit See Notes 18 and 23, *infra*

2. Scope and applicability of the Rule. — In order that this rule may apply the following conditions must be satisfied —

1 The death must occur *pending* the suit Thus the rule does not apply where a plaintiff dies *after decree* [1]

2 The right to sue must survive to a 'legal representative' as defined by Section 2, sub section (11) [2]

3 The right to sue must survive either to *other* persons jointly with the surviving plaintiffs or to those *other* persons exclusively

4 The deceased plaintiff must have been a *necessary party* to the suit Otherwise, or, if he has no interest in the suit, his legal representatives need not be made parties and the rule will not apply [3]

Where a plaintiff dies, the suit cannot be dismissed for default of appearance under Order 9 The provisions of Order 22 will apply to such cases [4] See Note 1 to O 9 R 8, *ante*

The principle of the rule has been held to apply to proceedings in revision[5] and to cases before the Deputy Commissioner under the Chota Nagpur Tenancy Act [6] But it does not apply to proceedings in an application for probate [7] The rule applies to proceedings under the U P Encumbered Estates Act of 1934 [8]

As to the applicability of the rule to appeals, see Note 3 below

3. Rule applies to appeals. — The provisions of this rule apply also to appeals (*vide* Rule 11, *infra*) Where an appellant dies during the pendency of the appeal and his right of appeal does not survive to the surviving appellant alone, his legal representatives can and should be brought on record and if no application

Order 22 Rule 3 — Note 2

1 (81) 3 Mad 236 (238)
(27) AIR 1927 Oudh 156 (157) 2 Luck 464
(37) AIR 1937 Rang 199 (200)
See Note 5 *infra*

2 (36) AIR 1936 Pat 123 (124) 15 Pat 82 (Assignee from a person is not his legal representative)

3 (21) AIR 1921 Lah 357 (358)
(32) AIR 1932 Lah 641 (643) 13 Lah 483 (Partition suit between two branches of Hindu family — Son of plaintiff dying — Suit does not abate)
(14) AIR 1914 All 113 (113)

4 (35) AIR 1935 Nag 189 (190) 31 Nag L R 374 (Where the suit is dismissed the dismissal

5 (13) 21 Ind Cas 407 (407) (Cal) (Note There is a conflict of decisions as to the applicability of Order 22 to revision proceedings—See Order 22 General, Note 2)

6 (23) AIR 1923 Pat 29 (29) 2 Pat 243

7. (32) AIR 1932 Cal 206 (207) (Probate appeal by legatee — Legal representative of legatee can be substituted in appeal)

8 (39) AIR 1939 All 717 (717) (In such proceedings the landlord is to be considered to be the plaintiff and the creditor who puts in his claim as the defendant)

therefor is made within the prescribed time, the appeal will abate so far as the deceased appellant is concerned [1, 2]

Where two independent appeals were filed against the same decree, one by the plaintiff and the other by one of the defendants, and during the pendency of the appeals the plaintiff died and his legal representatives were impleaded in his appeal but not in the defendant's appeal, it was held by the High Court of Madras[3] that the latter appeal abated and that the impleading of the legal representative in the plaintiff's appeal would not enure for the benefit of the other appeal

In applying the rule to appeals the interpretation of the words 'right to sue' as given in Note 3 to Rule 1 should be remembered and it will follow that even in cases where the *suit* would have abated by reason of the right to sue not surviving on the death of the plaintiff, the right to *appeal* may survive [4] See Note 3 to Rule 1

3a. Applicability of Rule to revision proceedings. — See Order 22, General, Note 2

4. Rule does not apply to execution proceedings. — See Rule 12 *infra* and Notes thereto

5. Where right to sue survives to persons other than the surviving plaintiff or plaintiffs alone. — This rule will apply only where the right to sue does *not* survive, where there are *several* plaintiffs, to the surviving plaintiffs alone[1] but survives either to the surviving plaintiffs jointly with *others*[2] or exclusively to *others* If the right to sue survives to the surviving plaintiff *alone* the case is not within this rule[3] but is governed by the provisions of Rule 2

Where the right to sue survives to a *contesting defendant*, the rule cannot apply inasmuch as he cannot continue the suit against himself [4] The case is, however, different if the defendant on whom the right to sue survives is only a *pro forma* defendant [5]

See also Notes to Rule 2 above

6 Death of a pauper applicant. — As already pointed out in Note 10 to Rule 1, the right to apply for permission to sue in *forma pauperis* is a purely *personal* right which does not survive at all On the death therefore of the petitioner in such an application, this rule will not apply [1] But, it has been held that the legal representative is entitled to be brought on the record and to continue the suit on payment of court fee or he may file a fresh application for leave to sue as a pauper [2] See also O 22 R 1, Note 10

Note 3
1-2 (86) 1886 All W N 90 (90, 91)
(35) AIR 1935 All 640 (641) (But where the

Note 5
1 (29) AIR 1929 All 347 (347)
2 (1900) 22 All 222 (223 224)
3

(But in such a case the Court may order legal

2

O. 22 R. 3
Notes 7-9

7. "On an application made in that behalf." — The Court cannot, under this rule, add a legal representative *suo motu* An *application* must be made for the purpose [1] The application can be made even by a defendant or respondent interested in bringing the legal representative on the record [2] Where there are several legal representatives it is not necessary that the application need be made by *all* of them [3] Further, even an application made by a person who is ultimately found not to be a legal representative has been held to be sufficient compliance with the requirements of the rule, if it has been made *bona fide* [4] But where *A* applies to be made a party as legal representative and the application states that *B* is not the legal representative *B* cannot seek to counteract his own failure to apply in time by relying on *A's* application [5]

Where a party dies after decree, his legal representative can file an appeal against the decree without making a separate application for impleading him as a party the appeal itself may be regarded as an application for the purpose [6]

8. Limitation for application under this Rule. — The period of limitation for filing an application to bring the legal representatives on record under this rule is ninety days from the date of the death of the plaintiff under Article 176 of the Limitation Act as amended by Act XXVI of 1920 and this is so even if the death had occurred before the amending Act was passed [1]

The onus is on the applicant to prove that the application is within time [2]

Where one of the legal representatives has applied in time to be made a party and the application has been granted, the other legal representatives may be brought on the record subsequently [3]

9. "Shall cause the legal representative of the deceased plaintiff to be made a party." — The Court is bound to implead the legal representatives as parties on an application made in that behalf,[1] unless there is a dispute as to who is the legal representative, in which case, the question should be decided by it under Rule 5 [2]

Where an application to add a person as the legal representative of a deceased plaintiff is filed, but the Court, without expressly adding the petitioner as a party allows him to prosecute the suit or appeal, the petitioner will be deemed to have been brought on the record [3] But the same result will not follow by the mere fact that a *vakalatnama* is filed by a pleader on behalf of the legal representative [4]

Note 7

one legal representative is sufficient for him to be made a party)
(86) 10 Bom 220 (223) (If an application has been made by one of the heirs of the deceased appellant in time the abatement is saved and the respondent is entitled to have the other heirs ...all

[illegible] on is sufficient to save suit from abatement)
5. (19) AIR 1919 Nag 150 (151, 152) 15 Nag

L R 21
6. (82) 1882 All W N 73 (73)

Note 8

[illegible]

Note 9

1 (01) 26 Bom 317 (319)

[illegible]

It has been held that where on the death of the father who was a co plaintiff in a suit, his sons refuse to be substituted as his legal representatives and are joined as *pro forma* defendants the requirements of law are complied with and the suit does not abate [5]

A Court to which a case has been sent on remand has jurisdiction to act under this rule.[6]

Where a suit is dismissed for default in ignorance of the plaintiff s death and subsequently an application is filed by his legal representative to be brought on the record the Court can set aside the order of dismissal and restore the suit to the file under Section 151 and substitute the legal representative s name for that of the deceased plaintiff [7]

10 Legal representative — The expression legal representative was not defined under the old Code Under the English law the primary meaning of the expression is executor or administrator though it may under special circumstances be controlled by the context [1] The same strict meaning was given to the expression in some cases under the old Code[2] while in other cases a wider meaning was given so as to cover all persons *representing the estate of a deceased person* [3] The present definition in Section 2 clause (11) of the Code is very wide[4] and gives effect to the latter view Under that definition the following persons are legal representatives —

1 A person who in law, represents the estate of a deceased person [5]

2 A person who intermeddles with the estate of a deceased [6]

3 Where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued [7]

The term next of kin is peculiar to the English law of inheritance and does not mean the same thing as the term legal representative under the Code [8]

(1) *Person who in law represents the estate of a deceased person* — There are certain cases which are governed by the Succession Act 1925 in which the executor or administrator alone can represent the estate of a deceased person [9] In such cases

5 (39) AIR 1939 Pat 225 (228)
6 (04) 7 Oudh Cas 17 (18)
7 (35) AIR 1935 Nag 189 (190) 31 Nag L R 374

Note 10

1 (1820) 6 Madd 159 Price v Strange
(04) 8 Cal W N 843 (851)
2 [*See* (95) 22 Cal 903 (908)]
[*See also* (97) 20 Mad 51 (53) (Executor was brought on record as legal representative)]
3 (04) 8 Cal W N 843 (851)
(79) 4 Cal 897 (908 919) (It includes the heir)
4 (34) AIR 1934 Lah 1 (3)
(37) AIR 1937 Sind 318 (320) (Residuary legatee under the will of a Hindu residing in Sind is legal representative even before obtaining letters of administration)
[*See also* (12) 17 Ind Cas 101 (106) 8 Nag L R 113 (Term as used in O 22 has a wide significance.)]
5 (19) AIR 1919 Mad 510 (513) 42 Mad 76 (He need not be necessarily the beneficial owner)
(   )
6 (16) AIR 1916 Mad 1022 (1024)

9 (38) AIR 1938 Bom 6 (9) I L R (1938) Bom 64 (Heir of a Parsi is not his legal representative—18 Bom 337 Relied on)
See S 211 of the Succession Act 1925
[*See also* (84) 8 Bom 241 (256) (Case under the Probate and Administration Act 1881 which has now been repealed by the Succession Act 1925)

O. 22 R. 3
Note 10

they alone are his legal representatives[10] In cases not governed by the Succession Act there may or may not be an executor or administrator Where there is an executor or administrator he will be the legal representative of the deceased person where the will is with regard to *part* of the property of the testator, the executor cannot be his legal representative with regard to the properties of the deceased not dealt with by the will[11] Where there are no executors or administrators, the heir or the legatee will be the legal representative of the deceased person in respect of the property respectively got by him[12] In other words, the term ' legal representative, as defined in this Code only denotes those classes of persons on whom the status of a representative is fastened *by reason of the death* of a person whose estate they are held to represent[13] But an assignee from the deceased of a certain property is not his legal representative, for, he does not get any estate of the deceased by reason of his death[14] Similarly, the Crown getting by escheat the property of a person on his death is not a legal representative, as it does not get the estate as *representing* the deceased person but in its *paramount* right[15] so also a zamindar who, on the death of a tenant gets under the village custom his interest by escheat, is not his legal representative[16] Again, the Official Assignee or Receiver of an insolvent s estate is not a legal representative of the insolvent[17]

(2) *Intermeddlers* — The term intermeddle' has been used to mean an intermeddling with the assets of a deceased person in such a way as to denote an assumption of the authority or an intention to exercise the functions of an executor or administrator[18] In other words, it has been used to mean what is known as an executor *de son tort*[19] It is therefore essential, in order to constitute a person an intermeddler, that there should be an *intention* on his part to act as a legal representative and to *represent the estate* of the deceased[20] A trespasser or a person who claims a title in himself adversely to the estate of the deceased cannot, *therefore* be an intermeddler within the meaning of the definition[21] He will, however be a legal representative if he intends to act as a legal representative and to represent the estate

10 (04) 8 Cal W N 843 (8o6)
[*See also* (97) 21 Bom 102 (10o) (But an administrator however appointed under S 10 of Regulation VIII of 1827 without leave being granted to him to sue is not the legal representative nor is he entitled to continue an appeal)]

11. (29) AIR 1929 Lah 546 (546)

12 (04) 8 Cal W N 843 (8o6) (Heirs)
(93) 17 Bom 758 (7,0)
(36) AIR 1936 Oudh 7 (9) 12 Luck 1 (Universal legatee is legal representative)
[*See* (35) AIR 1935 All 390 (391) (In this case it was held that a person who would have got for which see Note 4 to Section 52 *ante*)]
[*See also* (37) AIR 1937 Sind 318 (3?0)]

13 (29) AIR 1929 Oudh 353 (354)

14 (29) AIR 1929 All 444 (446) (His case comes under O 22 R 10)

15 [See (00) [illegible]

16 (14) AIR 1914 Oudh 208 (20o)

17 ('35) AIR 1935 Mad 151 (152) 58 Mad 403

18 Halsbury Vol 14 page 147
(38) AIR 1938 Mad 684 (686) (A mere alienee from a legal representative is not a legal representative.)

19 Halsbury Vol 14 pp 147 to 151 See also meaning of *executor de son tort* in Wharton s

21 [*See* (26) AIR 1926 Cal 825 (825) (Mere taking away a portion of the property of the deceased does not make such person while there is a legal representative present, an executor *de son tort*)]

as such[22] It depends, in each case, upon the particular facts of that case whether he intends to do so An intermeddler is a legal representative only for the purposes of the procedure in instituting and defending suits and only to the extent of the property with which he had intermeddled[23] It has been held in the undermentioned case[24] that an intermeddler cannot sue on behalf of the estate though a suit may be brought *against* him as representing the estate

Where it is alleged on behalf of the plaintiff that the defendant is the legal representative of the deceased debtor in that he has intermeddled with the estate of the deceased, the burden is on the plaintiff to prove that the defendant has intermeddled with the property of the debtor at the time of his death[25]

The definition in Section 2 clause (11) merely means that a person who intermeddles with the estate may be treated as the legal representative It does not mean that such a person is to be preferred to a person who is found to be the true legal representative of the deceased[26]

(3) *Representative suits* — In representative suits the legal representative must be a person on whom *the estate devolves on the death of the party suing or* sued[2] Where, on the death of a trustee a new trustee is elected or appointed the latter is not the legal representative of the deceased trustee, inasmuch as the estate did not devolve on him *on the death* of the former trustee but by virtue of his appointment or election which has no retrospective operation[28] In a suit by a *Hindu widow* for the benefit of the estate, the estate will devolve on the death of the plaintiff on the next reversioner who will therefore be the legal representative of the plaintiff[29] In a suit by a *reversioner* in respect of an estate held by a Hindu female the reversioner plaintiff sues on behalf of the whole reversionary body In other words all the reversioners are represented in the suit by the plaintiff reversioner, and on the latter s death other reversioners may be brought on the record for the purpose of continuing

22 (18) AIR 1918 Pat 216 (216)
[*See also* (79) 4 Cal 342 (345 346) (Party who takes possession of the estate of a deceased Hindu treated for some purposes as his representative)
(03) 30 Cal 1044 (1057) (Do)
(24) AIR 1924 Cal 362 (362) (Person possessing judgment-debtor s property is his legal representative)
(17) AIR 1917 Mad 979 (980) (Person in possession of estate belonging to deceased can represent deceased defendant)]

23 (24) AIR 1924 All 717 (718) (But not for the purpose of succession to the property of the deceased)

24 (38) AIR 1938 Nag 298 (299) I L R (1939) Nag 526 (Decision proceeds on the ground that under the English law an executor *de son tort* is liable to all the trouble of an executorship without any of the profits or advantages and that he cannot bring an action himself in the right of the deceased but actions may be brought against him)

25 (34) AIR 1934 Rang 196 (197) (Proof of possession by defendant of property which deceased owned some time prior to his death is not enough)

26 (39) AIR 1939 Pat 117 (118)

27 (17) AIR 1917 Mad 578 (583) 40 Mad 177

28 (26) AIR 1926 Mad 540 (541)
(24) AIR 1924 Lah 251 (251)
(32) AIR 1932 Cal 783 (784) (Suit by mohunt on behalf of deity)
(22) AIR 1922 Mad 402 (403) 45 Mad 703
(21) AIR 1921 Mad 124 (124) (Where a trustee sued on behalf of a trust impleading his co

is inapplicable)
[**See however** (30) AIR 1930 All 348 (349) (Religious endowment — Successor in management is legal representative of previous manager)]

29 (98) 20 All 341 (343 344)
(16) AIR 1916 All 34 (35 36) 38 All 111
(10) 7 Ind Cas 97 (97) 33 All 15
(96) 23 Cal 636 (638)
(1900) 23 Mad 125 (133)
(16) AIR 1916 Mad 611 (612 613) 39 Mad 382
(93) 1893 Pun Re No 97 page 386
[*See* (12) 15 Ind Cas 461 (463) (Mad) (Where however the suit is in her personal capacity

(19) AIR 1919 Oudh 258 (259) 22 Oudh Cas 260 (A Hindu widow cannot be deemed to represent her husband s estate so as to bind the reversionary heirs of her husband in relation to any

the suit[30] This however is not because the succeeding reversioners are legal repre en tatives of the deceased reversioner (for there was no estate vested in him which devolved on his death to the succeeding reversioners) but under the provis ons of O 1 Rules 8 and 10[31] See Note 24 to O 1 R 8 It has been held that a *benamidar* s in some sense a trustee for the real owner and his son who has some interest can succeed to the trusteeship and can be considered to be h s legal representative within the meaning of Section 2 clause (11)[3]

When a person s name is entered on the record as representing the estate of a deceased person there is no determination of any question as to the *capacity* in which the name is entered It may be afterwards shown that the person was substituted in a representative character for instance as representing the members of a joint Hindu family[33]

The right to enforce a partnership contract does not vest in the surviving partner *alone*[34] But though the rights of a deceased partner may devolve on his representative the right to sue survives to the surviving partners in the absence of any statutory authority to the contrary the latter may therefore continue the suit as legal representatives of the deceased partner[3]

It is not necessary that the legal representative should be in actual possess on of the assets of the deceased It is sufficient if he is entitled to the possession thereof *i e* if he is a person on whom the estate would devolve[36]

If *A* allows his *benamidar* *B* to sue in *his own name* he cannot on the death of *B* claim to come in as *B s* legal representative[37] A District Judge taking pos ess on of the assets of a deceased person under Section 64 of the Administrator General s Act II of 1874 is not the legal representative of the deceased[38]

If a legal representative dies his own legal representatives who have rece ved assets of the previous deceased will represent him[39]

11 Two or more legal representatives — The express on le al repre sentative must where there are more legal representatives than one be read in the pl [1]

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(193)
mpt ve
reversioner for declar ng al enat on by w dow neffectual as aga nst reversioners — On h s death r ht to sue survives to next presump a ed
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31 (19) AIR 1919 Mad 4 9 (460)
See also the follow ng analogous cases
(12) 15 *Ind Cas* 399 (402) (Mad)
(20) AIR 1920 Mad 524 (525) (Where on refusal

ted s not correct—See Note 24 to O 1 R 8
[See however (39) AIR 1939 All 672 (673) I L R (19 9) All 713 (Brothers su ng as re er n
32
33
425 (The person s entered merely to represent the estate)
34 (97) 21 Bom 412 (421)
35 (87) 9 All 486 (490)
36 (*31) AIR 1931 Nag* 173 (175) 27 Nag L R 247 (Plea that he has no assets of the deceased is
38 pu pose of execut on of decree aga nst the deceased)
39 (1900) 22 All 367 (369 3 0)

Note 11

1 (94) 16 All 211 (212)

and if any of them refuses to join as plaintiff or appellant he must be made a defendant or a respondent[2] Where, however, some of them are omitted to be brought on the record, there is a conflict of views as to whether the suit or appeal abates. According to the High Court of Allahabad[3] and the Judicial Commissioner's Court of Sind,[4] it does According to the High Court of Calcutta the term "legal representative" means all the representatives of whom the representative applying *knew or ought to have known* Where one or more of the legal representatives are unknown or are unwilling to join in the application, a *bona fide* application by all the representatives who are willing to join will be sufficient compliance with this rule[5] The High Courts of Bombay,[6] Lahore[7] and Madras,[8] and the Judicial Commissioner's Courts of Nagpur[9] and Oudh[10] hold that a *bona fide* application by all those representatives who are willing to join is enough and will save the suit or appeal from abatement In cases where the legal representatives are added after notice to the defendants or respondents and they do not raise any objection as to there being other legal representatives, even the Allahabad High Court agrees that it is not open to the defendants or respondents to subsequently contend that the suit or appeal has abated by reason of the fact that all the representatives were not brought on record[11] Further, where the legal representatives of a deceased person constitute a joint Hindu family and the manager of the family is brought on the record as representing the family, it is not necessary to bring on record the other members of the family[12]

See also Note 9 to Rule 4, *infra*

12. Wrong person as legal representative. — It is the duty of the defendant to enquire and ascertain who the legal representatives of the deceased plaintiff are[1] Consequently an objection that any person is not the legal representative of a deceased

fide believed that they alone were the legal representatives as the parties were governed by customary law and not by Mahomedan law the appeal does not abate)
[*See also* (27) AIR 1927 Lah 94 (95) (But where the interest involved in the suit or appeal cannot be sufficiently represented in the absence of the omitted legal representatives omission to implead all will be fatal to the suit or appeal)
(39) AIR 1939 Lah 439 (444) ILR (1939) Lah

not legal representatives even though their contention may be found to be untrue that would not make the whole of the suit or any portion of the suit abate)

9 (23) AIR 1923 Nag 101 (102) 18 Nag L R 21

10 (17) AIR 1917 Oudh 34 (35) 20 Oudh Cas 67 (The legal representatives who are unwilling to be made co plaintiffs may be added as defendants even after period under Art 176, Limitation Act)

11 (28) AIR 1928 All 532 (533) 50 All 857

12 (38) AIR 1938 All 256 (258) I L R (1938) All 425
(36) AIR 1936 Pat 3 (5) (Suit on mortgage—

Note 12

1. (21) AIR 1921 Lah 60 (60)
(03) 26 Mad 224 (228)

O. 22 R. 3
Notes 12-13

plaintiff must be taken by them at the earliest possible opportunity and if no such objection is so taken and a person has been impleaded as the legal representative of the deceased plaintiff, it is not open to the defendants to subsequently contend that the true legal representatives have not been brought on record and that therefore the suit must abate[2] See also Note 7, *supra*

See Note 63b to Section 11 and Sections 50 and 52, and the undermentioned case[3]

See also Note 10 to Rule 4, *infra*

13. Joint Hindu family and legal representatives. — It has been held by the High Courts of Lahore[1] and Bombay[2] and the Chief Court of Oudh[3] that where a coparcener in a joint Hindu family dies, the survivors are not his legal representatives inasmuch as they take the estate by *survivorship* and not *by succession* The High Court of Patna has, on the other hand, held that they are his legal representatives within the meaning of Section 2 (11) of the Code[4] It has been held by the Allahabad High Court that the last portion of the definition of a 'legal representative' in Section 2 (11) is wide enough to cover the case of a coparcener who gets property by survivorship on the death of a coparcener who sues or is sued in a representative character[5] But it has been held that by force of Section 53, where a son or other descendant of a Hindu has joint family property in his hands which is liable for the debts of the ancestor such son or other descendant is a "legal representative" of the ancestor[6]

Where, however, the deceased coparcener was the *managing member* of the family representing the family, the succeeding managing member is, according to the High Courts of Bombay[7] and Madras,[8] a "person who, in law, represents the estate of a deceased person" and is therefore his legal representative The Oudh Judicial Commissioner's Court also has held that where a suit is brought by the manager of a joint Hindu family and the plaintiff dies pending the suit, the substitution of the persons who become the managing members of the family after him is sufficient to save the suit from abatement and it is not necessary to bring on record all the members of the family[9]

In the case of a *separated* Hindu[10] or in a suit by a member of a joint Hindu family on a *personal* contract made with him his *heirs* will be his legal

2 (03) 27 Bom 162 (182 186 187)
(21) AIR 1921 Lah 60 (60)
(03) 26 Mad 224 (228)

3. (33) AIR 1933 Mad 43 (48) (Decree against wrong legal representative does not bind the real representative)

Note 13

1 (21) AIR 1921 Lah 34 (35) 2 Lah 114

2 (18) AIR 1918 Bom 165 (166) 42 Bom 504

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person)
[*See also* (35) AIR 1935 All 390 (391)]

6 (36) AIR 1936 Bom 456 (458 459)
(37) AIR 1937 Mad 785 (785) (Creditor can file administration suit against undivided son of Hindu debtor)

7. (31) AIR 1931 Bom 484 (489) 55 Bom 709

8 (25) AIR 1925 Mad 456 (457)
[*See also* (32) 1932 Mad W N 491 (492 493)]

9. (17) AIR 1917 Oudh 34 (35) 20 Oudh Cas 67
[

refused to allow them to continue the suit

10. (04) 27 Mad 106 (109)

O. 22 R. 3
Notes 13-16

representatives[11] The institution of a suit for partition by an adult coparcener effects a division in status In the case of a minor's suit for partition, the division in status would be effected from the date of the suit conditional on the Court being able to find that the suit when filed was for the benefit of the minor. Where the minor plaintiff dies after the institution of the suit for partition and before the Court has found that the partition is for his benefit, according to the High Court of Madras, the suit does not abate but it is open to his legal representative to proceed with the trial and obtain a decree on his showing that the suit when instituted was for the benefit of the minor[12] But the High Court of Bombay has taken a contrary view that the heirs of the minor are not entitled to continue the suit[13] After a preliminary decree for partition even the minor plaintiff becomes a divided member, and on his death, his heirs will be his legal representatives[14]

See also the undermentioned case[15]

14. Legal representatives of deceased plaintiff or appellant already on record in another capacity. — Where the legal representatives of a deceased plaintiff or appellant are already on the record, though in another capacity, an application to bring them in as legal representatives is unnecessary[1] As to whether such an application is necessary in the case of the death of a defendant or respondent see Note 12 to Rule 4, *infra*

15. Determination of the question as to who is the legal representative. — Where a dispute arises as to who is the legal representative, the Court should under Rule 5 determine the question[1] The effect of such a determination is however only limited for the purposes of the suit and is not to be conclusive of his rights[2]

16. What pleas may be taken by a legal representative — When a party dies his legal representative is appointed merely in order that the suit might proceed and a decision arrived at It is the rights and disabilities of the *original parties* that have to be considered and not those of the legal representatives themselves[1] All that the representative can therefore do is to take up the suit at the stage at which it was left when the original plaintiff died and to continue it[2] He must rely on the same cause of action and on the same title as the deceased plaintiff[3] It is not open to him to assert his own *individual* or hostile title in the suit[4] Likewise the defendant is not

11 (19) AIR 1919 All 189 (190) 41 All 515
(38) AIR 1938 Bom 451 (453) (Pre note in favour of manager of Hindu joint family — If holder dies a succession certificate may be

Note 14

to Court informing of party s death and the fact that h s representatives were on the record

Note 15

1 (94) 17 Mad 209 (211)
2 (23) AIR 1923 Nag 209 (209)

Note 16

O. 22 R. 3
Notes 16–18

entitled to raise against the legal representative any defence other than those which he could have raised against the deceased plaintiff [5]

17. Minor as legal representative. — A minor is not disentitled to be made a party as the legal representative of a deceased plaintiff, but he must be represented by a next friend [1]

17a. Insolvent legal representative. — See the undermentioned case [1]

18. "The suit shall abate so far as the deceased plaintiff is concerned" — If on the death of a plaintiff or appellant, no application to implead his legal representatives is filed within the prescribed time, the suit or appeal will abate [1] But if such application has been made but rejected, the suit or appeal will not abate [2] It is immaterial that the application was made by a wrong person, if it was made *bona fide* [3]

The impleading of the legal representative in an interlocutory matter in the suit will be enough to save the suit from abatement [4] But the impleading of a legal representative in a *cross appeal* will not save the *appeal* from abatement [5]

Under the old Section the Court had to pass an *order* that the suit or appeal abated Under the present rule, however, the abatement takes place automatically and no separate order to that effect is necessary,[6] so that, any decree passed in the suit in disregard or in ignorance of an abatement will, to that extent, be set aside on appeal [7]

An abatement under this rule will be only so far as the deceased plaintiff is concerned If it is a case of death of a sole plaintiff the abatement will be of the entire suit [8] If, on the other hand, it is a case of death of one of two or more plaintiffs the abatement will, *in the first instance,* be only so far as he is concerned [9] The effect of such abatement on the whole suit or on the rights of the other parties will depend upon the nature of the suit and of the reliefs claimed (*vide* Note 23, *infra*) Apart

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5 ('96) 19 Mad 345 (347).

Note 17

1 ('24) AIR 1924 Mad 813 (814)

Note 17a

perty vests in him and his subsequent withdrawal does not re-vest the property in the insolvent)

Note 18

1 ('69) 11 Suth W R 543 (543)
('33) AIR 1933 Rang 234 (234)
('17) AIR 1917 Low Bur 132 (133)
('96) 1896 All W N 91 (91 92)
[*See also* ('30) AIR 1930 Oudh 3 (5) 5 Luck 241 (If a portion of the plaintiff's claim is admitted by the defendant that portion does not abate)]

2 ('21) AIR 1921 Nag 23 (24) 17 Nag L R 45

3 ('10) 5 Ind Cas 514 (515) (Mad)

4 ('25) AIR 1925 Pat 145 (145)
[*See also* ('34) AIR 1934 Mad 448 (450) (Death of one appellant who was also impleaded in

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6. (AIR 1922 All 209, Overruled—

7) Bom

602

7.

8

9

sion of land and demolition of buildings — Appeal by al

from any such effect the abatement will be limited to the extent that the deceased plaintiff is concerned[10]

19. *Death after preliminary and before final decree.* — In suits requiring a preliminary and a final decree can there be an abatement on the ground that no application was filed in time to implead legal representatives on the death of a plaintiff or of a defendant after the preliminary, but before a final decree? It was held in the undermentioned cases[1] by the High Court of Allahabad, that the suit would abate, the reason being that a suit is 'pending' till a final decree is passed The said Court did *not accept the position that the principle laid down by the Privy* Council in *Lachmi Narain* v *Balmakund*, A I R 1924 Privy Council 198 was applicable to such cases In order to avoid this difficulty, O 22 R 12 has now been amended by that Court so as to make Rules 3, 4 and 8 inapplicable to proceedings after the preliminary decree[2]

The view of the other High Courts is that the rule does not apply to such *cases and that there can be no abatement of a suit on account of the death of a party* after a preliminary and before a final decree[3]

But, as no decree can be passed against a dead person, where after a preliminary decree, the defendant dies and the Court passes a final decree against him without bringing his legal representatives on the record, the final decree is a

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10. (98) 22 Bom 718 (721)
(28) AIR 1928 Lah 737 (737, 738)
(01) 25 Mad 426 (428)
[*See also* (21) AIR 1921 All 34 (35)]

Note 19

1 (31) AIR 1931 All 490 (497) 54 All 75 (FB)
(31) AIR 1931 All 154 (155) 53 All 374
(17) AIR 1917 All 429 (429) 39 All 551
(22) AIR 1922 All 396 (396 397)
(27) AIR 1927 All 272 (272) 49 All 310
(30) AIR 1930 All 779 (782 783) 52 All 910
(30) 1930 All L Jour 999 (1002)
(15) AIR 1915 All 88 (88) 37 All 226

2 (34) AIR 1934 All 465 (468)
[*See also* (35) AIR 1935 All 180 (181) (The Allahabad amendment of Rule 12 *infra* is not, *however retrospective*)]

3 (33) AIR 1933 Rang 318 (319 320) 11 Rang 446
(29) AIR 1929 Cal 430 (430) 57 Cal 285 (AIR *1921 Cal 551 and AIR 1926 Cal 308 held not to* be good law)
(03) 30 Cal 609 (612)
(30) AIR 1930 Lah 329 (330)
(28) *AIR 1928 Mad 914 (918) 51 Mad 701 (FB)* (AIR 1923 Mad 237 and AIR 1924 Mad 786 Overruled)
(29) AIR 1929 Nag 142 (144) 27 Nag L R 119 (FB)
(29) AIR 1929 Nag 206 (207)
(27) AIR 1927 Oudh 561 (561)
(27) AIR 1927 Oudh 156 (157 158) 2 Luck 464
(31) AIR 1931 Pat 57 (57) (*Authority of AIR* 1919 Pat 430 (FB) doubted)
(33) AIR 1933 Pat 27 (28)
(36) AIR 1936 Cal 540 (541) (Death of some plaintiffs after preliminary decree for ascertainment of mesne profits — Suit does not abate by reason of non substitution of deceased plaintiffs legal representatives within time)
(35) AIR 1935 Lah 712 (714) *(Obiter)*
(37) AIR 1937 Lah 164 (166) 17 Lah 817
(37) AIR 1937 Lah 615 (616) (Order 22 Rr 3 4 and 5 do not apply to a case of defendant dying after passing of preliminary decree)
(37) AIR 1937 Sind 208 (209) 30 Sind L R 428 (But where pending an appeal from the preliminary decree one of the respondents dies and no application is made within time to bring on record his legal representatives the appeal will abate)
[*See* (29) AIR 1929 Cal 648 (649) (Death of one of several mortgagors after preliminary decree and before final decree — Legal representatives not brought on record — Suit does not abate with respect to mortgagors on record)
(25) AIR 1925 P C 117 (117) 4 Pat 507 52 Ind App 188 (PC) (Under the Code of 1882 proceeding for ascertainment of mesne profits was a proceeding in execution and O 22 R 12 applied —*Hence substitution not necessary*)]
[*See also* (23) AIR 1923 Cal 626 (628 629) 50 Cal 650 (Compromise decree in mortgage suit —No abatement on death after such decree)
(09) 3 Ind Cas 999 (1000) (Cal)
(23) AIR 1923 Oudh 156 (157)
(21) AIR 1921 Pat 185 (186) (Proceeding for

O. 22 R. 3
Notes 19–23

nullity [4] See Note 8 to Section 52 *ante* But, where there are several defendants one of whom dies after the preliminary decree and a final decree is passed without bringing his legal representatives on the record, the final decree will be valid as against the other defendants [5]

20. Death after final decree. — See Notes to Rule 12

21. Suits under Section 92 of the Code. — See Note 30 to Section 92 *ante*

22. Suits under Order 1 Rule 8 of the Code. — See Note 24 to Order 1 Rule 8 and the undermentioned case [1]

23. Effect of abatement on the rights of parties. — As pointed out in Note 18 *supra*, an abatement under the rule will, *in the first instance*, be only so far as the deceased party is concerned and not of the whole suit or appeal [1] The effect of this limited abatement on a suit or appeal will depend upon the nature of the right or relief claimed in the suit or appeal If such right or relief is an *indivisible* one existing in all the plaintiffs *jointly* or in or against all the appellants *jointly*, the whole suit or appeal, as the case may be, will fail by reason of an abatement with respect to one of them [2] But if such right or relief is divisible or exists individually in each an abatement with respect to one or some alone will not cause the entire suit or appeal to fail [3]

In appeals to which Order 41 Rule 4 is applicable, *i. e*, where the appeal proceeds on grounds common to all the appellants so that any one of them could have prosecuted the appeal without the others, an abatement with respect to one of them

(05) 9 Cal W N 171 (174 175)
(33) AIR 1933 Cal 798 (799) (Preliminary mortgage decree against widow of mortgagor—Afterwards widow ceasing to be heir of mortgagor on account of re marriage—Final decree without proper legal representative is not nullity but is only voidable — Suit does not abate)]
[But see (10) 5 Ind Cas 272 (273) (Cal)
(27) AIR 1927 Bom 156 (157) (Notice issued to heirs before passing of final decree — Objection raised only before execution Court — Omission to mention their names in the decree can be rectified in execution)
('26) AIR 1926 Sind 20 (21)
(30) AIR 1930 Cal 422 (423 424) 57 Cal 148]
4 (35) 39 Cal W N 1284 (1288)
(36) AIR 1936 Cal 698 (699)
5. (39) AIR 1939 Cal 403 (407) I L R (1939) 1 Cal 493

Note 22

1 [illegible] son [illegible] to [illegible] ich [illegible] be

Note 23

1. ('30) AIR 1930 All 211 (212)
2 ('20) AIR 1920 Cal 168 (169)
(35) 155 Ind Cas 610 (611) (Lah)
(26) AIR 1926 Lah 474 (476).
('32) 33 Pun L R 38 (39)
('32) AIR 1932 Lah 281 (286) 13 Lah 70
(32) AIR 1932 Pat 327 (329) 11 Pat 538
('35) AIR 1935 Lah 478 (479) (Contract to sell

one — Heirs not impleaded — Appeal abates in toto)
[See ('33) AIR 1933 Pat 270 (271) (But in the case of joint Hindu family if the father is already on record he will represent the interests of the sons)]

[illegible]

passer of common property—Any cosharer [illegible]

[illegible]

O. 22 R. 3
Notes 23–25

will not cause the appeal to fail[4] But if the nature of the appeal is such that it cannot be heard in the absence of any of the appellants the provisions of Order 41, Rule 4 cannot be invoked and the whole appeal will fail[5] One test of determining whether the failure to bring in the legal representative of a deceased appellant will cause the entire appeal to fail is can the appeal be decided without bringing the legal representatives of the deceased party on the record without bringing into existence two decrees contrary to each other ?[6]

Where an appeal has abated the respondent cannot claim its being heard even though he might have filed a memorandum of cross objections He must file a separate appeal[7]

As pointed in Note 18 *supra* a judgment given in ignorance of an abatement is null and void[8] The remedy of the legal representative in such cases is not to sue again on the same cause of action but to have the suit revived[9]

See also Notes to Rule 9 *infra*

24. Award of costs. — The provision for the award of costs contained in this rule should not be taken in a restricted sense The power to award costs in proper cases exists in Courts and this power is not restricted by this rule[1] The rule only extends or recognizes the power in cases of abatement under the rule

The power can also be exercised by an Appellate Court[2] See also Note 16 to Section 35 *ante*

25 Revision — *A* applied to be added as the legal representative of a deceased plaintiff It was found that *A* was not the legal representative The Court thereupon on that application itself impleaded as legal representative another person who did not seek and was not sought to be impleaded It was held that the order was liable to revision[1]

A applied to be added as the legal representative of a deceased plaintiff He was directed to file a separate suit to establish his claim as such Such a suit was not filed The Court thereupon ordered the first suit to abate It was held that the order of abatement was made without jurisdiction and could be set aside in revision[2]

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(33) 146 Ind Cas 945 (946) (Lah) (Shares of parties ascertainable—No total abatement)

56 Cal 692]

6 (35) AIR 1935 Pat 4 (5) (If the result of hearing and deciding the appeal would be to bring each

(14) AIR 1914 Lah 382 (383) 1914 Pun Re No 88
(18) AIR 1918 Lah 227 (228) 1918 Pun Re No 84
[*See* (35) AIR 1935 All 640 (641)]
[*See also* (26) AIR 1926 Lah 431 (432)]
[**But see** (34) AIR 1934 Lah 206 (207 208) 15 Lah 667]

5 (28) AIR 1928 Cal 184 (184 185)
(09) 4 Ind Cas 385 (386) (All)
(19) AIR 1919 Cal 410 (411)
(28) AIR 1928 Cal 824 (824)
(30) AIR 1930 Lah 174 (175)

Note 25

1 (19) AIR 1919 Nag 150 (152) 15 Nag L R 21
2 (83) 1883 Bom P J 6 (7)

O. 22 R. 3
Note 26

26. Appeal. — An order on an application under this rule allowing[1] or refusing to allow[2] a person to be brought on the record as the legal representative of a deceased party is not appealable The reason is that such an order does not adjudicate upon the *rights of parties* on any point or points in controversy in the suit and is therefore *not* a decree,[3] nor is such an order an appealable one under the provisions of Section 104 and O 43 R 1 Under the old Code, an order under this rule whether a person should be brought on record as a legal representative of the deceased party was sometimes held to be one under Section 367 of the old Code (corresponding to Rule 5 of this Order) and was therefore held to be appealable under Section 588, clause 18 of that Code[4] Under the present Code there is no appeal from an order under Rule 5 and the said cases would, therefore, be no longer law An order bringing on record the legal representative of a deceased appellant is not a "judgment' within the meaning of Clause 15 of the Letters Patent[5]

In *Niranjan Nath* v *Afzal Hussain*,[6] a Full Bench of the Lahore High Court observed as follows "When the order of the Court *merely* recognizes an abatement, which has already taken place on account of the death of a plaintiff not followed by an application within six months [the period of limitation now is ninety days under Article 176 of the Limitation Act] to implead his legal representative, and does not determine any matter in controversy between the parties, it cannot be *regarded* as a decree If, on the other hand, the order of abatement is the result of an adjudication upon the rights of the parties with respect to a matter in controversy, and is not passed upon an application for the revival of the suit made under O 22 R 9 [an order under O 22 R 9 refusing to set aside the abatement of a suit is an *appealable* order under O 43 R 1 clause (k) and hence cannot be a decree *vide* Section 2,

sue did not survive after the death of the plaintiff It was also pointed out that where the Court holds that the result of the abatement of a suit with regard to one of the plaintiffs owing to his le[illegible]
limitation to be brought [illegible]
to the other plaintiffs als[illegible]
and the order would am[illegible]
an abatement [illegible]

2. ('10) AIR 1915 All 158 (159) 37 All 272 (Order under O 22 R 5)
('81) 3 All 844 (845)
('26) AIR 1926 Mad 586 (591) 49 Mad 450 (FB) (Order under O 22 R 5 — AIR 1920 Mad 424, Overruled.)
('16) AIR 1916 Mad 523 (524) 39 Mad 488
('24) AIR 1924 Mad 622 (623) (Applications by [illegible] R 5)

3. ('32) AIR 1932 All 466 (466)
('20) AIR 1920 Lah 8 (9) 1 Lah 403
('24) AIR 1924 Mad 613 (614)

4. ('95) 18 Mad 496 (497)
('07) 10 Oudh Cas 121 (125)

5. ('33) AIR 1933 Mad 417 (417) 56 Mad 653

6. ('16) AIR 1916 Lah 245 (247) 1916 Pun Re No 128 (FB)

7. [illegible]

declared to have abated, open to appeal[8] It has been held in the undermentioned case[9] that an order of rejection of a petition for substitution under this rule does not *ipso facto* cause the suit to abate. O. 22 R. 3 Note 26

A decree dismissing the suit will be appealable by a party thereto[10]

Where a suit automatically abates in the absence of an application under this rule within time, it has been held by the Lahore High Court[11] that an application thereafter for substitution must be deemed to be made under Rule 9 *infra*, and that an order on such application would be appealable under the provisions of Order 43

See also Note 21 to Rule 1, *ante*

Procedure in case of death of one of several defendants or of sole defendant.

R. 4. [S. 368.] *(1)* Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone,[5] or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf,[6] shall cause the legal representative of the deceased defendant to be made a party[8] and shall proceed with the suit. O. 22 R. 4

(2) Any person so made a party may make any defence[15] appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited[7] by law no application is made under sub-rule *(1)*, the suit shall abate as against the deceased defendant.[17]

[1877, S. 368; 1859, S. 104.]

Local Amendments

CALCUTTA

(1) At the end of sub rule (3) delete the period and *add* the words "except as hereinafter provided "

(2) *Insert* the following as sub rule (4)

"(4) The Court, whenever it sees fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or has failed to appear and contest the suit at the hearing, and judgment may in such case be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place "

MADRAS

(1) *Remove* the period at the end of sub rule (3) and *add* the following "except as hereinafter provided "

[*See also* ('95) 17 All 172 (174)]
8. ('95) 17 All 286 (288)
9. ('21) AIR 1921 Nag 23 (24) 17 Nag L R 45
10 ('95) 18 Mad 496 (498)
[*See also* ('20) AIR 1920 Lah 8 (9) 1 Lah 493]
11. ('24) AIR 1924 Lah 424 (424)

O. 22 R. 4
Notes 1–2

(2) *Insert* the following as new sub rule (4)

"(4) The Court, whenever it sees fit, may exempt the plaintiff from the necessity to substitute the legal representative of any such defendant who has been declared *ex parte* or who has failed to file his written statement or who, having filed it has failed to appear and contest at the hearing, and the judgment may in such case be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place"

Synopsis

1. Legislative changes. —

1 Under Section 368 of the old Code, the plaintiff had to make an application specifying the person whom he alleges to be the legal representative of the deceased defendant It was, however open to the person to object that he was not the legal representative The real legal representative could also make the application to have himself impleaded The present provision is more general in the matter of the application and lays down that "the Court shall, on an application made in that behalf, cause the *legal representative* of the deceased defendant to be made a party." See Note 16 *infra*

2 The words "as against the deceased defendant" in sub-rule (3) are new.

2. Scope and applicability of the Rule. — This rule deals with the death of a defendant in a pending suit It will be interesting to note the position of this rule in relation to Rule 2 on the one hand, and in relation to Rule 10 on the other *If a case* falls within Rule 2, this rule is excluded,[1] and if a case falls within this rule, Rule 10 will be excluded[2]

Order 22 Rule 4 — Note 2

1. (26) AIR 1926 Lah 607 (608) 7 Lah 399

2. (25) AIR 1925 All 431 (432) (AIR 1926 Lah 37, Overruled) 47 All 741

O. 22 R. 4
Notes 2-3

For the application of this rule the following conditions are necessary, *viz* —

(1) There must be a *suit* (or an appeal). Thus, the rule has been held to be inapplicable to an investigation into an application for permission to sue in *forma pauperis*,[3] and to proceedings by contributories under Section 214 of the Companies Act, 1882[4] But it has been held to apply to proceedings under Section 21A of the Punjab Alienation of Land Act[5]

(2) The death of the defendant must be *pending the suit* Thus, the rule will not apply if such death was either before the institution of the suit[6] or after decree in suit[7] In the former case, if the deceased was the sole defendant, the suit will have to be dismissed as being against law[8] If he was one of two or more defendants, his name will have to be removed from the record and the suit proceeded with against the other defendants, if need be, after an order under O. 1 R 10[9] The suit or appeal must be pending in a Court having *jurisdiction* to entertain it Otherwise, there can be no question of abatement of the suit or appeal[10]

(3) The right to sue should survive but not against the surviving defendants *alone* Thus, if the right to sue does not survive at all the rule will not apply[11] And if it survives against the surviving defendants *alone*, Rule 2, and not this rule, will apply[12]

3. Rule applies to appeals. — This rule applies also to the case of the death of a respondent in a pending appeal[1] The words "right to sue" in this rule should be taken to mean "*right to appeal*" in cases where a party dies after decree in the suit, but pending appeal[2] But where the appeal has been filed in a Court not having *jurisdiction* to entertain it, there can be no abatement[3]

Under the old Code it was held by the Allahabad High Court in a number of cases that the provisions of Section 368 were limited to the case of the death of a respondent, who was a defendant in the lower Court,[4] and held that a defendant-appellant need not apply under the Section for impleading the legal representatives of

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('27) AIR 1927 All 272 (272) 49 All 310 (Right to sue includes the right to continue the suit)
('92) 16 Bom 27 (28)
3 ('83) 7 Bom 373 (376)
4. ('96) 18 All 156 (158)
5. ('35) AIR 1935 Lah 443 (444)
6. ('08) 31 Mad 86 (88)
('37) AIR 1937 Lah 794 (795) (Suit originally instituted in wrong Court and on return of plaint re presented in proper Court—Death of some of the defendants in the interval — No question of abatement arises)
7. ('05) 28 Mad 361 (362) (Where a defendant dies after an *ex parte* decree against him, his legal representatives cannot apply to set it aside unless plaintiff has clearly brought them on record as legal representatives under S 234 (S 50))
8. ('14) AIR 1914 Cal 895 (896)
('19) AIR 1919 Cal 257 (258)
('16) AIR 1916 Mad 440 (441)
('28) 1928 Mad W N 240 (241)
('20) AIR 1920 Sind 82 (83)
[*See* ('93) 16 Mad 319 (320)]
9. ('26) AIR 1926 Lah 153 (153, 154)
('28) AIR 1928 Lah 359 (360) 9 Lah 526
10. ('35) AIR 1935 All 92 (93)
11 ('21) AIR 1921 Lah 390 (391)
('35) AIR 1935 All 106 (107)
('33) AIR 1933 Cal 61 (63) 36 Cal W N 1007 (1009, 1010)
12. ('06) 4 Cal L Jour 568 (570 571)

estate — Suit against such father and son — Father dying — Right to sue survives against son)

Note 3

1. ('80) 4 Bom 654 (655)
('98) 22 Bom 718 (721)
('04) 31 Cal 487 (494) 31 Ind App 71 (PC)
('80) 1880 Pun Re No 30 p 67
2. ('34) AIR 1934 All 1029 (1030)
3 ('35) AIR 1935 All 92 (93)
4. ('87) 9 All 118 (119)
('85) 7 All 734 (738)

O 22 R. 4 Notes 3–4b

a deceased plaintiff respondent[5] It is now, however well settled that the rule applies to the case of the death of a respondent whether he was a plaintiff or a defendant in the original suit[6] The question whether the abatement is partial or total will in the case of a suit depend on the nature of the right claimed but in an appeal it will have to be decided with reference to the nature of the *decree appealed* against[7] As to this see Notes 22 and 23, *infra*

The provisions of sub rule (4) framed by the High Court of Madras are applicable to appeals also Thus where on the death of one of the respondents the appellant fails to bring on record his legal representative the Appellate Court has jurisdiction to exempt his being brought on record and the appellate decree has the same force and effect as if it had been passed before he died[8]

3a Applicability of Rule to revision proceedings — See Order 22 General Note 2

4 Rule does not apply to execution proceedings. — This rule does not apply to execution proceedings[1] Rule 12 contains a specific declaration to this effect For fuller discussion see Notes to O 22 R 12.

4a Suit against municipality — A certain Municipality was superseded by the Government and a Special Officer was appointed A suit was brought against the Municipality represented by the Special Officer and was decreed The defendant appealed against the decree making the Special Officer as representing the Municipality respondent to the appeal The administration of the Municipality was then restored to the Commissioners It was held by the Patna High Court in the undermentioned case[1] that it was not necessary to bring the Commissioners on the record as *the legal* representatives of the Special Officer as the appeal was against the Municipality which was a Corporation and the Commissioners were not the representatives of the Special Officer The decision proceeds on the ground that the Municipality continues *to be* a Corporation notwithstanding the appointment of a Special Officer But this decision is inconsistent with the decision in the undermentioned case of the Lahore High Court[2] In that case a suit was filed against a Municipality and then the Municipality was superseded and an Administrator was appointed It was held that a decree passed against the Municipality in such a suit without bringing on record the Administrator or other person as the legal representative of the Municipality was a nullity

4b Suit against devasthanam — See the undermentioned case[1]

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5 (85) 7 All 693 (697 698 700 01) (Per Mahmood J *Contra*)

6 (1900) 22 All 430 (433)
(05) 28 Mad 498 (499)

7 (30) AIR 1930 Lah 651 (653)
[*See also* (33) 141 Ind Cas 239 (240) (Pat)]

8 (35) AIR 1935 Mad 236 (238) 58 Mad 752 (This power is discretionary and will rarely be exercised in the case of a single respondent)

Note 4

1 (31) AIR 1931 Bom 495 (42) (The proper procedure in execution is regulated by O 21 R 16 in case of a deceased decree-holder and O 21 R 22 and S 50 in case of deceased judgment-debtor)
(23) AIR 1923 Lah 560 (563) (Appeal from order in execution proceedings—O 22 R 11 not applicable)
(11) 10 Ind Cas (405) (406) (Lah)
(39) AIR 1939 Sind 234 (235) I L R (1939) Kar 22

Note 4a

1 (3) AIR 1937 Pat 583 (58)

2 (33) AIR 1933 Lah 63 (84)

Note 4b

1 (37) 1937 Mad W N 465 (4) (Suit against devasthanam—Defendant represented by trustee —Trustee ceasing to be such subsequently — Omission to bring on record another trustee does not cause abatement)

5. Where right to sue survives against persons other than the surviving defendant or defendants. — The rule does *not apply if the right to sue survives* against the surviving defendants *alone* In other words, it is necessary that the right to sue should either survive to *other* persons alone or to other persons along with the surviving defendants For some illustrative cases, see the cases cited below [1] See also Notes to Rule 2 and Note 5 to Rule 3, *ante* **O. 22 R. 4 Notes 5-7**

6. "On an application made in that behalf." — Under the old Code it was for the plaintiff to bring the proper legal representatives of a deceased defendant on record and he was to choose the representative at his own risk [1] Even the last paragraph in Section 368 was only subsequently added to the Section Before that addition, it was held that the Court could not, except on the application of the plaintiff or the appellant, place on record the representative of a deceased sole defendant or respondent and that the representative of the deceased defendant or respondent could not apply under that Section [2] Under the present rule it is open to any person interested to apply for the addition of the proper representative [3] But even under the present rule, in the absence of a proper application by anybody else the duty of applying for bringing in the proper legal representatives on record ultimately rests on the plaintiff[4] as the consequence of not applying in time will be the abatement of the suit Such an application is not obviated by the mere fact that a legal representative has been impleaded in another independent proceeding [5]

Even under the old Code where the Court was to simply enter the name of the person nominated by the plaintiff it was held that it had in some cases power to add other persons jointly with those nominated by the plaintiff [6] Under the present Code the Court has power to determine who is the legal representative

7. Limitation to implead legal representative. — Under the Limitation Act of 1877 there was a sharp conflict of opinion on the question as to the period within which an application to implead the legal representatives of a deceased respondent in an appeal had to be filed [1] Under the present Code such applications

Note 5

1 (1900) 22 All 430 (433) (Suit for joint possession decreed — Appeal—One respondent died—Legal representative not brought on record — *Held* right to appeal does not survive against surviving respondents alone)
(04) 31 Cal 487 (494) 31 Ind App 71 (PC) (Suit for taking accounts and winding up the affair of a partnership —Right to sue does not survive against surviving partners alone — If legal representative is not added, suit cannot proceed

made nearly two years later — *Held* that the appeal abated inasmuch as the right to sue did not survive only against the two defendants on the record)

Note 6

1 (13) 21 Ind Cas 397 (400) (Cal)
(90) 1890 Pun Re No 5 p 12
2 (85) 9 Bom 56 (58)

[See however (25) AIR 1925 Mad 777 (777) But order that is made bringing the legal representative of the deceased respondent on the record in the memorandum *of objections* will enure for the whole of the proceedings including the appeal)
(19) AIR 1919 Mad 1026 (1027) (Appeal and memorandum of objections are not independent proceedings)]
6 (85) 8 Mad 300 (303)

Note 7

1 *In the following cases Article 178 was held applicable*

whether in a suit or in an appeal, to implead legal representatives are governed by Article 177 of the Limitation Act (IX of 1908)[2]

Has the Court power to excuse delay and accept an application made after the period of limitation? It has been held that Section 5 of the Limitation Act does not apply to an application under this rule[3] But an abatement can be set aside for *sufficient cause under* Rule 9, *infra*, so that in such cases the strict procedure would be to declare the suit or appeal to have abated and to allow the plaintiff or appellant as the case may be, to apply under Rule 9[4] As to what is sufficient cause, See Rule 9

8. "Shall cause the legal representative of the deceased defendant to be made a party." — On the death of a defendant in a suit the Court should bring the legal representative on the record before proceeding further with it The suit may be described to be in a state of suspension till then, and no orders excepting formal, or processual can be passed[1] If the suit is disposed of without impleading the legal representatives of a deceased party, retrial will be ordered[2]

Where the Court makes an order for the substitution of the names of the heirs of a deceased defendant or respondent, it is no part of the duty of the plaintiff or appellant to see that the record of the Court is corrected in terms of the order This is a ministerial function which the Court s establishment is charged to perform[3]

If it is necessary in any case that some person who is not an heir *ex concessis* of a deceased defendant should be substituted instead, it is not enough that the name of the person is substituted or added in the cause title But it is necessary that the plaint should also be amended making the necessary allegations on which the liability of the added person is based[4]

9. Two or more legal representatives. — Supposing that a defendant dies

(88) 10 All 260 (262, 263)
(88) 10 All 264 (267, 269) (FB)
(88) 10 All 270 (271) (FB)
(86) 9 Mad 1 (8, 4, 5)(FB) (Karnan, J , dissenting)
('06) 29 Mad 529 (530) (28 Mad 498 Overruled) [*See* ('10) 5 Ind Cas 420 (421) 34 Mad 292
(86) 10 Bom 663 (665) (Art 171 B, Limitation Act (1877) not applied)
('85) 11 Cal 694 (695, 696) (Art 171B applied)]
In the following cases Article 175C was held applicable
(89) 11 All 408 (413 415)
(07) 29 All 535 (536)
(07) 34 Cal 1020 (1023)

2 ('24) AIR 1924 Lah 316 (318) (But an application for bringing legal representative of a deceased person who was not a defendant or respondent on date of his death is governed by Art 181 and not by Art 177)
(33) AIR 1933 Lah 356 (358) 14 Lah 543 (If no application is made in time suit abates automatically)

3. ('14) AIR 1914 All 94 (95) 36 All 235
(22) AIR 1922 Lah 131 (131).

4 (29) AIR 1929 Lah 129 (130) 10 Lah 816 (Application specifically under Rr 4 and 9—Certain circumstances adduced as sufficient cause to excuse delay—Prayer that application be admitted and delay excused under S 5 of the Limitation Act—*Held*, application was in substance to set aside abatement)
[*See* (33) AIR 1933 Sind 36 (37) ?6 Sind L R 81]

Note 8

1. (31) AIR 1931 Lah 73 (74) (The state of suspension by lapse of time under Art 177 merges [illegible]

[illegible] 25 Sind W R 108 (109)
(24) AIR 1924 Lah 33 (34) (It is illegal for the Court to continue to hear a suit against a dead [illegible]

[illegible]
not insist on having a re hearing of the [illegible] because it turns out that at the time of hearing the respondent was dead when the representatives of the deceased themselves do not want it)
[*See also* (27) AIR 1927 Lah 200 (215) 8 Lah 54 (Refusal to bring in legal representative is a denial of natural justice which will make foreign judgment unenforceable.)]

3. (37) AIR 1937 Bom 401 (406) I L R (19[illegible]) Bom 602 (If it is not performed or neglected, the fault will not lie with the appellant)

4. (33) AIR 1933 Cal 314 (315)

leaving two or more legal representatives, the question arises whether all of them should be impleaded and what is the effect of a failure to do so On this question the Allahabad,[1] Bombay,[2] Madras,[3] Patna [4] Lahore[5] and Peshawar[6] Courts have held that even if one of them alone is impleaded, he sufficiently represents the estate and the suit does not abate Further, according to the Lahore High Court,[7] a *bona fide* application to bring in all those representatives who can be ascertained by the exercise of due care and industry will save abatement According to the Rangoon High Court[8] if the person impleaded as a matter of fact represented the estate and no objection as to the want of proper representation is taken at the time, there will be no abatement and the decree will bind the estate According to the Nagpur view the plaintiff can get relief against the legal representative impleaded, though it will not bind the other representatives [9] The Sind Court[10] has held that all the legal representatives should be brought on record in time, otherwise the suit will abate But even in that Court an objection that all the representatives have not been brought on record should be taken at the proper time, otherwise the defendants will be estopped from taking it at any subsequent stage [11] In any event if some of the legal representatives are specifically dispensed with the suit cannot proceed as against them and if the suit cannot proceed in their absence, the whole suit will abate [12]

It has been held by the Madras High Court[13] that where all the legal representatives are brought on the record but, subsequently, one of them dies and *his* legal representatives are not brought on the record, the proceedings are not vitiated

See also Note 11 to Rule 3 *ante*

10 Wrong person as legal representative. — An application to implead somebody other than the proper legal representative of a deceased defendant is not valid and a decree obtained against such person will *ordinarily* be not binding on the true representative or on the estate of the deceased defendant [1] But such a decree will be binding in the following circumstances, *viz* —

(*i*) where the plaintiff acted *bona fide*

Note 9

1 ('28) AIR 1928 All 532 (533) 50 All 857
2 ('24) AIR 1924 Bom 420 (421)
('35) AIR 1935 Bom 287 (290)
3 ('02) 26 Mad 230 (234)

time there is no abatement and an effective *decree can be passed against the estate of the* deceased especially where the others are later on also added as parties though after the prescribed time)
[*See* ('12) 13 Ind Cas 313 (313) (Mad) (Where some of the legal representatives of a deceased respondent are brought on the record in time there is no bar to bringing the other representatives on the record subsequently)]
[*See also* ('36) AIR 1936 Mad 336 (337) 59 Mad

8 ('23) AIR 1923 Rang 114 (116) 4 Upp Bur Rul 150
9 ('23) AIR 1923 Nag 101 (102) 18 Nag L R 21
10 ('25) AIR 1925 Sind 2 (3 4)
('26) AIR 1926 Sind 20 (21)
1

deceased defendant *held* barred by failure to take the objection earlier)]
12 ('17) AIR 1917 Cal 98 (98)
13 ('36) AIR 1936 Mad 336 (338) 59 Mad 660 (In this case there was the additional factor that the plaintiff did not know about the death of one of the legal representatives)

Note 10

1. ('20) AIR 1920 All 323 (328) 42 All 497 (504)

O. 22 R. 4
Notes 10-12

(ii) where the decree obtained is free from fraud or collusion,
(iii) where the person wrongly impleaded was so impleaded in a representative capacity and the decree was passed against him as representing the estate of the deceased,
(iv) where the plaintiff was not aware of any fact which displaced the apparent title of the person, and
(v) where the real legal representative had not intervened during the pendency of the suit [3]

Thus, a decree obtained after impleading a person having a *prima facie* claim to be considered the legal representative of a deceased defendant[3] or after impleading a person who, but for some other facts of which the plaintiff is not aware, would be such legal representative,[4] will be binding on the estate In such cases, however, conditions (iv) and (v) must be satisfied, that is, the true representatives must not have intervened or applied to be made parties pending the suit[5] and the plaintiff must not, during such pendency, have been otherwise made aware that the person whom he has impleaded is not the true legal representative Where the plaintiff was in a position to know who the real heirs were on making inquiries which he failed to make, it has been held that his application to substitute a wrong person as the heir of the deceased cannot save the suit from abatement [6] Where a wrong person has been impleaded as the legal representative the Court can, on being apprised of the fact of the existence of the legal representative, strike out the former's name and substitute the latter's name on the record [7]

See also Section 11 Note 63b, Section 50 Note 14, Section 52 Notes 4 to 6 and Order 22 Rule 3 Note 12

11. Joint Hindu family and legal representative. — When the deceased defendant is a member of a joint Hindu family it must be shown, before the other members can be impleaded as legal representatives, that *prima facie* the deceased had an estate which survived to the other members [1] See also the undermentioned decision [2]

12. Legal r

It may be taken as

3 L R 89
does not

33 Mad
6 (Principle applied to execution proceedings)]
[See however (33) AIR 1933 Mad 43 (48) (Decree against wrong legal representative not in possession of estate is bad though not fraud)]
3 (91) 14 Mad 454 (457)
(25) AIR 1925 Oudh 330 (334) 28 Oudh Cas 177.
[*See also* (32) AIR 1932 Lah 426 (427) 14 Lah 78]

party but there is nothing to show ...

7. (83) 12 Cal L Rep 45 (46) (Court refused substitute *suo motu*)
(15) AIR 1915 Lah 144 (144)

Note 11

1. (30) AIR 1930 Mad 575 (576)
2. (39) AIR 1939 All 636 (636) (*Defendant in suit dying during pendency of suit leaving father, brothers widow and daughter — His father brought on record in his place and not his widow —Representation is defective — Even if it is assumed that the defendant was sued as manager*

defendant are already on the record in the suit, though in another capacity, no application is necessary under this rule to implead them as legal representatives, and the suit will not abate by reason of the absence of such an application [1] It is enough if the plaintiff, at some time or other during the hearing of the suit, states the fact and gets it noted on the record [2] Where, however, only *some* of the legal representatives are on the record but not all, it has been held by the Patna and Lahore High Courts that an application is necessary under this rule and that in its absence the suit will abate [3] In the undermentioned case[4] it was held by the Bombay High Court that even where the only heir of a deceased defendant is already on the record in another capacity, an application under this rule is necessary According to the High Court of Madras, where the legal representative already on the record sufficiently represents the estate, the suit will not abate by reason of the absence of an application under this rule and the decree passed in the suit will bind the estate [5]

See also Note 11 to Rule 3

13. Succession Act and legal representative. — Where the deceased is governed by the Succession Act, his legal representatives are his executors or administrators and not his heirs [1] Even though no representation is taken out for his estate, the plaintiff cannot on that ground add his heirs as legal representatives [2] The only course open to the plaintiff will be to move the Court to have an administrator appointed [3] On the death of an executor, the estate of the testator devolves on the residuary legatee and hence a suit or appeal filed against the executor will abate if upon his death an application for bringing on record the residuary legatee is not made within the period of limitation [4] See also Note 10 to Rule 3

14. Pro forma defendant or respondent — Where the deceased defendant or respondent *had no interest* in the litigation the rule does not apply and the failure to bring his legal representatives on the record within time will not cause the suit or appeal to abate [1] Thus there will be no abatement for failure to bring in the legal

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of joint family if father is not the manager his impleadment is not sufficient)

Note 12

Letter written within time to the Deputy Registrar mentioning his death and informing the Court that the legal representatives were already on the record may be treated as sufficiently complying with the necessity for

(21) AIR 1931 Oudh 209 (213) 24 Oudh Cas

3 (25) AIR 1925 Pat 123 (124) 3 Pat 853
(33) AIR 1933 Lah 356 (359) 14 Lah 543
(28) AIR 1928 Pat 250 (252 253) 7 Pat 285
4 (38) AIR 1938 Bom 6 (8) I L R (1938) Bom 64
5 (30) AIR 1930 Mad 69 (71 72)

Note 13

and son if father dies appeal does not abate as

Note 14

1 (23) AIR 1923 Cal 382 (384)

representative of a deceased defendant or respondent, who was only a *pro forma* defendant or respondent[2] or who was not a proper or necessary party to the suit or appeal[3]

15. What pleas may be taken by a legal representative. — A legal representative must continue the litigation on the *cause of action sued upon* and cannot set up a new or individual right[1] He cannot set up a plea open to him personally[2] But he can take up any plea which may be appropriate to his character as legal representative[3] Thus, he can rely on any one of the alternative defences of the deceased[4] even though it may not have been raised by him specifically[5] But he cannot take up a new and inconsistent plea[6] or a plea contrary to the one taken up by the deceased[7] See also Note 16 to Rule 3 and Note 7 to Section 50

16 Effect of decree against legal representative of deceased defendant — A decree obtained against the legal representative of a deceased defendant is binding on the estate If the person against whom the decree has been obtained is a limited owner, such as a Hindu widow, the question whether the decree is or is not binding on the reversioner will depend upon the question whether the suit was one which affects the *whole inheritance* or only on a cause of action *personal* to the widow[1] In the latter case the decree is not binding on the reversioners[2] Whereas in the former case *i e* when the decree has been fairly and properly obtained against the widow in her representative capacity it
whom the decree has been ob
has been held by the Bombay
rightly entitled to the estate even though the plaintiff acted under a *bona fide* mistake and was not aware of the existence of the true legal representative[4] However this may

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(33) AIR 1933 Lah 406 (407)
(26) AIR 1926 Cal 247 (248)
(26) AIR 1926 Cal 512 (513)
(14) AIR 1914 Mad 708 (709) 38 Mad 1064 (The test to decide whether a right survives is whether the result of the adjudication will affect the deceased party)
(26) AIR 1926 Lah 189 (189) (The only point in dispute in the case did not affect the deceased defendant)
(35) AIR 1938 Cal 541 (543) (No abatement as a whole)
(35) AIR 1935 Cal 202 (203)
[*See* (38) AIR 1939 Cal 639 (640) (Where the legal representative of a *pro forma* respondent who is dead is not brought on record the appeal does not abate in toto)

3 (33) AIR 1933 Lah 406 (407)
(26) AIR 1926 Lah 444 (444) (Appeal *held* to ... de-

[*See* (32) AIR 1932 Lah 641 (642) 13 Lah 483]

Note 15

1 (27) AIR 1927 Nag 162 (163)
(35) AIR 1935 Mad 52 (54)
2 (25) AIR 1925 Mad 59 (59)
(97) 19 All 480 (482)
(99) 21 All 277 (279)
(99) 21 All 356 (358)
[*See also* (18) AIR 1918 Cal 151 (152) (But after a widow s death the *reversioner* was clothed with the full rights of a proprietor as the heir of a last male owner and could reopen the matters settled against the widow)]
3 (30) AIR 1930 All 348 (349) (Legal representative a manager of mutt—Preliminary decree on a mortgage by deceased defendant manager allowed to be challenged)
4 (13) 19 Ind Cas 401 (403) (Bom)
5 (16) AIR 1916 Mad 1139 (1139)
6 (21) AIR 1921 Cal 343 (344)
7 (24) AIR 1924 Mad 245 (246)

Note 16

1 (81) 7 Cal 357 (366)
2 (99) 26 Cal 285 (299 300)
3 (98) 20 All 341 (343 344)
(81) 6 Cal 479 (482)
(85) 11 Cal 45 (51 52)
(86) 13 Cal 283 (291)
(96) 23 Cal 636 (638)
(04) 8 Cal W N 843 (851)
(09) 1 Ind Cas 62 (64) (Cal)
4 (27) AIR 1927 Bom 63 (66, 67) 50 Bom 60

be, where the legal representative stands by and allows a stranger to enter into possession of the property, a decree obtained *bona fide* against the latter will be binding on the former.[5] Moreover, if the Court has *decided* that a person is the proper *legal representative* and passes a decree against him, it is binding on the estate even though it may subsequently turn out that he is not the proper legal representative[6] See also Notes 63 and 63b to Section 11, Note 14 to Section 50 and Notes 5 and 6 to Section 52

17. "The suit shall abate as against the deceased defendant." — If a sole defendant dies and no application is made within the period of limitation, for bringing on record his legal representatives, the suit abates[1] But if one of several defendants or respondents dies and no application is made within the period of limitation for bringing on record his legal representatives, the suit or appeal will, in the first instance, abate not in its entirety but only so far as the deceased defendant or respondent is concerned[2] But such abatement may under certain circumstances result in the whole suit or appeal failing[3] On this subject, see Note 22 below Under the old Code a specific order of abatement was necessary and it was held that such an order ought not to be passed without notice to the plaintiff[4] Under the present Code, however, the abatement takes place automatically and no separate order therefor is necessary[5]

Where a suit abates it is, so to speak "dead or at an end'[6] and a decree passed in the face of such abatement is a nullity so far as the legal representative is concerned[7]

18. Death after preliminary and before final decree. — See Note 19 to Rule 3

5. ('78) 3 Cal L Rep 157 (158)
6 ('01) 25 Bom 337 (347) 27 Ind App 216 (PC)

Note 17

1. ('22) AIR 1922 Cal 408 (409) 49 Cal 524
('24) AIR 1924 Lah 316 (317, 318) (And no failure by the persons concerned to object to action taken on an application presented after expiry of such time would alter the fact of abatement)
('36) AIR 1936 Pat 110 (110) (One of the defen

is dead, the application abates under O 22, R 4 (3))

2 ('98) 22 Bom 718 (721)
('33) AIR 1933 Lah 682 (684)
('33) AIR 1933 Lah 805 (805, 806) (Suit or appeal

3 ('02) 26 Bom 203 (206)

('28) AIR 1928 Lah 746 (747)
('37) AIR 1937 Bom 401 (406) *ILR (1937) Bom 602*
('37) AIR 1937 Nag 88 (89) (Suit abates automatically if no application is filed within limitation —Application to set aside abatement within sixty days of abatement is proper and not premature even if made before order of Court that suit has abated)
('34) AIR 1934 Lah 442 (443) 15 Lah 879
6 ('28) AIR 1928 Cal 234 (235) (Attachment before judgment — Death of defendant before decree — Heirs not impleaded — Abatement — Application to implead heirs and restore suit ordered—Effect—Attachment not revived)

have been passed *qua his share in the land in*

O. 22 R. 4
Note 19

19. Decree against a dead person. — See also Note 8 to Section 52 A decree passed *against a dead person* without impleading his legal representatives is a nullity [1] This does not mean that a party who was heard and against whom a decree has been passed on the merits can take advantage of the death of another party and claim a re hearing on the merits [2] In an Allahabad case[3] the plaintiff obtained an *ex parte* decree against a defendant who had been dead before the decree, but of whose death plaintiff had no knowledge It was held that on the decree being held inexecutable the plaintiff might apply to have the case re opened after impleading the legal representatives

Where a suit is filed against several defendants one of whom is dead, it cannot be said in such a case that there is no valid plaint and the Court has power, under O 1 R 10 *ante*, to implead, if necessary, the legal representatives of the deceased person [4] Where some of several defendants had been dead when the decree was passed, the others may object to the execution on the ground that the decree is a nullity [5]

A decree passed by the Privy Council is an order of the Sovereign, and even if passed against a deceased respondent without impleading his legal representatives, it is not a nullity [6]

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dispute—Therefore he or his heir need not have been impleaded as respondents to the second appeal)
('22) AIR 1922 Lah 78 (78)

Note 19

1 ('39) 138 Ind Cas 444 (445) (Lah) (Appeal [illegible] of [illegible] ent [illegible]

(09) 4 Ind Cas 137 (138) (Bom) (Death taking place after close of evidence but before arguments)
(83) 1883 Bom P J 5
('11) 11 Ind Cas 782 (782) (Low Bur)
('17) AIR 1917 Low Bur 132 (133)
(78) 3 Cal L Rep 192 (193)

(12) 15 Ind Cas 832 (833) 5 Sind L R 260
(68) 10 Suth W R 455 (456)
(70) 14 Suth W R 337 (338)
(76) 25 Suth W R 103 (103)
(23) AIR 1923 All 141 (144) 45 All 198 (But a decree passed against *A* as the legal representa [illegible]

(39) 5 Cutt L Tim 15 (16) (But the question whether the whole decree is a nullity depends on the question whether the failure on the part of [illegible]

(Death of respondent — [illegible] brought on record — Appeal automatically abates—Appellant must apply under R 9 — If owing to ignorance of death appeal is heard and accepted application by legal representatives for review becomes necessary—Accepting of such application has not the effect of *setting aside* [illegible]

[illegible] is a nullity and the [illegible]
[**See however** (23) AIR 1923 Cal 676 [illegible] (Order of remand passed in ignorance of death of one of the respondents — *Held* order not a nullity)]
[illegible] ('28) AIR 1928 Lah 784 (786) (Decree [illegible]

[illegible] of [illegible] 01, [illegible]

5 (24) AIR 1924 [illegible] Followed)
6. (32) AIR 1932 Pat 261 (262, 263) 11 Pat 445,

See also the undermentioned decision [7] See also Note 19 to Rule 3 *a ite*

20 Order 41 Rule 20 and abatement — Rule 20 of Order 41 does not override the provisions of Order 22 and will not prevent an abatement [1]

21 Order 1 Rule 8 and abatement — See Note 24 to Order 1 Rule 8

22 Where suit or appeal abates against deceased defendant or respondent only — As under Rule 3 an abatement under this rule will in the first instance be only so far as the deceased defendant or respondent is concerned [1] If the deceased was the sole defendant or respondent the abatement puts an end to the suit or appeal But if he is one of many defendants or respondents the effect of the partial abatement on the whole suit or appeal will depend upon the nature of the suit or appeal If on account of the partial abatement it becomes for any reason impossible to proceed with the suit or appeal to its final conclusion the entire suit or appeal will fail [2] But if the suit or appeal can proceed to a final adjudication in the absence of the legal representatives of the deceased defendant or respondent the partial abatement will not affect the rest of the suit or appeal [3] Such a final adjudication is possible in cases where the interest of the deceased defendant or respondent can be separated from those of the others In such cases a decree can be given against the latter without affecting the rights of the legal representatives of the former [4] The abatement therefore will not result in a total failure of the suit or appeal Thus in the following cases

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7 (23) AIR 1923 All 141 (144) 45 All 198 (In this case it was held that a final decree wh ch was against one of defendants abates t does not abate as a whole)
(06) 33 Cal 580 (582) (L ab lity jo nt and several—Whole suit does not abate)
(23) AIR 1923 Lah 252 (252)
(17) AIR 1917 Lah 450 (451)

Note 20

1 (26) AIR 1926 Cal 335 (336)
(31) AIR 1931 Nag 184 (186) 27 Nag L R 220

Note 22

1 (12) 14 Ind Cas 535 (536) (Lah)
(15) 26 Ind Cas 523 (524) (Oudh)
(20) AIR 1920 Cal 264 (266)

suit—Person in possession of property being only proper but not necessary party impleaded—Death

4 (25) AIR 1925 All 108 (114) 47 All 100
(33) AIR 1933 Lah 556 (557) (Two respondents in appeal being co-owners each ent tled to half share in property — Death of one of them and failure of appellant to mplead legal representat ve w th n t me Appeal does not abate wholly)
(33) AIR 1933 Lah 1001 (1001 1002) (Appeal by mortgagee — Death of one of puisne mortgagees respondents and legal representat ve not brought on record—Appeal does not abate n its ent rety)

O. 22 R. 4
Notes 22-23

abatement as regards the deceased was held not to affect the rest of the suit or appeal—

(1) Where the suit is for the recovery of a specific sum of money from the deceased defendant and for a specific sum from each of the other defendants [5]

(2) Where the suit relates to distinct plots of land in the hands of the several defendants including the deceased defendant,[6] or where it relates to specified shares[7] or to shares which are ascertained or ascertainable [8]

(3) Where the liability sought to be enforced against the defendants is *joint and several* [9] Thus, the liability of co promisors is joint and several[10] as also the liability of a surety [11] In the case of suits to enforce such liability the suit does not abate *in toto* on the death of one of the promisors or the surety as the case may be The liability of joint wrongdoers or tort feasors is joint and several and the suit or appeal will abate only so far as the deceased defendant is concerned [12] On the same principle, a suit for ejectment of trespassers will abate only so far as the deceased defendant is concerned and may be proceeded with against the rest [13] The same principle applies to suits for rent against fixed rate tenants[14] or joint holders of a holding,[15] as their liability is likewise joint and several

In short, ther
or only in part is to
and prosecuted with
are maintainable against the defendants severally, then the abatement will be only in part in spite of the other defendants having been impleaded in the same suit [17]

(24) AIR 1924 Lah 93 (94)
(25) AIR 1925 Lah 381 (384 385) 6 Lah 233
(30) AIR 1930 Lah 709 (710) (Death of one tort feasor — Suit does not abate)
(25) AIR 1925 Nag 299 (301) 21 Nag L R 38
(25) AIR 1925 Nag 239 (240) (One of the decree-holders respondents dying—Presumption is that both decree-holders were equally interested to recover the amount—Extent of interest thus being

(39) AIR 1939 All 626 (636)
(35) AIR 1935 Lah 853 (854) 16 Lah 747

(26) AIR 1926 Lah 264 (266) 7 Lah 376
(30) AIR 1930 Lah 33 (34)
(31) AIR 1931 Lah 466 (467) 12 Lah 318
(36) AIR 1936 Pat 548 (550) 15 Pat 326
(35) AIR 1935 Lah 322 (324)

8. ('27) AIR 1927 Lah 783 (784)
('28) AIR 1928 Lah 572 (575 576) 10 Lah 7 (FB)
('30) AIR 1930 Lah 126 (127)
9. (06) 33 Cal 580 (582)
10. (22) AIR 1922 Lah 182 (183)
('25) AIR 1925 Pat 434 (434, 435) 4 Pat 187
11. ('03) 25 All 206 (208)
12 ('24) AIR 1924 Lah 348 (349) 5 Lah 54
('34) AIR 1934 Lah 941 (942) 155 Ind Cas 669

14 ('12) 17 Ind Cas 89 (89, 90) 34 All 601

record — As against the other decree can be executed as a money decree but not as a rent decree)]
16. ('24) AIR 1924 Nag 123 (123)
(33) AIR 1933 Sind 334 (335)
17. (27) AIR 1927 Lah 851 (852)

to proceed with the suit or appeal as against the rest, the suit or appeal will fail *in toto*.[1] Such impossibility may arise from the suit or appeal becoming imperfectly constituted for want of necessary or essential parties,[2] or from the undesirable possibility of having two inconsistent or contradictory decrees in one and the same suit,[3] or from the futility of proceeding further in a matter in which the decree, if given, cannot be effectually executed by reason of the outstanding right of the legal representative of the deceased.[4]

Note 23

1. ('31) AIR 1931 Nag 184 (186) 27 Nag L R 220
('26) AIR 1926 Cal 893 (894, 895) 53 Cal 752
(1900) 22 All 430 (433)
('04) 31 Cal 487 (494) 31 Ind App 71 (P C)

[illegible]

(Appeal from preliminary decree — Respondent who is necessary party dying pending appeal—Appeal abates in its entirety.)
('35) AIR 1935 Oudh 329 (330, 331) 11 Luck 5

[illegible]

brought on record—Appeal abates as a whole.)
('38) AIR 1938 Bom 6 (9) I L R (1938) Bom 64 (Suit by some partners of a firm for dissolution and for accounts—Nature of suit is such that if one defendant dies and his legal representative is not brought on the record suit abates as a whole.)
('39) *AIR 1939 All 698 (699)*
2. ('28) AIR 1928 Lah 572 (575, 576, 582) 10 Lah 7 (F B)
('34) 147 Ind Cas 1187 (1188) (Lah) (Death of co-sharer whose representative not brought on record

('18) AIR 1918 Cal 286 (287)
('20) AIR 1920 Cal 264 (267)
('22) AIR 1922 Lah 101 (102)
('26) AIR 1926 Lah 216 (216, 217)
('26) AIR 1926 Lah 332 (333)
('26) AIR 1926 Lah 474 (476)
('11) 9 Ind Cas 940 (940) (Mad)
('12) 16 Ind Cas 688 (688) (Mad)
('26) AIR 1926 Mad 379 (380)
('32) AIR 1932 Mad 212 (213)
('31) AIR 1931 Pat 17 (18) 9 Pat 693
('16) AIR 1916 Lah 366 (368)
('05) 3 Low Bur Rul 168 (169)
('23) AIR 1923 Rang 258 (259, 260) 1 Rang 189
('14) AIR 1914 Lah 123 (125) 1915 Pun Re No 41
('35) AIR 1935 Pat 241 (242) (Appeal—Death of one of respondents not making representation of *the interests involved, incomplete — No abate*ment—But if representation is incomplete appeal abates as a whole.)
[*See also* ('25) AIR 1925 Mad 237 (238).]
3. ('25) AIR 1925 All 141 (141)
('26) AIR 1926 All 128 (129, 130) 48 All 81
('26) 96 Ind Cas 932 (932) (Lah)
('27) AIR 1927 All 331 (332)
('27) AIR 1927 All 776 (777)
('20) AIR 1920 Cal 264 (267)

[illegible]

dants pending appeal and his legal representative not brought on record—Appeal abates as a whole.)
('35) AIR 1935 Pat 430 (430) (Appeal—Death of one of several respondents — Right capable of being exercised only collectively — Legal representative not impleaded—Appeal abates as a whole.)
('36) AIR 1936 Oudh 209 (211) (Where a joint decree has been given in favour of the respondents the entire appeal abates if the appellant fails to bring the legal representatives of a deceased respondent on the record, as otherwise the decision may result in two conflicting deci

[illegible]

record — Appeal abates as a whole as such heirs are necessary parties—But if receiver is on record appeal does not abate.)
[*See also* ('26) AIR 1926 Cal 667 (668).]
4. ('29) AIR 1929 P C 58 (60) 56 Ind App 80

O. 22 R 4
Note 23

On the above principles the non impleading of the legal representatives of a deceased defendant will result in total failure of the suit or appeal in the following cases

(1) Where the interests of the defendants in the suit are *joint and indivisible* so that the interest of the deceased defendant cannot be separated from those of the rest,[5] such as the interests in a pre emption suit[6] but not the rights arising from a sale in distinct shares [7]

(2) Where a decree appealed from is joint and indivisible [8] But a decree cannot be said to be joint and indivisible merely because it is on one sheet of paper [9] The interest awarded in the decree must in *substance* be joint and indivisible [10]

In this connexion the following distinction between a suit and an appeal should be noted In a suit the nature of the abatement will depend upon the relief involved [11] If the plaintiff sets up a joint and indivisible right and the defendants set up a separate or separable right, the point should be decided before deciding the nature of the

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[*See also* (25) AIR 1925 Cal 411 (412)]

62

pre-emption suit—Death of one of joint vendees respondents—Legal representatives not brought

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7 (31) 132 Ind Cas 895 (896) (Lah)

8 (24) AIR 1924 All 95 (96)

(33) AIR 1933 Lah 356 (359) 14 Lah 543 (Suit against defendants not as partners dismissed—One respondent dying during appeal — Appeal abating against him — Joint decree—Abatement of whole appeal must be decided by reference to decree)

(33) AIR 1933 Pat 646 (647) (Declaratory decree obtained by three members of joint Hindu family

(20) AIR 1920 Lah 174 (174 175)

(20) AIR 1920 Lah 67 (68) 1 Lah 225

(20) AIR 1920 Lah 72 (73)

(21) AIR 1921 Lah 160 (161)

(25) AIR 1925 Lah 494 (494) 6 Lah 313

(26) AIR 1926 Lah 137 (138)

(26) AIR 1926 Lah 37 (38 39)

(27) AIR 1927 Lah 860 (860)

(17) AIR 1917 Mad 398 (399)

(32) AIR 1932 Mad 212 (213)

(29) AIR 1929 Nag 358 (360)

(25) AIR 1925 Pat 517 (518)

(25) AIR 1925 Pat 590 (591)

(11) 12 Ind Cas 871 (871) 1911 Pun Re No 60

(13) 18 Ind Cas 256 (256) (Lah)

(17) AIR 1917 Lah 321 (322)

(19) AIR 1919 Lah 390 (391)

(36) AIR 1936 Oudh 209 (211) (Where a joint ... of all re pon

(Plots jointly

abated in toto)

[*See also* (15) AIR 1915 Cal 756 (756)]

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abated as a whole)

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One of several tenants can institute a suit under

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(23) AIR 1923 Cal 289 (290)

abatement[12] In an appeal, however, the nature of the abatement will have to be decided not upon the nature of the relief involved in the suit but upon the nature of the relief *awarded by the decree* appealed against[13] Thus, if the decree awarded joint possession the abatement will affect the whole appeal even though the plaintiff had asked for separate possession in the plaint[14] Even in cases where the plaintiff *could*

he chooses to ask for a joint relief and on
› appeal will *abate in toto on the death of*
egal representatives are not brought on the
record in time[15]

24. Inherent power to add legal representative after abatement. — Even after a suit or appeal has abated, the Court has inherent power to add the legal representatives of the deceased defendant or appellant in proper cases[1] The proper procedure in such cases would be to just declare that the suit had abated, then to set the abatement *aside for valid reasons and then add the legal representatives and* proceed with the suit or appeal[2] It should, however, be noted that such a course will not be adopted unless very strong grounds are made therefor[3]

25. Appellate Court and abatement. — The Court to appoint the legal representative of a deceased defendant or respondent will be the Court in which the suit or appeal was pending when the death took place[1] Similarly, the Court to declare an abatement will be the Court in which the suit or appeal was pending when the abatement took place[2] Where, however, *such Court proceeds to a decision on the* merits in spite of an abatement that has taken place, the Appellate or second Appellate Court, as the case may be, may set aside the decision and either declare the abatement[3] or remand the matter for disposal according to law[4]

26. Award of costs. — If a suit abates on the ground that the legal representatives of a deceased defendant are not impleaded within time, there is no

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is not open to the plaintiff appellant to prose

cute his appeal only against some of the wrong doers at his choice)
(26) 94 Ind Cas 253 (253) (Lah)
(17) AIR 1917 Cal 647 (647) (Where a suit brought against several joint promisors is dismissed the plaintiff cannot appeal against some only releasing his claim against the others)
[*See also* (26) AIR 1926 Cal 667 (668)]

Note 24

1 (11) 11 Ind Cas 559 (560) 35 Bom 393 (Case

impleaded and abatement set aside even without an application by him for setting aside abatement)]

Note 25

[*See also* (28) AIR 1928 Lah 784 (786, 787) (Decree was passed before time for bringing legal representatives on record had expired)
(01) 1901 All W N 157 (167) (Do)]

O. 22 R. 4
Notes 26-29

provision in the rule entitling the legal representatives to come to Court and ask for costs [1]

27. Re-hearing of suit or appeal. — Where a decree is passed against a deceased respondent without impleading his legal representatives, it is competent for the Court to entertain an application for impleading the legal representatives and to re open and re hear the suit or appeal [1]

28. Revision. — No revision lies from an order that a deceased plaintiff's legal representatives are not necessary parties to an application to set aside an *ex parte* decree [1]

29. Appeal. — Under the old Code an order of abatement was appealable, not as a decree but as an order under Section 588 (18) [1] Under the present Code, where the facts fall within the four corners of the rule, an order of abatement thereunder is not open to appeal The only remedy is that provided by Rule 9 But when the *suit is dismissed* as having abated and the propriety of the dismissal on that ground is questioned, an appeal will lie as if from a decree [2] Thus, where on abatement of a suit so far as the deceased is concerned, the Court dismissed the whole suit an appeal would lie [3] No appeal lies from an order bringing in certain persons as legal representatives of a deceased defendant [4] Such an order is also not a 'judgment' within the meaning of the Letters Patent (Clause 10 of the Letters Patent of the Allahabad High Court) *and no appeal lies from it under the Letters Patent* [5]

See also Note 26 to Rule 3 *supra*

O. 22 R. 5

Determination of question as to legal representative.

R. 5. [S. 367.] Where a question arises as to whether any person is or is not the legal representative[3] of a deceased plaintiff or a deceased defendant, such question shall be determined[4] by the Court

[1877, S. 367; 1859, S. 103.]

Local Amendment

MADRAS

Add the following as a proviso:

"Provided that an appellate Court before determining it, may direct any lower Court to take evidence thereon and to return the evidence so taken together with its finding and reasons and may take such finding and reasons into consideration in

Note 27

1 (27) AIR 1927 Oudh 221 (221) 2 Luck 592 (Plaintiff was ignorant of respondent's death—Application for substitution treated as under Order 22 Rule 9)

Note 28

1. (26) AIR 1926 Pat 29 (30).
(35) AIR 1935 Pat 121 (121)

Note 29

1. (03) 25 All 206 (207)

(A I R 1916 Lah 245, relied on)]
4. (25) AIR 1925 All 481 (482) 47 All 741
5. (37) AIR 1937 All 192 (194) I L R (1937) All 381
(39) AIR 1939 Nag 39 (40) (Dismissal of cross objections as having abated is decree)

Synopsis

Other Topics (miscellaneous)

1. Legislative changes. —

1 Under Section 367 of the old Code the Court had the *option* of either determining who is the legal representative of a deceased party or of staying the suit until the question has been determined in a separate suit [1] Under the present rule the Court *shall* determine the question and has no option in the matter

2 The words "at or before the hearing" which occurred in the old Section have been omitted

3 The provisions of the old Section, in terms, applied only to the case of the death of a *plaintiff* [2] But the present rule will apply to the case of the death of a *plaintiff* as well as to the case of the death of a *defendant*

2 Scope of the Rule. — As has been observed in Note 1 above, where a dispute as to who is the legal representative arises it is the duty of the Court under this rule to decide it [1] The decision, however should be limited for the purpose of carrying on the suit and cannot have the effect of conferring any right to heirship or to property [2]

The rule applies to appeals[3] but not to execution proceedings [4] Nor does it apply to a case where a party dies after the preliminary decree but before the final decree in the suit [5] See also Note 19 to Rule 3 *ante*

3. Legal representative. — See Note 10 to Rule 3

4. "Shall be determined." — See Notes 1 and 2 above For the purpose of determining as to who is the legal representative, the Court must, when necessary, hold an enquiry in which evidence may be adduced[1] and must come to a conclusion as to who is the legal representative according to the rights of the parties [2] It cannot

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Order 22 Rule 5 — Note 1

1. ('85) 1885 All W N 7 (7)
('09) 2 Ind Cas 479 (479) (Mad)
('87) 9 All 447 (450)
('94) 1894 Pun Re No 66 page 218 (Old Code S 368)
('88) 1888 Pun Re No 29 page 78 (Do)
2. ('13) 21 Ind Cas 397 (400) (Cal)
[*See also* ('88) 10 All 223 (232) (FB)]

Note 2

1 ('18) AIR 1918 Bom 175 (177) 42 Bom 535
('18) AIR 1918 Bom 100 (101) 43 Bom 168 (Even though it might have primarily passed an order bringing some person on record as legal representative)
('19) AIR 1919 Mad 971 (971)
('21) AIR 1921 Nag 23 (25) 17 Nag L R 45
('22) 4 Lah L Jour 314 (316)
('39) AIR 1939 Pat 117 (118)

Note 4

O. 22 R. 5
Notes 4-7

simply make all the claimants parties without making any such enquiry[3] A lengthy or elaborate enquiry is, however, unnecessary for the purpose[4] and where there is no dispute as to his being the legal representative, the mere fact that no steps were taken to have him declared as such, does not vitiate the decision in the case[5]

5. "By the Court." — The "Court" here means the Court before which the question as to who is the legal representative arises It will be the trial Court, when the question arises in the suit, or the Appellate Court, if the question arises in appeal. An Appellate Court cannot delegate its powers to the trial Court All that it can do is to direct the trial Court to take evidence on the question and remit the same The *decision* must be by the Appellate Court[1] This principle has, in Madras, been embodied in a rule framed by the High Court as a proviso to this rule

6. Objection as to the representative character. — The procedure laid down in this rule should be followed not only when two or more persons claim in opposition to each other but also when the representative character of a person who alone claims is denied by the other side[1]

The objection should, however, be taken at the earliest possible moment[2] But when the legal representative is appointed without notice to the other side, the latter can at the hearing raise objection to the representative character of the person so appointed[3]

7. Effect of order under this Rule. — An order under this rule will enable the person to represent the estate in the suit and will make an adjudication therein binding on the estate[1] To this extent and in this sense it is final[2] The mere admission of a person as legal representative for the purpose of further prosecution of the suit will not, however, conclusively establish his right to do so if his legal position is one of the main or vital issues in the suit itself[3] Further, as has been seen in Note 2 above, an order appointing a person as a legal representative for the suit will not have the effect of deciding that he is the *heir* of the deceased party[4]

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(91) 15 Bom 145 (147) (Do)
4. (22) AIR 1922 Lah 175 (176)
('88) 1888 Pun Re No 29, page 78
5 (22) AIR 1922 All 223 (226) 44 All 407

Note 5

1 (22) AIR 1922 Pat 197 (197)
(18) AIR 1918 Mad 1103 (1107)

Note 6

1

Iad 581

Note 7

1. (23) AIR 1923 Rang 114 (116) 4 Upp Bur Rul 150
(22) AIR 1922 Mad 477 (477) 46 Mad 190 (FB) (Where a person who is not the legal representa

able to him)
2 (28) AIR 1928 All 532 (533) 50 All 857

deceased respondent)
[*See* (39) AIR 1939 Nag 147 (148) ILR (1939) Nag 165 (A decision under O 22 R 5 as to whether a person is not a legal representative though not *res judicata*, is final so far as the suit in which it is made is concerned, not on the ground of *res judicata*, but because of S 47)]
3. (23) AIR 1923 Nag 209 (209)
(06) 28 All 109 (111)
(03) 27 Bom 162 (169)
4. (10) 8 Ind Cas 999 (1037) 1910 Pun Re No. 31
(23) AIR 1923 Rang 114 (116) 4 Upp Bur Rul 150

8. Power of Court to correct its own order. — As already pointed out in Note 6 above, where a person has been appointed legal representative without notice to the other side, the latter can afterwards object to the representative character of that person and the Court can after enquiry correct the order already passed **O. 22 R. 5 Notes 8–11**

9. Suit to establish title as legal representative — As to whether a decision under this rule can be re adjudicated upon in a separate suit see Note 13 to Section 11 *ante*, and the undermentioned cases [1]

10. Appeal. — See also Note 26 to Rule 3 *ante* An order under Section 367 of the old Code (corresponding to this rule) was appealable as an order under Section 588, clause (18) of that Code [1] Under the present Code no appeal lies from such an order either as a decree or as an appealable order [2] Nor is such an order a 'judgment within the meaning of the Letters Patent (Clause 10 of the Letters Patent of the Allahabad High Court) [3]

But as to whether an objection to an order under this rule can under Section 105 of the Code, be a valid ground of attack in an appeal from the decree see Note 6 to Section 105

11. Revision — A decision under this rule amounts to the decision of a case within the meaning of Section 115 and is open to revision [1] Thus, if a Court simply adds a legal representative without holding an enquiry into the dispute and deciding it it acts with material irregularity in the exercise of its jurisdiction and a revision will lie [2]

R. 6. [New] Notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place **O. 22 R. 6**

No abatement by reason of death after hearing

[R S C, O. 17 R 1, last portion]

Note 9

party not *res judicata*)

Note 10

1 (90) 12 All 200 (202)
(07) 10 Oudh Cas 121 (125)
[*See also* (06) 9 Oudh Cas 354 (356)]
2 (12) 13 Ind Cas 70 (70 71) (Cal)
(33) AIR 1933 Bom 396 (397) 57 Bom 641
3 (37) AIR 1937 All 192 (194) ILR (1937) All 331

Note 11

1 (35) AIR 1935 Lah 934 (934)
2 (25) AIR 1925 Mad 456 (457)
(24) AIR 1924 Mad 813 (815)

O 22 R.6
Notes 1-2

Synopsis

1 Scope and applicability of the Rule
2 No abatement by reason of death after hearing

1. Scope and applicability of the Rule — This rule is new and embodies an exception to the principle that the Court has no jurisdiction to pass a decree for or against a dead man[1] It is based on the principle that a judgment pronounced at any time after the conclusion of the hearing shall be construed to be operative as if it had been delivered on the day on which the hearing was closed[2]

Even under the old Code it had been generally held that the death of a party after the hearing but before pronouncement of the judgment will not make the judgment invalid[3] The Chief Court of the Punjab, however, took a different view[4] This rule gives effect to the former class of decisions

For the application of the rule, it is immaterial whether the death is or is not brought to the notice of the Court[5]

Where, however, the legal representative brought on the record is under a legal disability and no guardian or next friend is appointed to act for him, the decree is a nullity as against him and the rule cannot be invoked to validate the same[6]

The principle of the rule will apply to proceedings in arbitration[7]

Where an *ex parte* decree was passed against two plaintiffs and an order was made for the setting aside of the decree on condition that the defendant deposited a certain sum of money in Court within a stated time, it was held that the fact that one of the plaintiffs died in the interval between the conditional order and the final order setting aside the *ex parte* decree on the required amount being deposited within the time allowed, did not affect the validity of the latter order and that the principle of this rule applied[8]

2. No abatement by reason of death after hearing. — The principle of the rule will not apply unless the hearing had been *concluded* before the death[1] Thus the rule will not apply where the party died on the day fixed for the hearing but *before the hearing*[2]

The ' hearing contemplated by the rule is such a hearing as is provided *for* by Order 18 and includes arguments and where anything remains to be done or furnished by either party as a basis of consideration which is to end in the judgment and decree capable of execution the hearing ' cannot be said to have been concluded under the

Order 22 Rule 6 — Note 1

1 (12) 15 Ind Cas 832 (833) 5 Sind L R 260
(39) AIR 1939 Pat 534 (535)

[illegible]
(03) 26 Mad 101 (102)
(27) AIR 1927 Oudh 561 (561)
(16) AIR 1916 Lah 133 (135) 1915 Pun Re No 106

3 (93) 21 All 314 (315 316)
(95) 19 Bom 807 (809)
(97) 21 Bom 314 (319)
(84) 19 Cal 513 (538) 19 Ind App 103 (P C)

(07) 6 Cal L Jour 547 (555)
(03) 26 Mad 101 (102)

Code judgment without *legal representa*[illegible] death after hearing and before judgment is not void but may be irregular)

5 (18) AIR 1918 Upp Bur 9 (10) 3 Upp Bur

[illegible]

Note 2

1 (09) 4 Ind Cas 137 (137 138) (Bom)
2 (20) AIR 1920 Oudh 57 (58)

rule[3] Thus, the rule will not apply if the party died before the completion of arguments[4] It has been held that where during the interval between the last hearing of a suit and the date on which the judgment is pronounced, the Court makes a local inspection of the site in suit and makes a reference to it in the judgment, the hearing of the suit cannot be said to have "concluded' on that day of hearing[5] O. 22 R. 6 Note 2

Where a defendant dies after the conclusion of the hearing and before delivery of judgment in the suit, and the plaintiff appeals against the decree, there can be no abatement of the appeal and the plaintiff can make the legal representative of the *defendant a party to the appeal It is not necessary that he should make an application* for bringing on record the legal representative of the defendant[6]

R. 7. [S. 369.] *(1)* The marriage of a female plaintiff or defendant shall not cause the suit to abate, but the suit may notwithstanding be proceeded with to judgment, and, where the decree is against a female defendant, it may be executed against her alone. O. 22 R. 7

Suit not abated by marriage of female party.

(2) Where the husband is by law liable for debts of his wife, the decree may, with the permission of the Court, be executed against the husband also; and, in case of judgment for the wife, execution of the decree may, with such permission, be issued upon the application of the husband, where the husband is by law entitled to the subject-matter of the decree.

1. Scope of the Rule. — *A* died pending suit and his wife was brought on the *record as his legal representative The suit was decreed against her Pending appeal,* she married again The lower Court's decree was confirmed in appeal and the decree was sought to be executed against the second husband It was held that this was not a case where the husband was liable for the debts of the wife and that the decree could not be executed against the second husband[1]

R. 8. [S. 370.] *(1)* The insolvency of a plaintiff in any suit which the assignee or receiver might *maintain for the benefit of his creditors,* shall not cause the suit to abate, unless such assignee or receiver declines to continue the suit or (unless for any special reason the Court O. 22 R. 8

When plaintiff's insolvency bars suit.

('19) AIR 1919 Mad 685 (689) (Where a party to

(F B)
[*See also* ('30) AIR 1930 Sind 259 (260) 25 Sind L R 107]
4. (02) 26 Bom 317 (319)

Order 22 Rule 7 — Note 1
1. (68) 9 Suth W R 442 (443)

O. 22 R. 8
Notes 4-11

the Insolvency Court can step in and get the fruits of the execution handed over to him[1]

An insolvent is entitled to make an application for execution of a decree obtained by him before an order for his adjudication was passed[2]

See also Notes to Rule 12 *infra*

5. "Insolvency" must be existing. — The rule does not, as has been seen in Note 2 above, apply unless an adjudication has *actually* taken place[1] Where a suit is instituted or continued by the receiver and pending that suit the adjudication is annulled, the receiver can nevertheless continue the suit unless the property is diverted from him and re vested in the quondam insolvent[2]

6. Plaintiff's insolvency. — See Note 2 above.

7. Defendant's insolvency. — See Note 2 above

8. Insolvency of pauper applicant. — The rule does not apply to the adjudication of a petitioner pending his application for permission to sue in *forma pauperis* Such an application cannot be dismissed on the ground of the adjudication[1] If the petitioner is adjudicated after he obtains leave to sue in *forma pauperis*, the receiver can come in and continue the suit in the same way as the insolvent could have done[2]

9. Suit instituted after adjudication. — After adjudication the insolvent has to

. . .

has he got the right to appeal against a decree in the suit? According to the Bombay High Court, he can appeal[2] The High Court of Madras[3] has, on the other hand, held that he cannot appeal

9a. "Which the assignee or receiver might maintain for the benefit of his creditors." — In the undermentioned case[1] where the trial Court had passed against an insolvent a decree for maintenance, and the insolvent appealed from the decree, it was doubted whether the appeal was one "which the assignee or receiver might maintain for the benefit of the creditors' of the insolvent although the appeal, if successful, might incidentally benefit them.

10. Limitation. — There is no limitation for the receiver to appear and apply on the adjudication of the plaintiff for being allowed to continue the suit[1]

11. Costs payable by plaintiff prior to insolvency. — If a receiver elects to continue the suit he must give security only for the costs already incurred up to the time of his electing to continue the suit and not for *subsequent cost* as to which he will be personally liable[1] The order for furnishing the security must be passed at the time

Note 4

1. ('24) AIR 1924 Lah 615 (616)
('30) AIR 1930 Lah 205 (205 206)
2. ('39) AIR 1939 Mad 196 (198)

Note 5

1. ('29) AIR 1929 Bom 202 (204)
(1900) 27 Cal 217 (219)
2. ('07) 32 Bom 321 (333, 336)

Note 8

1. ('25) AIR 1925 Mad 791 (791)
2. ('18) AIR 1918 All 177 (177)

Note 9

1. ('14) AIR 1914 Mad 395 (395)
('39) AIR 1939 Mad 196 (197)
2. ('29) AIR 1929 Bom 202 (204)
3. ('26) AIR 1926 Mad 556 (556, 557) 49 Mad 461 (F B)
('26) AIR 1926 Mad 1214 (1214)
[But see ('21) AIR 1921 Mad 402 (403)]

Note 9a

1. ('37) AIR 1937 Mad 915 (917)

Note 10

1. ('22) AIR 1922 All 361 (362) 43 All 621

Note 11

1. ('26) AIR 1926 Lom 533 (534)

of the receiver electing to continue the suit and not afterwards[2] An order that the receiver need not furnish security is not appealable[3] **O. 22 R. 8 Notes 11–14**

12. Costs of successful defendant.—In England the executors and trustees in bankruptcy continuing a suit filed by the bankrupt will be personally liable for all costs from the beginning of the suit[1] In India, however, such personal liability extends only for the costs incurred after the receiver comes on the record[2]

13. Cause of action arising after insolvency. — Where the suit is filed in respect of a cause of action arising after adjudication the insolvency is by itself no ground for demanding security for costs[1]

14. Appeal. — An order under this rule is not appealable[1]

R. 9. [Ss. 371, 372A.] *(1)* Where a suit abates or is dismissed under this Order,[3] no fresh suit shall be brought on the same cause of action. **O. 22 R. 9**

Effect of abatement or dismissal.

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply[5] for an order to set aside the abatement[4] or dismissal; and if it is proved that he was prevented by any sufficient cause[8] from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

(3) The provisions of section 5 of the Indian Limitation Act,[7] 1877, shall apply to applications under sub-rule *(2)*.

[1877, S 371.]

Synopsis

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2. (27) AIR 1927 Mad 511 (511 512)
3. (31) AIR 1931 Rang 286 (286) 9 Rang 478

Note 12

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(1884) 28 Ch D 53 (55) Borneman v Wilson (Referred in 20 Bom 167)
(1882) 20 Ch D 780 (785) Watson v Holliday (Affirmed in (1883) 48 L T 545 52 L J Ch 543 31 W R 536—Do)
Daniel's Chancery Practice, page 1175 6th Ed
2. ('26) AIR 1926 Bom 533 (534)

Note 13

1 (19) AIR 1919 Cal 719 (720) 46 Cal 156

Note 14

1. (36) AIR 1936 Lah 83 (84 85) (If the lower Appellate Court entertains an appeal it will be exercising a jurisdiction not vested in it by law and revision will lie)

O. 22 R. 9
Notes 1-3

1. Legislative changes. —

This rule embodies the provisions of Sections 371 and 372A of the old Code — sub rules (1) and (2) correspond to Section 371 and sub rule (3) corresponds to Section 372A

The following changes between the present rule and the above Sections of the old Code may be noted —

1 The words 'The plaintiff or person claiming to be the legal representative of a deceased plaintiff or the assignee or receiver in the case of an insolvent plaintiff' have been substituted for the words "but the person claiming to be the legal representative of the deceased or bankrupt or insolvent plaintiff"

2 The words "applicable to appeals' which occurred in Section 372A have been omitted

2. Scope and applicability of the Rule. — The rule is a disabling one and should therefore be strictly construed[1] Its application is limited to abatement or dismissal under one or other of the rules of this Order and does not extend to abatement on account of some other cause[2] Thus, an application under sub rule (2) cannot be made when the abatement is by reason of the fact that the right to sue does not survive[3]

This rule does not apply to proceedings before the High Court on reference under Section 66 (2) of the Income Tax Act[4]

3. No fresh suit shall be brought on the same cause of action. — An abatement under Rule 3 or Rule 4 bars a fresh suit on the *same cause of action*[1] If the fresh suit is, however, on a different cause of action[2] or if the plaintiff in the latter suit does not claim under a devolution of interest from the plaintiff in the former suit,[3] the suit is not barred by this rule Where the legal representatives of a deceased plaintiff applied to be brought on record, but on the objection of the defendant the Court disallowed the application and dismissed the suit and the legal representatives thereupon filed a fresh suit on the same cause of action, it was held that it was not

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Order 22 Rule 9 — Note 2

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Note 3

1 ('09) 3 Ind Cas 739 (740) 33 Mad 167 (The legal representative of a plaintiff after whose death a suit is dismissed cannot sue on the same

suit be brought on the ground that in the former suit the Court acted under some other

So new suit was not barred)

('37) AIR 1937 Mad 101 (103) (Suit to recover possession by benamidar for owner—Benamidar dying pending suit — No legal representative brought on record — Fresh suit by owner—Abatement of previous suit is bar *to fresh suit* on same cause of action)

2. ('29) AIR 1929 All 306 (307, 308)

('33) AIR 1933 Lah 109 (110) 14 Lah 380 (Suit by mortgagor for redemption — Vendee from mortgagor made a *pro forma party*—Vendee died and his legal representatives not brought on record — Subsequent *suit by* mortgagor against vendee for unpaid purchase money is not barred)

('37) AIR 1937 Oudh 248 (249) 13 Luck 193 (Cause of action for ejectment of tenant is different from cause of action for recovery of rent)

3 ('31) AIR 1931 Lah 79 (80) 12 *Lah* 275 (Where a reversioner sued challenging an alienation and he having died the suit abated and subsequently another reversioner sued *on the* same cause of action *held, that the later* suit was not barred)

('16) AIR 1916 Bom 278 (279) 40 Bom 248 (*A* a member of a joint Hindu family, sues *B* for redemption of a mortgage of ancestral property, but not in a representative capacity—*A* dies—*A's* heirs are not brought on the record and *the suit*

open to the defendants to object to the suit on the ground that it was barred under this rule[4] **O. 22 R. 9 Notes 3-6**

The dismissal of a suit for failure to deposit the costs of service of summons on the proposed legal representatives will not bar a fresh suit[5]

It has been held by the High Court of Bombay[6] that the bar under this rule has not got the same effect as *res judicata* and that it does not extinguish the right The High Court of Madras[7] has held, distinguishing the Bombay decision, that an order of abatement operates as a judgment in favour of the defendant and that if it is not vacated by an application under this rule, it is conclusive of the defendant s rights to the property The High Court of Lahore[9] also takes the same view as that of the Madras High Court

4. Setting aside abatement. — The Court can set aside the abatement of a suit if it is moved by an application under sub rule (2)[1] The remedy provided for in sub rule (2) applies where the suit has abated under Rule 3 or Rule 4[2] or where it has been dismissed under Rule 8[3]

An order setting aside an abatement should be passed only after notice to the other side If it is passed without notice, the other side can raise their objections to the order at the hearing of the suit or appeal[4]

See also the undermentioned case[5]

5. Who may apply under this Rule. — If the abatement was under Rule 3, the application under this rule may be made by the legal representatives of the plaintiff But a legal representative cannot apply under this rule if he had already applied to be brought on record within time and his application had been dismissed[1] If the abatement is under Rule 4 the plaintiff may make the application If the suit has been dismissed under Rule 8 the receiver or assignee in insolvency may apply

Where there are more plaintiffs or appellants than one each one of them can make the application[2]

The reversioners or any one of them can apply to set aside an abatement caused by the death of the widow plaintiff[3]

The legal representative of a respondent wishing to bring himself on the record need not apply to set aside the abatement of the appeal[4]

6. Minor and abatement. — Where an application made on behalf of *A*, a minor, to be brought on the record in the place of *B*, the deceased plaintiff, is

abates—Subsequently *A* s son and grandsons institute another suit for redemption of the same mortgage—The second suit is not barred)
(39) AIR 1939 Lah 580 (581) (Suit by reversioner to set aside alienation by widow—Its abatement does not bar fresh suit by another reversioner for same relief)
4 (19) AIR 1919 Mad 572 (573)
5 (83) 9 Cal 163 (165)
6 (04) 6 Bom L R 638 (639)
7 (20) AIR 1920 Mad 580 (581)
8 (33) AIR 1933 Lah 752 (753)

respect of whose property a vesting order was made on an application to declare him an insolvent but the proceedings in insolvency are subsequently annulled and he is not declared an insolvent is not an insolvent so as to make R 8 applicable and to treat a dismissal for default as an order under R 8—In such a case the

dismissed and *A* thereafter makes a second application, it can, in proper cases, be treated as an application under this rule for setting aside the abatement [1]

7. Limitation. — Under Article 171 of the Limitation Act, 1908, an application to set aside abatement should be filed within sixty days from the date of the abatement [1] If the petitioner was prevented by any sufficient cause from making the application within the said period the delay in filing the application may be excused under Section 5 of the Limitation Act [2] If no application is made within sixty days or within the extended time under Section 5 of the Limitation Act, the abatement becomes final and conclusive [3]

8. "Sufficient cause." — An applicant for setting aside an abatement must show that he had sufficient cause for not taking timely steps to continue the suit [1] As a matter of practice such cause must be alleged in the petition It is, however, not legally necessary to do so all that is necessary is that he should satisfy the Court that there was sufficient cause [2] The question as to what is sufficient cause depends upon the facts and circumstances of each case [3] The test to be adopted in determining it is to see whether the mistake or carelessness was real and unintentional and no damage has been done to the other side that cannot be repaired by costs or otherwise or whether the negligence was culpable or the applicant had acted *mala fide* or irreparable injury would result to the other side by the granting of the application in the former case the application must be granted,[4] in the latter case, it must be dismissed [5]

Note 6
1. (24) AIR 1924 Bom 416 (417)
Note 7

Bom 118]

representative of one of parties not brought on record — Provisions of C P C apply and time

[*See also* (25) AIR 1925 Bom 122 (123) 49

In the following instances the abatement was set aside under this rule on the ground of sufficient cause — **O. 22 R. 9 Note 8**

(1) Where, by virtue of an order of the Court, the petitioner *bona fide* believed that no separate application was necessary to implead the legal representatives [6]

(2) Where the legal representatives of a deceased appellant *bona fide* believed that the co-appellants were prosecuting the appeal and challenging the entire decree [7]

(3) Where the petitioner was a Government servant and had sent the necessary papers to the vakil but the papers were received by the latter on the last day of limitation after the rising of the Court [8]

For other instances see the undermentioned cases [9]

Can ignorance of *law* be pleaded as a sufficient cause for the purposes of this rule? On this question it has been held that while mere ignorance of law without anything more, will not constitute "sufficient cause" for the purposes of this rule,[10] it cannot be laid down as an inflexible rule that it can never be a sufficient cause for excusing the delay [11] Thus, where the original period of limitation prescribed had been shortened by an amending Act and, in ignorance thereof the application was made after the expiry of the shorter period, it was held that there was sufficient cause [12]

On the question whether the fact that the applicant under this rule was ignorant of the *death of the party* whose legal representatives had to be brought on the record, would constitute a sufficient cause for setting aside an abatement it has been held that if the ignorance is due to carelessness or want of diligence on the part of the petitioner it will not constitute a sufficient cause [13] Where, on the other hand it is not

6 ('19) AIR 1919 Lah 147 (148) 1919 Pun Re No 20 (Court had made an order allowing the parties on record to represent all the persons

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9. ('36) AIR 1936 Lah 710 (711) (Delay in ap

Limitation Act to be liberally construed—Death of opponent in Native State or foreign place — Difficulties in tracing legal representatives — Reasonable delay should be condoned Per B J Wadia J)

10 ('89) 11 All 408 (414 415)
('33) AIR 1933 Lah 356 (358) 14 Lah 543 (Mere ignorance of law that an application is necessary)
('34) 147 Ind Cas 1187 (1188) (Lah)
('20) AIR 1920 Lah 174 (174)
('85) 1885 Pun Re No 39 page 78
('12) 15 Ind Cas 708 (709) (Lah)

('14) AIR 1914 Lah 123 (124) 1915 Pun Re No 41
('16) AIR 1916 Lah 366 (367 368) 1916 Pun Re No 3
('15) AIR 1915 Lah 334 (336) (A careless mistake of law *held* to be no sufficient cause)
('29) AIR 1929 Nag 74 (75)
(1900) 3 Oudh Cas 13 (17)

704 (Ignorance of law of a Native State or foreign place (where deceased was domiciled) according to the law of which the legal representatives have to be brought on record may be sufficient cause)

12 ('23) AIR 1923 Bom 40 (40)
('23) AIR 1923 Lah 475 (475)
('21) AIR 1921 Mad 650 (651)

13 ('24) AIR 1924 Lah 461 (461, 462)
('33) AIR 1933 Lah 356 (358) 14 Lah 543
('33) AIR 1933 Lah 556 (557) (Death of respondent in appeal—Appellant, municipal committee not impleading legal representative within time—Time cannot be extended under S 5 in absence of good ground)
('26) AIR 1926 Lah 137 (138)
('14) AIR 1914 Oudh 411 (411)
('22) AIR 1922 Lah 61 (61)
('22) AIR 1922 Cal 335 (336 337) 49 Cal 62
('18) AIR 1918 Oudh 304 (305) 21 Oudh Cas 63
('25) AIR 1925 Oudh 306 (307)
('24) AIR 1924 Pat 126 (127)

O. 22 R. 9
Note 8

due to any want of reasonable diligence on his part or it is due to events beyond his control, it will constitute sufficient cause [14] Thus where the ignorance was due to the fact that the applicant was herself a pardanashin lady,[15] or that the deceased was a pardanashin lady,[16] or that the applicant lived far away from the place where the dec [17] the abatement was set aside It was held in the undermentioned case[18] tha the respondent is sufficient cause ant is not required to inquire from day to day as to whether the respondent is dead or alive

The negligence to look after the suit or appeal is not a it the *collusion* of the agent with the opposite side will be a sufficient ground for setting aside the abatement [20] Where the applicant gave instructions in time to her vakil to bring on record the legal representatives but owing to a mistake of the vakil in failing to notice the change effected in the period prescribed for such an application the application was not filed in time, it was held that the delay should be excused [21]

The fact that succession to the estate of the deceased is in doubt or is in dispute will not be a sufficient cause for not filing an application in time [22]

Where an application to add legal representatives is filed after the period of limitation has expired the Court may either first set aside the abatement by getting an application filed for the purpose and then substitute the legal representatives [23] *or in*

(IR 1001 P t 607 (607)
( ) AIR
(17) AIR 1917 Lah 10 (11) 1916 Pun Re No 115
(30) AIR 1930 All 779 (783) 52 All 910
(23) AIR 1923 Lah 132 (133) (No reason shown death—

that the

of the opposite

14 ('19)
(32) AIR
(25) AIR
(37) AIR 1937 Bom 401

sible—There is sufficient cause for setting aside atatement)
(38) AIR 1938 Mad 218 (218) I L R (1938) Mad 275
[*See also* (37) 1887 Pun Re No 42, p 91
(33) AIR 1933 Lah 916 (920) (Application to bring on record legal representative filed four days beyond limitation — Applicant not know ing date of deceased s death — Time was extended)]

15 (32) AIR 1932 Lah 148 (149)
[*See also* (34) AIR 1934 Lah 998 (995)]

16 (25) AIR 1925 Pat 162 (164)
(24) AIR 1924 Pat 319 (320)

17 (23) AIR 1923 Lah 546 (547)
(33) AIR 1933 Lah 224 (225) (And where means of communication were scarce)
(24) AIR 1924 Lah 429 (429) 5 Lah 70
(26) 91 Ind Cas 560 (561) (Oudh)
(07) 1907 Pun Re No 113 page 522
(18) AIR 1918 Lah 314 (314)
(29) AIR 1929 Lah 634 (635)
[*See also* (39) AIR 1939 Pat 623 (624) (Conduct of appeal in hands of agent who was neither living in the village nor had any touch with the village where the deceased respondent lived — Abatement set aside)]

18 (38) AIR 1938 Pat 125 (126) 17 Pat 84

19 (10) 7 Ind Cas 391 (392) (Cal)
[*See also* (37) AIR 1937 Nag 97 (98) I L R (1937) Nag 507 (Negligence of pleader is no ground for condoning delay though plaintiff was minor and next friend was a pardanashin lady)]

20 (19) AIR 1919 Cal 156 (157)

21 (21) AIR 1921 Mad 650 (651)

22 (16) AIR 1916 Cal 285 (286)
(16) AIR 1916 Mad 869 (871)
[*But see* (24) AIR 1924 Oudh 83 (84) 26 Oudh Cas 244 (But the fact that the legal representatives were minors who would not have obtained execution without obtaining a succession certificate is sufficient reason to excuse the delay)]

23 (04) 9 Cal W N 369 (370)

exceptional cases, even treat the application as one to set aside the abatement and pass necessary orders thereon[24] Where such an application is allowed without objection, the time will be deemed to have been extended and the legal representatives to have been properly brought on the record[25] Where the lower Court has considered all the circumstances and has decided that there is no sufficient cause[26] or has extended the time for substitution,[27] the Appellate Court will not interfere with the decision

Where an application has been made under this rule within time, a *bona fide* mistake therein can be corrected after the limitation period[28]

9. Formal order of abatement, if necessary before setting aside abatement. — In cases under the old Code it was held that when a formal order of abatement had not been passed, the proper procedure on an application to revive the suit was to pass first an order of abatement and then an order setting aside the abatement[1]

Under the present Code an abatement takes place automatically without any order and such abatement can be set aside on application under this rule even where no formal order declaring the abatement has been passed.[2] See Note 11.

10. Cause of action in the revived suit. — When a suit is revived under this rule it must be continued on the *same cause of action* no new cause of action can be introduced into it[1]

11. Substitution without setting aside abatement. — Strictly speaking, where an abatement has taken place, it should first be set aside before a substitution of the legal representative is ordered[1] This rule is strictly applied in the Patna High Court[2] In Bombay[3] and Allahabad[4] a more liberal interpretation is adopted and the substitution of the legal representatives without first setting aside the abatement has been held to be a mere irregularity which does not vitiate the decision. In a Calcutta case[5] where such substitution was ordered without objection by the other side, it was

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Appellate Court will interfere only when discretion not exercised judicially or is exercised arbitrarily)

27. (24) *AIR 1924 Lah 339 (342)*

(35) AIR 1935 Lah 712 (713) (Discretion is open to interference by Appellate Court only if it has been exercised in a perverse or an unjudicial manner)

(38) AIR 1938 Bom 408 (410) I L R (1938) Bom 704

28. ('27) AIR 1927 Oudh 170 (172)

Note 9

1. [illegible]

2. [illegible]

Dissented)

('24) AIR 1924 Bom 416 (417) (If no formal order application for substitution may, in suitable cases, be taken as one to set aside abatement)

(27) AIR 1927 Lah 865 (865) (One of the defen- [illegible]

abatement of the suit — *Held*, that though that portion of the order which decided that the suit had abated in toto may be a decree, the order declaring the partial abatement was one which could be set aside on an application under *O 22 R 9*)

(39) AIR 1939 Lah 572 (577)

(37) AIR 1937 Bom 401 (406) I L R (1937) Bom 602

[But see ('22) AIR 1922 All 209 (210) 44 All 459]

Note 10

1. ('94) 21 Cal 997 (1004, 1005) 21 Ind App 163 (PC)

('95) 22 Cal 92 (98)

Note 11

1. ('16) AIR 1916 Cal 690 (690)

2. (23) AIR 1923 Pat 417 (418) 2 Pat 168

[illegible]

O. 22 R. 9
Notes 11–14

held that the decision could not, in an appeal from the final order, be objected to on that ground

An application for substitution may, in substance, be treated as an application to set aside the abatement[6] This, however, should not be done when the merits of the case are against the petitioner[7]

12 Remand. — Where an Appellate Court finds that there was an abatement in the lower Court it should not proceed to set aside the abatement but should remand the case for disposal under this rule[1]

Where an Appellate Court finds that the lower Court s refusal to set aside abatement is wrong and remands the application for re hearing the remand is not a final order[2]

13 Appeal. — No appeal lies from an order *setting aside* an abatement[1] As to whether an order setting aside abatement affects the decision on the merits within the meaning of Section 105 see Note 6 to Section 105 *ante* Under the Code of 1877 no appeal was allowed even from an order *refusing to set aside* an abatement But under the Code of 1882 as well as the present Code an appeal is allowed from such an order[2] But no such appeal will lie when there has been no application to the Court to set aside the abatement[3] It has been held by the Calcutta High Court[4] that an order refusing to set aside an abatement of an appeal cannot be appealed against But the contrary view has been held by the Patna High Court[5] See also Note 14

14. Letters Patent Appeal. — The Allahabad[1] and Calcutta[2] High Courts have held that an order of *a single Judge* declining to set aside or setting aside an abatement in an appeal is a "judgment within the meaning of Clause 10 of the Letters Patent (Allahabad) and Clause 15 of the Letters Patent (Calcutta) and that therefore a Letters Patent appeal is competent from such an order But the Bombay High Court[3] has held that an order setting aside an abatement under this rule is not a ' judgment ' within the meaning of Clause 15 of the Letters Patent and that no appeal lies from such an order

An order setting aside an abatement passed by a *Division Bench* of the High Court cannot according to the Madras High Court be set aside by another Bench of the High Court The remedy is by way of review[4]

6 (20) AIR 1920 All 284 (285) 42 All 540
(24) AIR 1924 Lah 424 (424)
(28) AIR 1928 Lah 746 (747)
(37) AIR 1937 Lah 455 (457)
7 (24) AIR 1924 Mad 713 (714)
(30) AIR 1930 Cal 422 (424) 57 Cal 148

Note 12

1 (25) AIR 1925 Bom 290 (291)
2 (25) AIR 1925 All 263 (263 264) 47 All 335

Note 13

1 (17) AIR 1917 All 434 (435)
(25) AIR 1925 Cal 473 (474) 52 Cal 472 (An ... not be ... setting ... tion is

to revision)
(38) AIR 1938 Bom 408 (409) I L R (1938) Bom 704
2 (34) AIR 1934 Lah 315 (315) (Application to bring on record legal representative of deceased party after expiry of time is application to set aside abatement—Order refusing to set aside

... 95
4 (29) AIR 1929 Cal 532 (533)
5 (38) AIR 1938 Pat 125 (126) 17 Pat 84 (AIR 1925 Pat 162 Followed)
(39) AIR 1939 Pat 623 (624)

1
2 ... R (193)
3
Bom 704
4 (16) AIR 1916 Mad 130 (131)

15. Revision — Generally speaking no revision lies from an order under this rule[1] But where the order is passed without jurisdiction[2] or without adverting to the bar of limitation involved[3] a revision will lie O 22 R. 9 Note 15

R. 10. [S 372] *(1)* In other cases of an assignment,[4] creation[8] or devolution[9] of any interest[5] during the pendency of a suit,[13] the suit may, by leave of the Court,[18] be continued by or against the person to or upon whom such interest has come or devolved O.22 R.10

Procedure in case of assignment before final order in suit

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule *(1)*

[1877, S 372 See S 146]

Synopsis

1 Legislative changes
2 Scope and applicability of the Rule
3 Other cases of assignment creation or devolution of interest pending suit
4 Assignment of interest
5 Interest
5a Attachment of decree '
6 Trial Court can bring assignee on record pending an appeal
7 Transfer of decree
8 Creation of interest
9 Devolution of interest
10 Insolvency of defendant
11 Representative suits See Note 9
12 Annulment of order of adjudication
13 During the pendency of a suit "
14 Application under this Rule when to be made
15 Execution proceedings
15a Sub rule (2) See Note 5a
16 Laches
17 No new suit
18 By leave of the Court
19 Effect of adding new parties under this Rule
19a Suit against municipality ' See Note 4a to Rule 4
20 Appeal
21 Letters Patent Appeal
22 Limitation

Other Topics (miscellaneous)

No application — Effect of See Notes 2 9 and 14
Sub rule (2) See Note 8
Personal actions See Notes 9 and 10

1 Legislative changes —

1 The words given either with the consent of all parties or after service of notice in writing upon them and hearing their objections if any which occurred in the old Section have been omitted

2 The words or devolved in the present sub rule (1) are new

3 The words either in addition to or in substitution for the person from whom it has passed as the case may be which occurred in the old Section have been omitted

4 Sub rule (2) is new

2 Scope and applicability of the Rule — The rule is an enabling one[1] It is based on the principle that the trial of a suit cannot be arrested merely by reason of a

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Note 15
1 (14) AIR 1914 Mad 116 (116)
(33) AIR 1933 Nag 85 (87) 29 Nag L R 118
(21) 63 Ind Cas 230 (230) (All)
(33) AIR 1933 Pat 27 (28)
2 (24) AIR 1924 Mad 713 (715)
3 (26) AIR 1926 Cal 444 (445)

Order 22 Rule 10 — Note 2
1 (05) 28 Mad 157 (160)
(35) AIR 1935 Pat 488 (489) 15 Pat 64

O. 22 R. 10
Note 2

devolution of the interest of a party in the subject matter of the suit that the person acquiring the interest may continue the suit with the leave of the Court but that if he does not choose to do so the suit may be continued with the original party and the person acquiring the interest will be bound by, or can have the benefit of, the decree as the case may be[2]

The rule applies to appeals in cases where the devolution takes place pending appeal[3] Similarly, the rule also applies to second appeals[4] It applies equally to cases of devolution of the interest of the *plaintiff* or of the *defendant*[5] and to the case of appellants as well as to that of respondents[6]

In order that this rule may apply

(1) There must be an *assignment, creation* or *devolution* of an interest in the subject matter of the suit[7]

(2) Such assignment, creation or devolution of interest must be by, or from, a *party* to the suit and not a stranger[8] Thus, an assignee from the *heir* of a deceased plaintiff who was himself not brought on the record, cannot apply under this rule[9]

(3) The person to whom the assignment, creation or devolution of interest takes place must be arrayed on the same side in the suit as the person from whom it has passed[10]

The rule is a residuary one governing cases *which are not provided for by the previous rules* of the Order,[11] so that if any of these other rules apply to the facts of a particular case, the effect of that rule cannot be got rid of by a resort to this rule[12] Where, however, there are two devolutions, *viz*, one by the death of a party (coming under Rules 3 and 4) and the other by a transfer of his interest (prior to his death), the transferee has the right to be impleaded under this rule and the death of the plaintiff cannot take away the right[13]

Rule 10 is only a permissive rule and does not impose a disability upon a person already on the record—Appeal by original party is competent)
(21) AIR 1921 Cal 422 (423)

pendency of suit—Appellate Court has no jurisdiction to implead assignee as party under this rule)
(1900) 22 All 231 (232 233)
(85) 9 Bom 151 (156 157)

4. (38) AIR 1938 Mad 757 (758)
5. (15) AIR 1915 Cal 771 (772)
6. (96) 18 All 285 (287)

(A widow of the deceased testator cannot apply to be brought on record as the 'legal representative' on the death of the executors who instituted the suit)
(25) AIR 1925 Mad 487 (488)
[*See* (36) AIR 1936 Lah 652 (656) ILR (1937) Lah 525]

9. (25) AIR 1925 Mad 1166 (1166)

(34) AIR 1934 Lah 190 (190) (Transfer by defendant during pendency of suit to plaintiff's knowledge — Transferee not made defendant—Appeal against defendant abating for not bringing his legal representative on record—Transferee cannot be brought on record at that stage)
[*See also* (33) AIR 1933 Sind 371 (373) (Devolution of interest by death — Rule has no application)

13. (25) AIR 1925 Cal 467 (468) (The two de-

It should be noted that there is no abatement under this rule[14] The rule contemplates the *substitution* of a new party and not the *addition* of a new party[15] See also the undermentioned case[16]

3. Other cases of assignment, creation or devolution of interest pending suit. — As has already been seen in Note 2, this rule provides for all cases not falling within the scope of the previous rules of the Order, such as Rules 2, 3 4, 7 and 8[1] The words "other cases," etc mean cases other than those specifically provided for in the preceding rules[2] Those words were in the undermentioned case[3] held to indicate that the rule did not apply to a case of death But such a restricted interpretation does not appear to be warranted by the rule It would seem to apply even to cases of death if such cases do not fall within the provisions of Rules 3 or 4 *ante*[4]

As illustrations of "other cases of assignment, creation or devolution of interest" falling within this rule may be mentioned cases of transfer *inter vivos*[5] or cases where a mortgagee party in a suit releases the property to the mortgagor[6] Where a suit is instituted against a widow for recovery of debt due by her husband and, pending the suit she gives birth to a posthumous son, the son can be brought on the record under the principle of this rule[7] Where a suit was instituted against the G I P Railway and pending the suit the line was taken over by the Government, it was held that the Government should be made a party under this rule[8] But there is no "assignment creation or devolution of interest" by a company going into liquidation[9]

In *Manindra Chandra Nandy* v *Ram Kumar*[10] the defendant in a suit for possession granted a lease of the suit property to another during the pendency of the suit The suit was decreed and it was sought to make the lessee a party to the proceedings for the ascertainment of mesne profits The lessee had surrendered the lease and did not claim to remain in occupation of the land The allegation against the lessee was that he had removed mica from the land and was liable for damages It was held by the Privy Council in the above circumstances that the lessee could not be proceeded against in the same suit and be made a party to the proceedings for the ascertainment of mesne profits The reason given was that there was no assignment, creation or devolution of interest within the meaning of this rule Their Lordships observed as follows in the course of their judgment ' The order (Order 22) contemplates cases of devolution of interest from some original party to the suit, whether plaintiff or defendant, upon some one else The more ordinary cases are death, marriage, insolvency, and then come the general provisions of Rule 10 for all other cases But they are all cases of devolution There is, it should be noted in this rule, a significant change of language from that used in the earlier Code, where it is stated in Section 372 as follows 'In other cases of assigument, creation or devolution of any interest pending

14. (29) AIR 1929 All 444 (446)
15 (38) 42 Cal W N 1183 (1185) (Application to add a party—This rule does not apply)
16 (38) 42 Cal W N 1183 (1185) (The language of O 22 R 10 is wholly inapplicable to a case where some one is seeking to come into the proceedings in order to put forward a claim adverse to that of the original parties in the proceedings)

Note 3

1. (06) 30 Bom 250 (258)
2 (05) 9 Cal W N 171 (173)
(36) AIR 1936 Lah 83 (84)
3. (92) 16 Bom 27 (28)
4. (05) 9 Cal W N 171 (173)
5 (21) AIR 1921 Mad 599 (603) 44 Mad 919 (FB)
(27) AIR 1927 Lah 501 (504) (Where owing to an arrangement in the form of a sale or partition the interest of the deceased respondent vested in the surviving respondent the appeal may by leave of Court continue against the surviving respondent)
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7.
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9.
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[illegible]

O.22 R.10
Notes 3-5

the suit, the suit may, with the leave of the Court, given either with the consent of all parties or after service of notice in writing upon them, and hearing their objections, if any, be continued by or against the person to whom such interest has come, either in addition to or in substitution for the person from whom it has passed, as the case may require' The words 'in addition to' in the earlier Code have disappeared But the matter does not rest upon this change The liability, if any, of the appellant (the lessee) to pay damages for the removal of the mica is not a liability which has devolved to him from the defendant Raja They were both liable, if liable at all, as trespassers and a case, if any, against the appellant (lessee) must rest upon his action and the direct relation established thereby between him and the plaintiffs"

So, it was held in *Rameshwar v Mt Ganpati*[11] that the "interest" referred to in Rule 10 is the interest of a person who was a *party* to the suit, and it is the transfer of the interest of such a person to the applicant that entitles him to continue the suit under this rule Hence, it was held that where a suit had been brought by the next reversioner challenging an alienation by a Hindu widow and the plaintiff died pending the suit, the sister of
as a result of Act II o'
the suit under this ru...
had been transferred to her by the above Act

The words " has come or devolved" connote an interest *in praesenti* A person who has a merely contingent interest cannot come in under this rule [12]

See also Note 2 above

4. Assignment of interest. — As pointed in Note 3 above, a transfer *inter vivos*, such as a sale,[1] or any other kind of transfer will come within the rule It is also not necessary that such transfer should be direct [2]

5. "Interest." — A right to maintain a suit,[1] the right to recover mesne profits given by a decree[2] and the rights and interests of a *patnidar*[3] are "*interests*" within the meaning of the rule But the interest must be an interest in the *subject-matter* of the suit[4] or one which is vitally affected by the suit [5] For instances where the rule was

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11. ('36) AIR 1936 Lah 652 (656) I L R (1937) Lah 525
12. ('37) AIR 1937 Mad 200 (207)

Note 4

1. ('24) AIR 1924 Mad 648 (648)
('02) 5 Oudh Cas 91 (92)
('84) 8 Bom 323 (334, 335) (A mortgagee whose security was created prior to the suit and who made a further advance on the same security after the institution of the suit and agreed to buy the property after the termination of the suit was allowed to continue the defence when the mortgagor expressed his intention of abandoning it)

to continue the pending suit for pre-emption creates an assignment within the meaning of the rule)

Note 5

1. ('28) AIR 1928 Mad 246 (248)
2 ('16) AIR 1916 Pat 10 (11) 1 Pat L Jour 427
3 ...
4

961, Followed)
('37) AIR 1937 Mad 200 (207) ('Interest' means interest in the subject matter of the litigation)

decree on the posthumous son)
5. ('18) AIR 1918 Pat 606 (606) (Addition of parties is in the discretion of the Court)

held not to apply on this ground, see the undermentioned cases[6] The word "interest" includes also a portion of the interest[7] **O.22 R.10 Notes 5-8**

A, the plaintiff in a suit, transferred his rights in the subject-matter of the suit by means of a sale deed in favour of *B*, whereupon *B* was added as a co plaintiff to the suit Then, *B* executed a deed in favour of *C*, his father, alleging that the sale deed by *A* was executed in his name only benami for his father and that even assuming that he had any rights under it, he relinquished them in favour of his father It was held that the latter deed did not constitute any assignment, creation or devolution of any *interest* within the meaning of this rule[8]

5a. Attachment of decree. — The mere attachment of a decree does not, except as provided for by sub rule (2) amount to assignment, creation or devolution of any such interest as is mentioned in sub-rule (1) of this rule[1]

Sub rule (2) provides that the attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub rule (1) The benefit indicated in sub rule (2) is the right to oppose or support the pending appeal[2]

See also Note 8 below

6. Trial Court can bring assignee on record pending an appeal. — Where the suit is pending, the mere fact that an appeal is filed from an interlocutory order made in the suit will not deprive the Court of first instance of its jurisdiction to implead parties under this rule[1]

7. Transfer of decree.—This rule does not apply to the transfer of a decree[1] See also the undermentioned case[2]

8. Creation of interest. — Under the old Code an attaching creditor of the decree pending appeal therefrom could not claim to be impleaded in the appeal[1] But in view of the present sub rule (2) he can However, even under the present rule, a person who has attached property has been held not entitled to be impleaded, in a mortgage suit regarding the attached properties[2]

6. (03) 30 Cal 961 (964) (Where after a decree for money against it a company has assigned all its properties with liabilities the assignee cannot be proceeded against as no property in suit has been assigned to him)

(95) 22 Cal 259 (265) (In a suit on mere money claim the insolvency of defendant creates no assignment of interest within the meaning of this rule)

(25) AIR 1925 Nag 423 (426) (Suit by widow for partition of widow s estate — The widow dying, no devolution of interest in the suit on the adopted son)

7 (21) AIR 1921 Mad 599 (600 603, 605) 44 Mad 919 (FB)

(33) AIR 1933 Mad 411 (413) 56 Mad 459 (Mortgagee of deceased plaintiff's share is entitled to continue appeal)

[But see (34) AIR 1934 Mad 485 (488) (Rule will apply to assignment of fractional share but will not apply to transfer of fractional interest such as in the case of a mortgagee)]

8. (36) AIR 1936 Oudh 224 (225)

Note 5a

1 (36) AIR 1936 All 857 (858)

2 (38) AIR 1938 Mad 757 (758)

Note 6

1 (23) AIR 1923 Bom 303 (303)

Note 7

can apply for execution under O 21 R 16)

2. (96) 18 All 86 (87) (Decree transferred to another before appeal — Appellant only making original decree holder respondent and not the assignee — In spite of notice of assignment, no steps taken to make assignee of decree respondent for a long time— Application then to substitute him as respondent was refused)

Note 8

1 (98) 20 All 38 (39)

2. (26) AIR 1926 Nag 67 (65)

O. 22 R. 10
Notes 8-9

An adoption does not create an interest within the meaning of this rule[3]

It has been held that this rule will apply to a person acquiring the rights of a mortgagee on the principle of subrogation[4]

9. Devolution of interest. — Where a suit is brought by or against a person in a representative character and a devolution of the representative interest takes place, the rule that is applicable is not Rule 3 or Rule 4 but Rule 10, whether such devolution is by virtue of the death of the person or for any other cause[1] Thus, it will apply to a public trust which is represented at different stages of a suit by different representatives[2] When a trustee dies or retires[3] or is removed from office[4] and another is appointed in his place the estate "devolves" on the new trustee within the meaning of this rule The fact that the original trustee was wrongly appointed as trustee will not make any difference[5]

The following are illustrations of other cases of such devolution of interest —

1 One of four *uralans* of a Malabar *devaswam* sued for redemption of a *kanom* The other *uralans* had been made party defendants. One of three latter died pending suit It was held it was a case of devolution under this rule[6]

2 The manager of an undivided Mitakshara family files a suit as manager of the family and dies pending suit The succeeding manager can come in under this rule[7]

3 The manager of an encumbered estate under the Chota Nagpur Encumbered Estates Act (VI of 1876) files a suit on behalf of the estate Pending the suit the estate is released and restored to the owner The owner can come in under this rule[8]

4 A receiver appointed in a suit files a suit on behalf of the estate. Pending suit he is discharged and another receiver is appointed in his place The latter can come in under this rule[9]

5 A suit was instituted claiming a right of pre emption and for possession of property as against the vendor Pending the suit the vendor s rights devolved on another person under another decree The latter *person* can be impleaded as defendant under this rule[10]

6 When the Court of Wards assumes the management of the estate of a party to a suit during the pendency of the suit, there is a devolution of interest within the meaning of this rule[11]

In cases of devolution other than by death, it should be noted that if the person on whom the estate devolves does not bring himself on record, the decree passed in the suit will be binding on him[12]

3 (16) AIR 1918 Nag 1 (6) 15 Nag L R 24

4 (39) AIR 1939 Nag 215 (216) (Where a mortgage is split up each part should be treated as an

8 (01) 28 Cal 171 (175)

9. [*See* (21) AIR 1921 Cal 422 (423)]

10. (87) 1887 Pun Re No 29, p 62 [*See also* (30) AIR 1930 Oudh 51 (52). (Suit for *rent by person claiming to be zamindar— ... to be zamindar under*

Note 9

1. (32) AIR 1932 Cal 783 (784)

2 (22) AIR 1922 Mad 402 (403) 45 Mad 703 (33) AIR 1933 Cal 329 (332) 60 Cal 794

3. (26) AIR 1926 Mad 540 (541)

4.

5.

6.

7. [illegible]

11 [See [illegible] 17 Pat 1 32 Sind L R 290 (P C) (*In this case* the Privy Council observed that it was arguable whether Rule 10 will apply to such a case but did not express any definite *opinion* on the point)]

12. (21) AIR 1921 Cal 422 (423) (28) AIR 1928 Mad 246 (248)

Where the cause of action is purely a *personal* one there can be no devolution of interest[13] An adoption creates no devolution of interest within the meaning of this rule[14]

10. Insolvency of defendant. — The rule applies also to the devolution of interest by operation of law. The insolvency of a defendant will cause a devolution of his estate on the Official Receiver or the Official Assignee as the case may be But the question whether, on the adjudication of a defendant pending suit the receiver in insolvency can come in under this rule will depend upon the "interest' involved in the suit[1] If it is a suit *in personam*, such as for instance a mere money suit no interest devolves on the receiver or assignee and he cannot come in under this rule[2] But if it is a suit relating to the "estate," such as a suit to enforce a mortgage, the receiver or assignee is entitled to come in and should be impleaded[3] If in such cases the receiver or assignee refuses to defend the suit, the insolvent cannot on that ground defend it[4] If, however, the suit is of such a nature that it can go on without the insolvent defendant, the receiver need not be made a party[5]

A person was adjudicated an insolvent during the pendency of a suit for maintenance against him A decree was passed in the suit declaring the maintenance as a charge on the property of the defendant It was held that as this rule was only permissive and did not impose any disability on a person already on the record, the insolvent could file an appeal against the decree[6]

See also Note 14 to Order 34 Rule 1

11. Representative suits. — See Note 9 above

12. Annulment of order of adjudication.—Where, pending a suit instituted by the Official Assignee, the adjudication is annulled without any condition, the *quondam* insolvent is entitled to be substituted as plaintiff under this rule[1]

13. "During the pendency of a suit." — The rule does not apply unless the assignment, creation or devolution of interest takes place *during the pendency of the suit* Thus, it does not apply if the assignment, creation or devolution of interest takes place *before the suit is instituted*[1] Where, however, the suit has been instituted, it is pending so long as the final decree has not been passed in it, the rule is thus applicable to cases of assignment, creation or devolution of interest, after the

13. (34) AIR 1934 Pesh 89 (90) (Official Assignee's suit for avoidance of transfer by insolvent—Pending suit composition scheme accepted and insolvents properties transferred to a trustee—Official Assignee s right of suit is personal and cannot devolve on the insolvent or on the trustee)

(12) 16 Ind Cas 908 (909) 40 Cal 323 (Suit

Cause of action purely personal)

14. (18) AIR 1918 Nag 1 (6) 15 Nag L R 24

[*See also* (91) 18 Cal 43 (44) (As to the interpretation of this decision see 25 Mad 406)]

3 (27) AIR 1927 P C 108 (109) 54 Cal 595 54 Ind App 190 (P C)

('35) AIR 1935 Lah 316 (317 318)

4 (15) AIR 1915 Bom 293 (299) 39 Bom 568

5. (30) AIR 1930 Cal 388 (390)

6 (37) AIR 1937 Mad 915 (917)

Note 12

1. (08) 32 Bom 321 (334)

Note 13

1 (28) AIR 1928 All 120 (123)

(10) 7 Ind Cas 481 (482) (Cal)

(24) AIR 1924 Mad 648 (649) (Court auction held before suit—Sale confirmed pending suit—*Held* sale dates back — So no transfer pending suit—R. 10 does not apply)

[*See* (37) AIR 1937 Sind 47 (48) (Suit instituted against a person who was subsequently found

O.22 R.10 Notes 13-14

preliminary and before final decree [2] In fact the Courts which hold that Rules 3 and 4 do not apply to cases of death after the preliminary decree, hold that this rule applies to such cases [3] The assignment of the rights of the plaintiff after a final decree has been passed in a mortgage suit although before sale under the decree is not an assignment during the "pendency of the suit" [4]

This rule does not authorize the addition of a party to the suit after decree[5] and the rule has been held not to apply to cases of assignment of interest between the date of the decree and the date of the filing of the appeal,[6] though the assignee can be joined in the appeal [7] Similarly, where a decree has been amended, the question whether the rule is applicable to cases of assignment, etc, of interest during the period between the original and the amended decree has been left undecided [8]

See also Note 14 below

14. Application under this Rule, when to be made. — The rule provides for a *continuation* of the suit by the assignee or other person on whom the interest has devolved Therefore, on the one hand, an application under the rule can be made at any time when the suit is pending,[1] on the other hand, it cannot be made *after a final* decree has been passed [2]

The fact that the assignee made no application when the suit was *pending* will not however debar him from filing an appeal from the decree as a person claiming under the party within the meaning of Section 146 [3] An application under this rule may also be made to the Appellate Court during the pendency of an appeal *from the* decree [4] Thus the assignee of the interest of a party in the subject matter of a suit during the pendency of the suit can come in at the stage of appeal or second appeal and apply to continue the same [5] A different view has, however, been held by the *Oudh* Chief Court [6]

to be dead — Person in whom property of deceased vested can be joined as party under O 1 R 10—O 22 R 10 has no application, the person sued being dead before suit)]

2. ('01) 23 All 331 (334 335 338)
('24) AIR 1924 Cal 188 (189)
('29) AIR 1929 Nag 142 (144) (F B)
('30) AIR 1930 Nag 212 (213)
('37) AIR 1937 Lah 615 (616)

3 ('29) AIR 1929 Nag 142 (144) (F B) (Decisions of other High Courts are considered on this point)
('21) AIR 1921 Nag 32 (33 34) 17 Nag L R 81

4 ('38) AIR 1938 Cal 169 (170) I L R (1937) 2 Cal 207 (Assignee can apply for execution of decree as a transferee under O 21 R 16)

6. ('35) AIR 1935 Lah 119 (120) (Assignment of

7. ('17) AIR 1917 Oudh 176 (17?) *20 Oudh Cas* 31 (Under Section 146)

8. ('23) AIR 1923 Mad 57 (58)

Note 14

1. ('30) AIR 1930 Cal 267 (269)
('15) AIR 1915 All 88 (88) 37 All 226 (*In suits requiring a preliminary and a final decree the application can be made at any time before the final decree*)
('03) 30 Cal 609 (611)
('16) AIR 1916 Pat 10 (11) (Decree *directing* ascertainment of mesne profits—*Right* to recover mesne profits assigned — Proceedings taken to ascertain mesne profits are proceedings in suit— Assignee should apply to Court for permission to sue)

('18) AIR 1918 Mad 409 (410)
('26) AIR 1926 Mad 244 (245)

3 ('19) AIR 1919 Mad 755 (756) 41 Mad 510

4 ('24) AIR 1924 Cal 90 (91)

5 ('38) AIR 1938 Mad 757 (758) (Assignee of interest in subject matter of suit pending in trial Court — Assignee can apply to continue second appeal against the decree in the suit)

15. Execution proceedings. — There is a conflict of views on the question whether the rule applies to execution proceedings On the one hand, the facts that the rule relates to assignment before the final order in the suit, that it relates to assignments *pending suit* and that it provides for a continuation of the *suit*, have been relied on for holding that the rule does not apply to execution proceedings On the other hand, the fact that Rule 12 makes no mention of this rule as one of those not applicable to execution has been relied upon for holding that by implication, this rule applies to execution proceedings also The former view has been held by the Allahabad High Court,[1] and the latter view by the Calcutta High Court [2] In Patna the applicability of the rule to execution proceedings has been doubted [3] A Full Bench of the Madras High Court[4] held by a majority that the present rule was applicable to execution proceedings But this decision has been explained away in a later case which has held the rule inapplicable to execution proceedings [5]

15a. Sub-rule (2). — See Note 5a above

16. Laches. — This rule vests in the Court a discretion in the matter of allowing the suit to be continued by or against the assignee, and the permission may be refused on sufficient grounds Thus, delay or laches will be a ground for refusing permission under this rule [1]

17. No new suit. — So long as no final decree has been passed, the assignee can carry on the suit, and cannot in disregard thereof, file a new suit for the same relief [1] And where an assignee is added in a pending suit the suit merely continues as against him and does not become a new suit [2]

18. "By leave of the Court." — An assignee under this rule is not entitled to continue the suit as a *matter of right* The leave of Court must first be obtained The granting of the leave is, however, discretionary with the Court [1] The discretion should be exercised judicially [2] Unnecessary delay on the part of the applicant will be a good ground for refusing leave under this rule [3] The assignee has the option of either getting impleaded or keeping quiet if he considers his interests already protected [4]

Note 15

1. ('88) 10 All 97 (106)
[*See also* ('30) AIR 1930 All 604 (604) (Not [illegible]]

[illegible]

3. ('21) AIR 1921 Pat 180 (181)
4. ('21) AIR 1921 Mad 599 (601, 603) 44 Mad 919 (F B)
5. ('27) AIR 1927 Mad 824 (824)

Note 16

1. ('24) AIR 1924 Cal 188 (189),
('33) AIR 1933 Cal 696 (699) 60 Cal 940 (Preliminary decree in partition suit—No steps taken beyond appointment of commissioner—Application after 53 years to substitute persons as [illegible]

Note 17

1. ('79) 5 Cal 726 (731)
2. (*'01*) *23 All 331 (335)*

Note 18

[illegible]

('24) AIR 1924 Cal 188 (189 190) (But the application will as a rule be allowed to avoid multi[illegible]

[illegible] discretion, Court has to look at the position and see what is contemplated and what is likely to happen)
2. ('36) AIR 1936 Mad 714 (715).
3. ('36) AIR 1936 Lah 652 (657) I L R (1937) Lah 525
('36) AIR 1936 Mad 714 (715)
4. ('30) AIR 1930 All 380 (381).

O. 22 R. 10
Notes 18–20

The leave should not be given without *notice* to the party concerned[5] While the admission of assignment by such party is sufficient for giving the leave, it should not be refused merely because the assignment is challenged[6] In such cases the Court should go into the question of the truth or validity of the assignment[7] But where, in addition to the assignment being disputed, there has been long delay in making the application, leave may be refused[8]

19. Effect of adding new parties under this Rule. — As already pointed out (in Note 17 above) the suit only *continues* against the assignee He will be entitled to continue the further proceedings from that date but is bound by all orders passed up to that date[1] Similarly, after the assignee is impleaded, the assignor, though on record, will be concluded by all legal and *bona fide* proceedings taken by or against the assignee[2] Where a person is allowed to continue an appeal on an application by him under this rule and the appeal is dismissed with costs, he is liable for the full costs of the respondent in the appeal and not merely for the costs incurred from the date of his application under this rule[3]

Generally speaking the assignee will not be allowed to set up a case inconsistent with the one set up by his assignor But, in cases of institutions represented at different stages by different representatives, the Court has a discretion to allow amendments and new pleas in order to avoid multiplicity of suits[4]

See also the undermentioned case[5]

19a. Suit against municipality. — See Note 4a to Rule 1 *ante*

20. Appeal. — Under the old Code there was a conflict of opinions regarding the appealability of an order granting or refusing permission under this rule[1] This is no longer of any interest as the present O 43 R 1 (l) gives a right of appeal from an order granting, as well as from an order refusing, such leave[2] In fact an appeal is the only remedy of a party aggrieved by such order[3]

Where an order purports to be passed under this rule an appeal will lie, even though, on the facts, the order is improper[4] But where the order is not one under

istinct from

Mad 802

Note 19

1. ('20) AIR 1920 Mad 391 (396) 43 Mad 37
2. ('27) AIR 1927 P C 57 (59, 60) 51 Bom 442 54 Ind App 111 (PC)
3. ('33) AIR 1933 Mad 411 (413) 56 Mad 409
4. ('22) AIR 1922 Mad 402 (403) 45 Mad 703
5. ('32) AIR 1932 Bom 462 (464) (Suit by inamdar against tenants for recovery of assessment—Decree for plaintiff—Subsequently third party purchasing the land — The vendee intervened in appeal and also filed second appeal — Both dismissed merely confirming first Court's decree—No liability on the vendee—Decree cannot be executed against him)

Note 20

1. ('85) 7 All 681 (687)

('99) 4 Cal W N 403 (404)

tiffs—Order cannot be partly appealable and partly non appealable)

4 ('21) AIR 1921 Mad 599 (600 601) 919 (F B)
5. ('17) AIR 1917 Cal 560 (560)
('17) AIR 1917 Cal 627 (628)

substituting) does not come under this rule and an order allowing or refusing such an application is therefore not open to appeal[6] **O. 22 R 10 Notes 20-22**

No second appeal lies from an order under this rule[7]

See also the undermentioned case[8]

21. Letters Patent Appeal. — An order refusing the application of an assignee of the plaintiff under this rule is a 'judgment' within the meaning of Clause 15 of the Letters Patent[1]

22. Limitation. — The right to make an application under this rule is a right which accrues from day to day There is therefore no limitation for the application which can be made at any time[1]

Before the insertion of sub section (2) to Section 22 of the Limitation Act of 1908 there was a conflict of opinion as to whether the Section applied to parties added under this rule One view was that it did[2] Another view was that it did not[3] The insertion of sub section (2) in Section 22 of the Limitation Act now makes it clear that that Section does not apply to parties added under this rule See also the undermentioned case[4]

R. 11. [S 582] In the application of this Order to appeals, so far as may be, the word "plaintiff" shall be held to include an appellant, the word "defendant" a respondent, and the word "suit" an appeal **O. 22 R. 11**

Application of Order to appeals

Local Amendment

CALCUTTA

Add the following

Provided always that where an Appellate Court has made an order dispensing with service of notice of appeal upon legal representatives of any person deceased under O 41 R 14 (3) the appeal shall not be deemed to abate as against such party and the decree made on appeal shall be binding on the estate or the interest of such party

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and is not appealable)

Note 21

1 ('01) 24 Mad 252 (254)

Note 22

1 ('82) 8 Cal 420 (421)

('03) 30 Cal 609 (612)
('24) AIR 1924 Cal 90 (91)
('21) AIR 1921 Nag 32 (33 34) 17 Nag L R 81
('27) AIR 1927 Oudh 156 (158) 2 Luck 464
('35) AIR 1935 Lah 316 (317)

2 ('98) 25 Cal 409 (412)
('07) 34 Cal 612 (617 618) (FB)
('10) 5 Ind Cas 115 (116) (Cal)

3 ('80) 5 Cal 720 (724)
('07) 1907 Pun Re No 3 page 23

4 ('35) AIR 1935 Lah 316 (318) (Suit to enforce mortgage—Pending suit mortgagor adjudicated insolvent—Suit dismissed—Appeal—Application to implead Official Receiver as respondent but beyond limitation period — *Held* he can be impleaded under this rule.)

O 22 R. 11
Note 1

Synopsis

Other Topics (miscellaneous)

1. Scope of the Rule —The effect of this rule is to make the provisions of the previous rules applicable as far as may be to appeals [1] See also Notes under the various rules A decree passed without impleading the legal representatives of a party who has died pending appeal is a nullity [2] Further the result of not impleading in time the legal representative of a party who has died pending appeal will be to cause an abatement of the appeal so far as that party is concerned [3] The fact that in another independent appeal from the same decree the legal representatives have been impleaded will not be enough [4] But where the legal representative has of his own accord come on record no further application by the appellant is necessary [5] There will be no abatement when the deceased is only a *pro forma* respondent [6] This rule and consequently the provisions of the previous rules do not apply when the devolution of interest takes place before the filing of the appeal *i e*, after the decree in the suit and before the appeal is filed [7]

The rule has been held to be inapplicable to an application under Section 21 A of the Punjab Alienation of Land Act [8]

Order 22 Rule 11 — Note 1

1 (04) 31 Cal 487 (494) 31 Ind App 71 (P C)
(33) AIR 1933 All 388 (389) 55 All 509 (Rule 8 applies)
(34) AIR 1934 All 1011 (1012) (Rule 8 (1) applies)
(0) 28 Mad 359 (360)
(21) 59 Ind Cas 238 (239) (Lah)
(5) AIR 1925 Rang 95 (96) 2 Rang 445 (Rule 2 applies)
(27) AIR 1927 Bom 156 (157) (Rule 3 applies)
(66) 3 Bom H C R 81 (81) (Do)
(21) AIR 1921 Lah 160 (161) (Rule 4 applies.)
(28) AIR 1928 Pat 250 (252) 7 Pat 285 (Do)
(11) 12 Ind Cas 871 (871) 1911 Pun Re No 60
(85) 8 Mad 300 (303) (Rule 5 applies)
(09) 2 Ind Cas 412 (413) 36 Cal 418 (Rule 9 applies)
(55) 9 Bom 151 (157) (Rule 10 applies)
(26) AIR 1926 Lah 329 (330)
(35) AIR 1935 Lah 478 (478) 155 Ind Cas 610 (611)
(34) AIR 1934 All 1029 (1030) (Right to sue should be taken to mean right to appeal)

2 (02) 26 Bom 317 (319)

3 (02) 26 Bom 203 (206)
(2) AIR 1927 All 331 (332)
(26) AIR 1926 Cal 193 (203)
(14) AIR 1914 Mad 708 (700) 38 Mad 1064
Defendant s appeal abates)

4 (31) AIR 1931 Mad 277 (277)

5 (19) AIR 1919 Mad 1026 (1027)
(34) AIR 1934 Mad 449 (452) (Deceased

(27) AIR 1927 Lah 779 (7 9)
(38) AIR 1938 Cal 639 (640) (Legal representative of *pro forma* respondent not brought on record—Appeal does not abate in *toto*)
(35) AIR 1935 Cal 202 (203)

7 (96) 18 All 66 (67)
(26) AIR 1926 Lah 329 (330)
(81) 3 Mad 236 (238)

8 (30) AIR 1930 Lah 775 (775) 11 Lah 700

The rule has no application to appeals pending in Courts which have no jurisdiction to entertain them [9]

After abatement of an appeal, the trial Court has no jurisdiction to go on with the proceedings taken in pursuance of an order of the Appellate Court which was intended to operate only during the pendency of the appeal [10]

2. Abatement of appeals in personal actions — As a general rule the right to appeal in a *personal* action does not survive on the death of either party [1] But there are certain personal claims like a claim for damages with respect to which a suit and an appeal will stand on different footings So long as such claims remain unconverted into a decree as, for instance, where the suit to enforce the claim is dismissed and there is an appeal against the dismissal, the appeal will abate on death of the party [2] But if the suit has been *decreed* and the appeal is against the decree the death of either party will not cause abatement of the appeal [3] The principles underlying the above have been discussed in Rules 1, 3 and 4 *supra* If the suit is decreed in the lower Court, but set aside in first appeal and the death takes place pending a second appeal, there will be no abatement [4] The reason is that the claim having once been converted into a decree, the fact that the decree has been set aside in first appeal will not affect the survival of the right

3. Appeal by several defendants on grounds common to all. — Where the appeal is by several defendants on a ground common to all of them and one of them dies and his legal representatives are not impleaded within time, the entire appeal can nevertheless proceed as a whole The reason is that there is an abatement only so far as the deceased is concerned But from the nature of the appeal any one of the appellants can get a reversal of the *whole* decree [1]

4. Death of one of two representatives suing or sued in a representative capacity. — See Note 24 to Order 1 Rule 8

5. Suit under Section 92 — Appeal by surviving plaintiff See Note 30 to Section 92

6. Guardian cases — Abatement of appeal. — Where the right to guardianship is based on a *personal* preference the appeal relating to such right will abate on the death of the party [1] otherwise it will not [2]

9 (35) AIR 1935 All 92 (92 93)
10 (36) AIR 1936 Lah 618 (619)

Note 2

1 (19) AIR 1919 Lah 18 (19) 1919 Pun Re [illegible]

cannot be resurrected against representatives of debtor)

2 (18) AIR 1918 Mad 1100 (1101 1102)

for damages for breach of contract of marriage—Suit dismissed—Appeal by plaintiff — Pending appeal plaintiff dies — Appeal abates—It was assumed however that the right of appeal in respect of the amount of pocket expenses incurred while the contract was in execution could be

3 (02) 26 Bom 597 (608)
(03) 26 Mad 499 (500)
(39) AIR 1939 Nag 256 (258)

4 (17) AIR 1917 Upp Bur 14 (15) 2 Upp Bur Rul 105

Note 3

1 (03) 25 All 27 (28)

Note 6

1 (99) 23 Bom 719 (722)
2 (17) AIR 1917 Lah 355 (356)

O. 22 R. 11 Notes 7-10

7. Appellate Court's power to declare abatement of suit. — When the sole plaintiff respondent dies in appeal and the defendant appellant claims to be his legal representative, it is not the suit but the appeal that abates [1]

8. Appeal in suit for waqf property. — Certain persons sued in their capacity as followers of a shrine for a declaration that certain property was *waqf* property They succeeded in the suit and there was an appeal against the decree Pending appeal one of the plaintiffs respondents died It was held that appeal did not abate [1]

9. Death during pendency of appeal to the Privy Council. — The judgment of the Privy Council is an order of the Sovereign Order 22 of the Code has no application to appeals before the Privy Council Consequently, on the death of a party in an appeal pending before the Privy Council, no question of impleading legal representatives or of limitation therefor arises[1] and the judgment given without impleading legal representatives is not, on that ground, a nullity [2]

10. Limitation for application for substitution. — Under the old Code and the old Limitation Act there was a good deal of controversy as to the Article of the Limitation Act applicable to applications for substitution under the Section corresponding to this rule [1] But this is now of no practical importance as the limitation for all applications under this rule is specifically provided for in Articles 176 and 177 of the Limitation Act, 1908, under which the application should be filed within ninety days of the death of the party

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Local Amendment

MADRAS

O. 22 R 11A (Madras)

After Rule 11, *add* the following as Rule 11A

"11A The entry on the record of the name of the representative of a deceased

. . . . .

O. 22 R. 12

Application of Order to proceedings

R. 12. [New.] Nothing in rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order.

Note 7

1. ('19) AIR 1919 All 355 (356) 41 All 283

Note 8

1 ('21) AIR 1921 Lah 330 (331)

Note 9

1 ('09) 4 Ind Cas 454 (456) (Cal)

2 ('20) AIR 1920 Pat 89 (91 92) 5 Pat L Jour 314

('32) AIR 1932 Pat 261 (262) 11 Pat 445

Note 10

1. *See the following cases*

('88) 10 All 264 (267 269) (FB)

('07) 29 All 535 (536)

('86) 10 Bom 663 (665)

('8) 11 Cal 694 (696)

('86) 12 Cal 590 (593) (FB)

('07) 34 Cal 1020 (1022, 1023)

('05) 28 Mad 493 (4 J)

('84) 1884 Pun Re No 133 page 337.

Local Amendments

ALLAHABAD

At the end of the rule *add* the words

"or to proceedings in the original Court taken after the passing of the preliminary decree where a final decree also requires to be passed having regard to the nature of the suit"

OUDH

Add the following

"or to proceedings in the original Court taken after the passing of the preliminary decree where a final decree also requires to be passed having regard to the nature of the suit"

Synopsis

1. Execution proceedings | **2 Allahabad amendment**

1. Execution proceedings. — This rule is new Under the old Code there was a great difference of opinion as to whether the provisions relating to abatement contained in the previous rules applied to execution proceedings In several cases it was held that *they did not*[1] *and the present rule affirms the view expressed in those cases* [2]

It should be noted that the only provisions specified as not applicable to execution proceedings are those contained in Rules 3, 4 and 8 and that, even as to these it is only in respect to the *abatement* of the proceedings that those rules do not apply [3] In other words, the rule cannot be interpreted to mean that no substitution can be made in execution proceedings[4] and the Judicial Committee have specifically laid down that such substitution can be made [5] On the death, therefore, of a decree holder, pending an execution proceeding, can his legal representative get himself substituted and carry on the proceedings, or should he file a separate execution application? The Bombay,[6] Calcutta[7] and Nagpur[8] High Courts have held that he can continue the proceedings and that he need not present a separate execution application

(86) 1886 Pun Re No 103 page 248
(87) 1887 Pun Re No 42 page 91

Order 22 Rule 12 — Note 1

1 (81) 3 All 759 (765)
(80) 5 Cal L Rep 108 (111)
(84) 6 All 255 (259)
('78) 3 Bom 221 (222)
(95) 19 Bom 276 (281)
(96) 23 Cal 686 (689)
(83) 6 Mad 160 (161)
(92) 15 Mad 399 (400)
(08) 31 Mad 77 (79)

pending exe ution proceeding does not abate by reason of the death of any of the joint decree-holders)
(31) AIR 1931 Bom 425 (427)
(26) AIR 1926 Cal 957 (958)
(31) AIR 1931 Bom 425 (427)
(35) AIR 1935 All 27 (28)
(32) AIR 1932 Pat 222 (223) 11 Pat 546 (It is

ment debtor application for execution does not

[*See also* (24) AIR 1924 Mad 132 (132) 47 Mad 63 (It is desirable to bring them on the record)

not take steps for substitution under O 22 R 3, but may apply to carry on the proceedings or may file a fresh application)

O. 22 R 11 Notes 7-10

7. Appellate Court's power to declare abatement of suit — When the sole plaintiff respondent dies in appeal and the defendant appellant claims to be his legal representative it is not the suit but the appeal that abates [1]

8 Appeal in suit for waqf property — Certain persons sued in their capacity as followers of a shrine for a declaration that certain property was *waqf* property They succeeded in the suit and there was an appeal against the decree Pending appeal one of the plaintiffs respondents died It was held that appeal did not abate [1]

9 Death during pendency of appeal to the Privy Council — The judgment of the Privy Council is an order of the Sovereign Order 22 of the Code has no application to appeals before the Privy Council Consequently on the death of a party in an appeal pending before the Privy Council no question of impleading legal representatives or of limitation therefor arises[1] and the judgment given without impleading legal representatives is not on that ground a nullity [2]

10 Limitation for application for substitution — Under the old Code and the old Limitation Act there was a good deal of controversy as to the Article of the Limitation Act applicable to applications for substitution under the Section corresponding to this rule [1] But this is now of no practical importance as the limitation for all applications under this rule is specifically provided for in Articles 176 and 177 of the Limitation Act 1908 under which the application should be filed within ninety days of the death of the party

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Local Amendment

MADRAS

After Rule 11 *add* the following as Rule 11A

O 22 R 11A (Madras)

11A The entry on the record of the name of the representative of a deceased appellant or respondent in a matter pending before the High Court in its appellate jurisdiction except in cases under appeal to the King in Council shall be deemed to be a *quasi* judicial act within the meaning of Section 128 (2) *(i)* of the Code of Civil Procedure and may be performed by the Registrar provided that contested applications presented out of time shall be posted before a Judge for disposal

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O 22 R 12 **Application of Order to proceedings**

R. 12. [New] Nothing in rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order

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Note 7

1 (19) AIR 1919 All 355 (356) 41 All 253

Note 8

1 (21) AIR 1921 Lah 390 (391)

Note 9

1 (09) 4 Ind Cas 4 4 (4 6) (Cal)

2 (0) AIR 19 0 Pat 89 (91 92) 5 Pat L Jour 314

(32) AIR 1932 Pat 261 (262) 11 Pat 445

Note 10

1 *See the follow g cases*

(85) 10 All 264 (7 269) (FB)

(07) 29 All 535 (36)

(86) 10 Bo (63 (665)

(8) 11 Cal (04 ((06)

(86) 12 Cal 590 (93) (FB)

(07) 34 Cal 10 0 (1022 10 3)

(0) 23 Mad 498 (4 9)

(84) 1884 Pun Re No 133 page 357

Local Amendments

ALLAHABAD

At the end of the rule *add* the words

"or to proceedings in the original Court taken after the passing of the preliminary decree where a final decree also requires to be passed having regard to the nature of the suit"

OUDH

Add the following

"or to proceedings in the original Court taken after the passing of the preliminary decree where a final decree also requires to be passed having regard to the nature of the suit

Synopsis

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1. Execution proceedings. — This rule is new Under the old Code there was a great difference of opinion as to whether the provisions relating to abatement contained in the previous rules applied to execution proceedings In several cases it was held that they did not[1] and the present rule affirms the view expressed in those cases [2]

It should be noted that the only provisions specified as not applicable to execution proceedings are those contained in Rules 3, 4 and 8 and that, even as to these it is only in respect to the *abatement* of the proceedings that those rules do not apply [3] In other words, the rule cannot be interpreted to mean that no substitution can be made in execution proceedings[4] and the Judicial Committee have specifically laid down that such substitution can be made [5] On the death, therefore, of a decree holder, pending in execution proceeding can his legal representative get himself substituted and carry on the proceedings, or should he file a separate execution application? The Bombay,[6] Calcutta[7] and Nagpur[8] High Courts have held that he can continue the proceedings and that he need not present a separate execution application

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Order 22 Rule 12 — Note 1

1. (81) 3 All 759 (765)
(80) 5 Cal L Rep 108 (111)
(84) 6 All 255 (259)
(78) 3 Bom 221 (222)
(95) 19 Bom 276 (281)
(96) 23 Cal 686 (689)
(83) 6 Mad 180 (181)
(92) 15 Mad 399 (400)
(08) 31 Mad 77 (79)

2 (32) AIR 1932 Mad 73 (82) 55 Mad 352 (FB)
(09) 3 Ind Cas 324 (326) (Cal)
(29) AIR 1929 Pat 200 (200) (By virtue of O 22 R 12 nothing in R 3 applies to proceedings in execution of a decree or order and therefore a pending execution proceeding does not abate by reason of the death of any of the joint decree holders)
(31) AIR 1931 Bom 425 (427)
(26) AIR 1926 Cal 957 (956)
(31) AIR 1931 Bom 425 (427)
(35) AIR 1935 All 27 (28)
(32) AIR 1932 Pat 222 (223) 11 Pat 546 (It is not necessary that in execution proceedings representatives of a judgment debtor should be brought on record within ninety days)
(36) AIR 1936 Bom 456 (457) (On death of judgment debtor application for execution does not abate)

(20) AIR 1920 All 171 (172) 42 All 570
(35) AIR 1935 Pat 117 (118) 13 Pat 777
[*See also* (24) AIR 1924 Mad 132 (132) 47 Mad 63 (It is desirable to bring them on the record)

not take steps for substitution under O 22 R 3, but may apply to carry on the proceedings or may file a fresh application)

O. 22 R. 12
Notes 1-2

According to the Madras High Court,[9] the legal representative can be substituted under Section 146 and O 21 R 16 and allowed to *continue* the *application* The High Court of Patna[10] has also taken the same view as that of the High Court of Madras Thus, there is a consensus of judicial opinion that the deceased decree holder's legal representative can carry on the execution proceeding started by the decree holder and need not file a fresh execution application. Similarly, where a judgment debtor dies during the pendency of an application for execution, a fresh application for execution is not necessary for proceeding against the legal representatives of the deceased[11] Where such substitution is allowed there is no fixed time within which the application should be made[12] But such an application for substitution will not be a step in aid of execution[13]

There is a conflict of opinion as to the applicability of this rule to *appeals* against orders in *execution* It has been held by the High Courts of Madras,[14] Allahabad,[15] Lahore[16] and Nagpur,[17] by the Chief Court of Oudh[18] and by the Sind Judicial Commissioner's Court,[19] that an appeal against an order made in execution proceedings is not itself a proceeding in execution of a decree or order, that this rule does not apply to appeals against orders made in execution proceedings and that such appeals are subject to the same rules in regard to abatement as any other appeals The Calcutta High Court[20] has also held that where in an appeal relating to the execution of a joint decree one of the decree holders respondents dies and his legal representatives are *not brought on the record within the prescribed period of limitation*, the appeal cannot proceed against the surviving respondents alone The High Court of Patna[21] has, on the other hand, held that this rule applies to such appeals

Under the old Code, proceedings for the ascertainment of mesne profits were proceedings in execution and therefore this rule applied to such proceedings[22] Under the present Code, however, the position is different See also Note 19 to Rule 3 and Note 13 to Rule 10 as to the procedure applicable to cases where a party dies between the preliminary and final decrees in a suit

An application to set aside a sale is not a proceeding in execution for, after the sale and the subsequent deposit of the sale amount the execution is complete. Consequently, this rule does not apply to such applications[23]

See also the Notes to the respective rules of the Order as to their applicability to execution proceedings

2. Allahabad amendment. — The amendment of this rule made by the

14. (32) AIR 1932 Mad 574 (575, 576) 55 Mad 1006
(34) AIR 1934 Mad 664 (664)
(28) AIR 1928 Mad 772 (773) 51 Mad 658
15. (33) AIR 1933 All 858 (859) 55 All 509 (Rule 8 of this Order therefore applies to appeal against orders in execution)
16. (36) AIR 1936 Lah 1022 (1024) I L R (1937) Lah 50
[*See also* (21) AIR 1921 Lah 219 (220)]

AIR 1934 Oudh 337 (340)
AIR 1938 Sind 239 (240) I L R (193)
20. (19) AIR 1919 Cal 1053 (1053)
21. ('29) AIR 1929 Pat 565 (568) 9 Pat 372 (F B)
22. (25) AIR 1925 P C 117 (117) 4 Pat 507 52 Ind App 188 (P C)
('21) AIR 1921 Pat 185 (186)
23. (23) AIR 1923 Pat 29 (30, 30) 2 Pat 249

Note 2

ORDER XXIII.

WITHDRAWAL AND ADJUSTMENT OF SUITS

Withdrawal of suit or abandonment of part of claim

R. 1. [S 373] *(1)* At any time after the institution of a suit[10] the plaintiff may, as against all or any of the defendants,[21] withdraw his suit or abandon part of his claim

(2) Where the Court is satisfied —

(a) that a suit must fail by reason of some formal defect,[25] or

(b) that there are other sufficient grounds[26] for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,

it may, on such terms as it thinks fit,[31] grant the plaintiff permission[27] to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit[29] in respect of the subject-matter of such suit or such part of a claim

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission[35] referred to in sub-rule *(2)*, he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit[32] in respect of such subject matter[33] or such part of the claim

(4) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others

[1877, S 373, 1859, S 97 See S 11, O 2 R 2]

Synopsis

1 Legislative changes
2 Scope, object and applicability of the Rule
3 Applicability of Rule to appeals
4 Suits in Rent Courts
5 Probate proceedings
6 Execution proceedings
7 Insolvency proceedings
8 Application for final decree
9 Set off
10 " At any time after the institution of a suit "
11 Power of appellate Court to allow withdrawal of suit
12 Withdrawal of suit by plaintiff appellant
13 Withdrawal of suit by plaintiff respondent
14 Withdrawal of application for execution
15 Withdrawal of application for entering up satisfaction of decree
16 Withdrawal of application for withdrawal of suit.
17 Withdrawal of suit on behalf of minor
18 Withdrawal of suit by pauper plaintiff
19 Withdrawal of suit by some of several plaintiffs
19a Withdrawal of representative suits
20 Withdrawal of suit by vakil
20a Withdrawal of suit by benamidar

O.23 R.1
Notes 1–2

Other Topics (miscellaneous)

1. Legislative changes.—Under the law before the Code of 1859 the Court's leave was not necessary for bringing a fresh suit where a suit had been withdrawn by the plaintiff[1] Section 97 of the Code of 1859 gave power to the Court to permit a suit to be withdrawn with liberty to sue afresh, if it was satisfied that there were sufficient grounds for such a course The words as to the suit failing by reason of some formal defects were first introduced in the Code of 1877

2. Scope, object and applicability of the Rule. — The law as to the withdrawal of suits as enacted in the present rule is as follows —

(a) A plaintiff can withdr [illegible] permission of the Court But in this case he [illegible] of action He cannot withdraw a [illegible]

(b) A plaintiff may, in the circumstances mentioned in sub rule (2), be *permitted by the Court to withdraw* from a suit with liberty to sue afresh on the same cause of action[3]

The rule does not apply to *alternative claims* on the same cause of action[3] No permission to withdraw a suit can be granted where the deficiency in court fee has not been paid[4] The reason is that there is no proper suit till the deficiency in court fee is made up

A suit does not cease to exist in the eye of the law merely because an application is made by the plaintiff for the withdrawal of the suit The suit does not cease to exist

Order 23 Rule 1 — Note 1

1 (70) 7 Bom H C R A C 23 (24)

[illegible]

1 [illegible]

(3 [illegible]

2 [illegible]

[*See also* (20) AIR 1920 Mad 10 6 (10) (*Obiter*)]

3 (26) AIR 1926 Bom 163 (192)

[But see (24) AIR 1924 Bom 119 (126 12) 48 Bom 203]

4 (34) AIR 1934 All 359 (360)

till an order is made by the Court on the application[5] It is, therefore, open to the Court to consider and decide any objections that may be made to the withdrawal of the suit before passing orders on the application to withdraw the suit[6]

Where, on the death of one of several co plaintiffs in a case his sons are sought to be added as legal representatives but on their refusal to be joined as co plaintiffs, they are joined as *pro forma* defendants, there is no withdrawal of suit by the legal representatives within the meaning of this rule[7]

Where the *Court dismisses* a suit as against certain defendants on the ground of misjoinder of parties and causes of action there is no 'withdrawal or abandonment by the plaintiff[8]

3. Applicability of Rule to appeals. — The present rule applies also to appeals and an Appellate Court can therefore allow the withdrawal of an appeal with liberty to bring a fresh appeal or suit[1] The High Court may allow a second appeal to be withdrawn[2] The effect of the withdrawal without liberty of an appeal is to make the decree of the lower Court *res judicata* and the only executable decree in the case[3]

In the undermentioned case[4] it was held by the Bombay High Court that the *appellant is entitled as of right to withdraw his appeal provided that the respondent* has not acquired any interest thereunder, but that if the respondent has obtained any rights under the appeal, it is not open to the appellant to withdraw his appeal without permission

4 Suits in Rent Courts — The rule does not apply to suits under the Bengal Tenancy Act which is a complete Code in itself[1] Nor will the withdrawal without permission of an application under Section 105 of the Act or of a suit under Section 106

5
(

lants—Until orders are passed on the application

order to have passed was to reject the plaint and that a fresh suit was not barred)]

Note 3

[See however (38) AIR 1938 Bom 442 (443) I L R (193) Bom 66 (Clearly the provision

(03) 4 Ind Cas 137 (138) (Bom) (Decree in favour of dead person without legal representative void—Appeal and withdrawal—Defendant appellant not thereby estopped from pleading inexecutability)]

4 (38) AIR 1938 Bom 442 (443) I L R (1939)

to do so but that the Appellate Court had power to allow him to do so—Appellate Court might where appellant desires to withdraw and it has no jurisdiction to allow him to do so transpose the appellant as respondent and the respondent as appellant and proceed with the appeal but is not bound to do so always)

Note 4

1 (69) 11 Suth W R 46 (46)
(69) 11 Suth W R 3 (4)

O. 23 R. 1
Notes 4–9

of the Act bar a fresh suit in the Civil Court in respect of its subject matter The meaning of sub rule (2) of O 23 R 1 is that the plaintiff shall be precluded from bringing a fresh suit in *that* or in any Court of *similar* or *co ordinate jurisdiction* [2]

But the rule applies to suits under the North West Provinces Rent Act 1851, inasmuch as the Rent Courts under that Act are governed by the Code in those matters on which the Act is silent [3]

5. Probate proceedings. — The rule does not apply to applications for probate, inasmuch as Section 55 of the Probate and Administration Act (now Section 268 of the Succession Act of 1925) which provides that the provisions of the Civil Procedure Code should apply to proceedings for probate is limited by the words "so far as circumstances of the case permit [1]

6. Execution proceedings. — The rule does not apply to execution proceedings [1] including claim proceedings[2] as is made clear by Rule 4, *infra* The undermentioned cases[3] holding the contrary view are no longer good law See also Note 14 *infra*

7. Insolvency proceedings. — This rule read with Section 141 applies to proceedings in insolvency [1]

8. Application for final decree. — Where an application for final decree is withdrawn, it does not preclude a second application for the same purpose [1] The reason is that O 23 R 1 applies only where a *suit* or part of a *suit* is withdrawn

9. Set-off. — It is doubtful whether a defendant claiming a set off can be allowed to withdraw his claim for set off with liberty to sue again for the amount which formed the subject matter of such claim [1] But it has been held that where a defendant withdraws a plea of set off he will not be debarred from raising the same plea in a subsequent suit against him by way of *defence* [2]

Where the defendant in a suit makes a counter claim to the suit, but the plaintiff withdraws his suit with liberty to file a fresh suit, the counter claim can be continued as a plaint and can be proceeded with on the merits [3]

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(08) 35 Cal 990 (995)
(94) 21 Cal 514 (516 517 518)
(94) 21 Cal 428 (430)
(67) 7 Suth W R 302 (302)
(1864) 1864 Suth W R 47 (48) (FB)
he Bengal

2 ader S 106

((Application under S 105 of the Bengal Tenancy Act)
(1900) 5 Cal W N (8 N) cal (Application under S 104 Bengal Tenancy Act)
[But see (3) AIR 1923 Cal 624 (626) 50 Cal 626 (Civil suit barred by reason of provisions in S 109 Bengal Tenancy Act)]

3 (83) 5 All 406 (413)

Note 5

1 (17) AIR 1917 Pat 41 (42) 2 Pat L Jour 535
(32) AIR 1932 Lah 290 (291) (Permission *held* implied in this case AIR 1920 Lah 194, Followed)
[*See* (96) 19 Mad 458 (459 460)]
[*See also* (10) 6 Ind Cas 912 (916, 917) (Cal)]

Note 6

1. (92) 1892 Pun Re No 37 page 148

(92) 15 Mad 240 (241)
(91) 18 Cal 515 (518)

2 (07) 4 Low Bur Rul 75 (75)
[*See* (25) AIR 1925 Nag 2 (6) 20 Nag L R 105]

3 (89) 10 All 71 (76)
(90) 12 All 179 (185)
(94) 16 All 75 (77)
(88) 1888 All W N 272 (273)
(91) 1891 All W N 92 (93)
(91) 1891 All W N 124 (125)
(70) 5 Mad H C R 298 (303)

Note 7

1 (95) 17 All 156 (161)

Note 8

1. (28) AIR 1928 Mad 1165 (1166)

Note 9

1 (05) 32 Cal 654 (662, 663)
2. (37) AIR 1937 Oudh 334 (335) 13 Luck
3. (34) AIR 1934 Rang 160 (161)

O. 23 R. 1
Note 10

10. "At any time after the institution of a suit." — Sub rule (1) provides that *at any time* after the institution of a suit a plaintiff can withdraw his suit As a general rule a plaintiff can do this of his own accord and the order of the Court is not necessary for the purpose [1] But the withdrawal must be made *before* judgment is passed in the case [2] A plaintiff cannot also be allowed to withdraw his suit so as to deprive the defendant of any rights that may have accrued to him Thus, where, in a partition suit, the defendant has become entitled under Section 3 of the Partition Act to purchase the plaintiff s share at a valuation to be fixed by the Court,[3] or where a preliminary decree has been passed in such a suit,[4] or in a suit for accounts,[5] the plaintiff cannot be permitted to terminate the suit by withdrawing it Where, in such cases, the plaintiff desires to withdraw the suit, the proper course is to transpose the plaintiff as defendant and the defendant as plaintiff and proceed with the suit [6]

Where in a scheme suit under Section 92 of the Code the plaintiff applies to withdraw the suit and it appears that his object is to prevent the Court from deciding the suit on the merits, the Court can under O 1 R 10 transpose some of the defendants as plaintiffs and proceed with the suit notwithstanding the withdrawal of the suit [7]

A plaintiff who withdraws a suit under sub rule (1), must do so unconditionally He cannot abandon the suit and at the same time ask for a decision on the merits of the case [8] He is also liable to pay such costs as the Court orders him to pay [9] But the payment of the costs cannot be made a *condition precedent* to his withdrawing the suit [10] As to costs in a wife s suit for dissolution of marriage which is withdrawn by her see the undermentioned case [11]

A withdrawal under sub rule (1) may be in any form Where the plaintiff enters into a compromise with the defendant but does not communicate the terms of the compromise to the Court, he should be held to have withdrawn his suit under this sub rule [12] Similarly, when a suit is dismissed at the request of the parties on a petition of compromise being filed, the dismissal operates as a withdrawal of the suit under this sub rule [13]

Note 10

1 ('08) 32 Bom 345 (347)
('34) AIR 1934 Mad 485 (492) (Partition suit—Plaintiff s right to withdraw can be exercised until right in defendant had been legally created by preliminary withdrawal)

2 ('16) AIR 1916 Mad 575 (577)
('69) 2 Beng L R (S N) xi
('75) 1875 Pun Re No 65 page 168
('29) 116 Ind Cas 823 (824) (Mad) (Even after evidence and arguments on the objection of pecuniary jurisdiction of the Court the plaintiff can withdraw portion of the claim)

3 ('18) AIR 1918 All 356 (357)
[*See also* ('25) AIR 1925 Bom 425 (427) 49 Bom 672 (Compromise effected—Subsequent withdrawal by plaintiff is not permissible)]

4. ('12) 14 Ind Cas 259 (260) (Mad)
('34) AIR 1934 Mad 485 (492)
('20) AIR 1920 Mad 546 (546) (After withdrawal by plaintiff Court can transpose parties under

('35) AIR 1935 Mad 445 (446)]

5 ('26) AIR 1926 All 582 (583) (Proper course

such compromise being certified *held* fell under *R 1 or R 3 of O 23*)

6. ('26) AIR 1926 All 582 (583)
('20) AIR 1920 Mad 546 (546)

7. ('20) AIR 1920 Mad 732 (735)

8. ('09) 3 Ind Cas 572 (573) 5 Nag L R 121

9. ('16) AIR 1916 Mad 575 (577)
('25) AIR 1925 Oudh 699 (699) (The Court is not

247, 219)
t liable to

10. ('95) 17 All 156 (161)

11. ('98) 25 Cal 222 (229) (Costs allowed)

12. ('01) 23 All 219 (220)
('92) 1892 All W N 53 (53)

13. ('17) AIR 1917 Nag 1 (4)

O. 23 R. 1
Notes 10-12

The language of sub rule (2) implies that the Court can permit the withdrawal of a suit only while the suit is pending before it, i e, before it passes a decree[14]

11. Power of Appellate Court to allow withdrawal of suit. — A Court of appeal has power, in a proper case, to grant permission to withdraw a suit with liberty to file a fresh suit,[1] though such power should be used very cautiously[2] A contrary view, however, has been taken by the Sind Judicial Commissioner's Court[3] But it is submitted that this (the latter) view cannot be supported, seeing that in one case even the Privy Council on an appeal allowed the suit with reference to a portion of the subject matter to be withdrawn with liberty to sue again[4] But the Appellate Court has no power to allow a suit to be withdrawn *before the appeal has been admitted*[5] So also where a suit is dismissed and the appeal from the decree of dismissal is also dismissed, the Appellate Court cannot, as part of the same order, allow the suit to be withdrawn with liberty to sue again[6] But, where the trial Court had decreed the suit and the Appellate Court allowed the appeal and set aside the decree of the trial Court but did not expressly dismiss the suit, it was held that the Appellate Court's order passed at the same time, allowing the suit to be withdrawn with liberty to bring a fresh suit was not without jurisdiction The decision proceeds on the ground that while there is a subsisting decree there can be no power to allow the withdrawal of the suit and the proper course for the Appellate Court in allowing withdrawal of a suit is to first *set aside* the decree of the lower Court.[7]

12. Withdrawal of suit by plaintiff-appellant. — A plaintiff appellant is not entitled as a matter of right to withdraw his suit and he will not be permitted to

cause shown—Suit reaching its final stage—*Held*, suit should not be allowed to be withdrawn at that stage)]

Note 11

1. ('21) AIR 1921 All 65 (66)
('24) AIR 1924 All 260 (260)
('21) AIR 1921 Bom 278 (280) 45 Bom 206
d in

259

... (72) 17 Suth W R 164 (165)
('35) AIR 1935 Mad 445 (446) (Appellate Court

('37) 166 Ind Cas 290 (290) (Lah) (High Court can on appeal from remand order allow suit to be withdrawn)

2
('

late)
('34) AIR 1934 All 214 (215) (Permission to withdraw suit with liberty to bring fresh suit not asked in trial Court nor in lower Appellate Court till case is fully argued—Permission should

813 is relied on But 10 Ind Cas 813 can be distinguished and hence cannot support the view expressed by the Sind Court in these decisions.
4. ('15) AIR 1915 P C 21 (27) 42 Cal 537 42

5
6
7. ('36) 163 Ind Cas 367(369) 39 Cal W N 1094)

the benefit of the lower Court's adjudication in his favour [1]

13. Withdrawal of suit by plaintiff-respondent. — A plaintiff respondent is not entitled, as a matter of right, to withdraw his suit pending the appeal but the Court may, in the exercise of its discretion, allow him to do so. A plaintiff sued the Government and some ryots, claiming a certain channel as his private property and praying for an injunction restraining interference with his rights. A decree was passed in the suit in plaintiff's favour. Against this decree the Government did not appeal but the ryots appealed. Then the plaintiff sought to withdraw his suit against the ryots, being satisfied with a decree against the Government. It was held that he could not be allowed to do so as the decree against the Government considerably prejudiced the rights of the other defendants, *viz.*, the ryots and that the proper course was to hear the appeal on the merits [1]

14. Withdrawal of application for execution. — The provisions of Order 23 do not apply to execution proceedings (see Rule 4, *infra*). But a party setting the Court in motion has the right to withdraw the proceedings from the Court. Hence, a decree holder may withdraw his application for execution and if the Court persists in selling the judgment debtor's property after such withdrawal, it acts without jurisdiction [1] But the procedure as to the Court allowing withdrawal with permission to sue afresh does not apply to execution proceedings [2] Conversely, the withdrawal of an application for execution does not require the sanction of the Court to enable fresh proceedings to be taken [3] A decree holder cannot, of his own volition, withdraw from execution proceedings where a third party has acquired an interest or right in the property which is the subject matter of the execution proceedings [4] See also Note 6 *ante*

15. Withdrawal of application for entering up satisfaction of decree. — Where a decree holder applies to enter up satisfaction of a decree but afterwards wants to withdraw his application, it has been held that the Court should not allow him to do so, but should inquire into the matter under O. 21 R. 2. Allowing a withdrawal of the application without any such inquiry will amount to a refusal to exercise jurisdiction under Order 21 Rule 2 such as would justify interference by the High Court in revision [1]

16. Withdrawal of application for withdrawal of suit. — A plaintiff applying to withdraw his suit unconditionally has a *locus pœnitentiæ* until his petition has been acted upon by the Court, and he can withdraw his petition at any time before an order is made as prayed for in his petition [1]

Note 12

tarwad — Substitution ordered and appeal proceeded with.)

[*See also* (21) 63 Ind Cas 169 (171) (Cal) (Withdrawal of suit in second appeal by plaintiff appellant depends upon the question if concurrent decrees of two Courts have to be set aside. Where the decree is based upon a concurrent finding of fact leave to withdraw can not be granted.)]

Note 13

1. ('24) AIR 1924 Mad 79 (79, 80) 46 Mad 811

Note 14

4. ('38) AIR 1938 Cal 615 (618)

Note 15

1. ('19) AIR 1919 Mad 198 (199)

Note 16

1. ('23) AIR 1923 Mad 246 (247)

O 23 R. 1
Notes 17–19a

17 Withdrawal of suit on behalf of minor — Courts should be very jealous of the interests of minors and should not allow a suit instituted on behalf of a minor to be withdrawn without being satisfied that the withdrawal is for the minor s benefit[1] Where the next friend of a minor fraudulently withdraws a suit on behalf of the minor the latter can sue again in respect of the same subject matter[2]

It has been held by the High Court of Madras[3] that the Court should not allow the unconditional withdrawal of a suit on behalf of a minor by the minor s next friend without liberty being reserved to bring a fresh suit According to the High Court of Calcutta[4] the withdrawal of a suit by the next friend of a minor has the same effect as the withdrawal by a person of full age

18 Withdrawal of suit by pauper plaintiff. — The withdrawal of a suit by a pauper plaintiff amounts to failure in the suit within the meaning of O 33 R 11 and the plaintiff must pay the court fees under that rule[1]

19 Withdrawal of suit by some of several plaintiffs — Where there are several plaintiffs in a suit the suit cannot be withdrawn without the consent of *all* the plaintiffs[1] But one of several co plaintiffs or co appellants may withdraw *from* the suit or appeal so far as his own interest is concerned[2]

The withdrawal of unnecessary plaintiffs *from* a suit does not cause the dismissal of the suit[3]

19a Withdrawal of representative suits — It has been already mentioned in Note 10 *ante* that ordinarily a party prosecuting an action may at any time withdraw it But where the plaintiff sues in a representative character it is not open to him to put an end to the litigation by w[illegible] doubt go out of the suit but that does not [illegible] people are interested in it and have a right to [illegible]

(12) 15 Ind Cas 852 (853) (Mad) (Plaintiff can not withdraw application except on very good grounds—Per Sadasiva Iyer J)
(10) 7 Ind Cas 892 (893) (Cal)
(74) 6 N W P H C R 66 (68)
[But see (67) 2 Agra 158 (159)]

Note 17

1 (34) AIR 1934 Oudh 257 (257) (Suit by person on his own behalf and on behalf of his minor brother to set aside alienation by father—Major withdrawing from suit—As the suit was for benefit of minor and as minor became a ward of the Court it refused to allow minor s suit to be withdrawn)
2 (19) AIR 1919 Lah 395 (396) 1919 Pun Re No 59
(84) 10 Cal 357 (367) (Fraudulent withdrawal)
(02) 29 Cal 735 (737) (Guardian grossly negligent of minor s interest—Minor can have suit reopened on review through another next friend)
3 (04) 27 Mad 377 (379 380)
4 (84) 10 Cal 357 (364 365)

Note 18

1 (05) 29 Bom 102 (104 105)
(07) 31 Bom 10 (15) (F B)

Note 19

1 (0) 55 Ind Cas 996 (99) (All)
(33) AIR 1933 Mad 824 (825) 57 Mad 299 (Court can refuse to allow one of several plain [illegible]

rule (1))
(25) AIR 1925 Cal 637 (640) 52 Cal 139 (Case in Revenue Court)
(19) 52 Ind Cas 183 (184) (U P B R)
(22) AIR 1922 Pat 489 (490 491) 1 Pat [illegible]
(87) 1887 Pun Re No 93 p 209
(28) AIR 1928 Mad 496 (496) (Two plaintiffs one of whom a minor represented by the other as guardian—Suit cannot be withdrawn)
[S[illegible] (23) AIR 1923 Bom 43 (44) (Minor and [illegible]

ther O 23 R 1 sub rule (1) is con[illegible] any rules of Hindu law—Quaere)]
[But see (85) 1885 All W N 169 (190) (Pre-emption suit by several plaintiffs — One of them withdrawing — Rights of others [illegible] affected)
(8) 9 Cal L Rep 332 (333)]
2 (27) AIR 1927 Bom 244 (244)
(08) 1908 Pun W R No 119
3 (21) 60 Ind Cas 592 ( ) (U P B R)

Note 19a

1 (34) AIR 1934 All 4 (7) 55 All S[illegible]

O. 23 R. 1 Notes 20-21

20. Withdrawal of suit by vakil. — The authority to compromise an appeal, conferred on a vakil by a vakalatnama, does not authorize him to withdraw the appeal unconditionally [1] But a vakalatnama which authorizes him to choose arbitrators, prefer objections to the award, file solenama, and do all necessary acts in connexion with the suit will include also an authority to withdraw a suit under this rule [2]

20a. Withdrawal of suit by benamidar. — Where a benamidar, in breach of trust fails to carry on the suit and withdraws it, the real owner will be entitled to have the order of withdrawal vacated and to continue the suit [1]

21. "As against all or any of the defendants." — Where there are several defendants to a suit the plaintiff may withdraw his suit as against *some* of the defendants alone [1] and if it is so withdrawn without the liberty of suing again being reserved a subsequent suit against them will be barred [2] In *Mahant Singh* v *U Ba Yi*,[3] the plaintiff brought a suit against four persons as the trustees of a certain pagoda Subsequently these four persons were removed from their office as trustees and eight others were appointed to their place Upon this the plaintiff applied to the Court for striking out the names of the four persons whom he had originally impleaded as defendants in the suit and for substitution in their place of the eight new trustees and the Court complied with the plaintiff s request It was found that the four old trustees were personally liable to the plaintiff and not in their capacity as trustees and that the new trustees were not liable to the plaintiff at all The question arose as to whether the plaintiff could again sue the four persons whose names had been struck out at his instance It was held by the Privy Council that the plaintiff was not entitled to sue them again and that a suit would be barred under this rule In the course of their judgment their Lordships observed as follows

> The appellant (plaintiff) indeed contended that he had not proceeded under O 23 R 1 in applying to substitute the new trustees for the old but that his application was made under O 1 R 10 alone Their Lordships cannot accept this view The last named rule no doubt authorizes the Court to order the name of the party improperly joined to be struck out and that the name of any person who ought to have been joined be added But such an order is expressly directed to be made on such terms as may appear to the Court to be just If no terms are inserted in the order then in their Lordships view the effect of withdrawing the suit against some of the defendants is to be ascertained from O 23 R 1 That Order is not very happily worded but its meaning is reasonably clear Under its provisions the Court may give liberty to the applicant to institute a fresh suit after a withdrawal but if it does not do so the plaintiff is precluded from instituting a fresh suit in respect of the same subject matter

(32) AIR 1932 Mad 31 (32) (Application by karnavan of a Malabar tarwad for withdrawal of appeal—Junior members allowed to prosecute the appeal.)

proprietary body — One of them withdrawing— re- ute nal ody to

Note 20

1 (20) AIR 1920 Mad 232 (232) (Power to withdraw must be specifically given)
[*See however* (38) *AIR 1938 All 450* (451) (Authority of defendant s counsel to enter into compromise or settlement includes authority to consent to withdrawal of suit with liberty to bring fresh suit)]

2 (12) 14 Ind Cas 190 (190) (Cal)

Note 20a

1 (38) AIR 1938 Cal 874 (879)

Note 21

1 [*See also* (21) 62 Ind Cas 25 (27) (Pat) (Some defendants exonerated—Claim for mesne profits—No joint decree but liability of each to be

O. 23 R. 1
Notes 21–23

The above view has been followed in the undermentioned decision of the Oudh Chief Court[4] But, the Madras High Court in an earlier decision[5] had held that where a plaintiff, having regard to the view of the Court that the suit is bad for misjoinder of parties and causes of action, elects to give up some of the defendants there is no withdrawal or abandonment within the meaning of this rule and that a fresh suit against such defendants is not barred The decision proceeds on the ground that in such cases, the plaintiff is really acting under compulsion of law and not out of voluntary choice In view of the above decision of the Privy Council this decision of the Madras High Court cannot be considered to be good law For the same reason the undermentioned decisions[6] also in which it was held that the striking off of the name of a defendant from the array of parties at the instance of the plaintiff does not amount to a withdrawal' of the suit, must be regarded as no longer good law

22. Effect of permission. — The granting of the permission to withdraw with liberty to bring a fresh suit removes the bar of *res judicata* which would otherwise apply if a fresh suit on the same cause of action is brought[1] It places the plaintiff in the same position as he would have been in, had he brought no suit at all[2] But the granting of the permission to withdraw a suit with liberty does not imply the recognition of the maintainability of the second suit[3] Thus, where a suit instituted with the leave of the Court under Clause 12 of the Letters Patent is withdrawn with liberty to bring a fresh suit and an application is again made under Clause 12 of the Letters Patent for leave to institute the fresh suit there is nothing to prevent the Court from dealing with the application and granting or refusing leave as it deems proper[4]

A suit against a number of defendants was dismissed and the plaintiff appealed from the decree dismissing his suit Pending the appeal, one of the defendants died and as no application for bringing on record his legal representatives was made within the period of limitation the appeal abated as against him The suit was then withdrawn with leave to bring a fresh suit It was held that the legal representatives of the deceased defendant who had acquired a valuable right under the decree of the trial Court could not be affected by this order to which they were not parties[5]

23. Withdrawal from suit pending arbitration. — After a reference to arbitration has been made by order of Court under Schedule II of the Code, the Court has no jurisdiction, whether before or after the award has been passed, to allow the

4 ('40) AIR 1940 Oudh 48 (44) 1939 Oudh W N 990 (992) (One of several defendants removed from array of defendants—Permission under O 23 R 1 not obtained — Attempt to re implead him — His re impleadment will be a fresh suit and will be barred — In circumstances of case suit had to be dismissed as against other defendants also)
5 ('35) AIR 1935 Mad 696 (697)
6 ('10) 5 Ind Cas 725 (726) (Cal)
('14) AIR 1914 Bom 242 (242) 39 Bom 52 (Striking off of name of defendant, in this case, was held to be under O 9 R 5 rather than O 23 R 1)

Note 22

1 ('87) 10 Mad 160 (164)
('91) 14 Mad 78 (80)
('25) AIR 1925 P C 55 (58) 52 Ind App 100 27 Oudh Cas 334 47 All 158 (P C)
('10) 8 Ind Cas 268 (269) (Mad) (Withdrawal of a suit with the leave of the Court does not bar a fresh suit merely because some of the d[illegible]
[illegible]
(
(
suit by several plaintiffs not barred)
('85) 1885 All W N 151 (151) 7 All 649
('17) AIR 1917 Pat 188 (189) (Withdrawal of suit in appeal)
2 ('11) 12 Ind Cas 323 (324) (Oudh)
('25) AIR 1925 Cal 845 (851) 52 Cal 694 (F B) (Per Suhrawardy, J)
3. ('22) AIR 1922 Mad 447 (450) 45 Mad [illegible]
4 ('01) 24 Mad 293 (295)
5 ('35) AIR 1935 All 553 (554) (It was held that in the circumstances of the case the necessary effect of the suit being barred as against the representatives of the deceased was to bar it as against the other defendants also)

suit to be withdrawn with liberty to bring a fresh suit[1] And this is so even though the reference is invalid, and the award consequently void[2] But where the reference to arbitration is private and out of Court and an application is made to the Court under Schedule II, Paragraph 20 of the Code, to file the award, the applicant may be allowed to withdraw the application[3]

24. Withdrawing from suit after suit has abated against some of the defendants. — An order granting permission to withdraw a suit with liberty to bring a fresh suit passed after the suit has abated, is without jurisdiction[1] Where a suit abates as against a particular defendant by reason of his legal representatives not having been brought on the record within the period of limitation and the plaintiff thereupon withdraws his suit with permission to bring a fresh suit, the fresh suit can only be brought against defendants who were *actually* on the record at the time of the permission and not against the legal representatives of the deceased defendant[2]

25. "Formal defect." — The expression *"formal* defect' connotes defects of various kinds not *affecting the merits* of the case[1] A defect which goes to the *root* of the plaintiff s claim is not a formal defect[2] The "formal defect" need not necessarily be in the pleadings.[3]

The rule requires that the *Court* must be satisfied that the suit must fail by reason of some formal defect Hence, mere objections by the defendant are not enough[4]

The following are some examples of "formal defects' within the rule —

(1) Omission to obtain the permission of the Insolvency Court for filing the suit[5]

(2) Misjoinder of parties or causes of action[6]

(3) Erroneous valuation of the subject matter of the suit[7]

(4) The institution of a suit in a Court which has no jurisdiction to entertain the suit is a formal defect or at least one analogous to a formal defect so as to come within sub rule (2) (b) But in such case the Court can only *return the*

Note 23

1. ('87) 9 All 168 (172)
('84) 6 All 211 (213)
('16) AIR 1916 Oudh 141 (141)
('03) 7 Cal W N 186 (187 188)
('38) AIR 1938 All 56 (56 57) I L R (1938) All 146
[*See also* ('38) AIR 1938 Lah 582 (583)]

2 ('25) AIR 1925 Mad 621 (624) (As award was absolutely void the second suit was not in competent)
[*See* ('28) AIR 1928 Mad 1085 (1086, 1087) (Award much wider than submission—Court refusing to pass decree on award—Permission to withdraw suit and sue again cannot be granted)]

3. ('04) 31 Cal 516 (518)

Note 24

1. *('36) 40 Cal W N 1019 (1022)*

2. ('14) AIR 1914 Mad 170 (170) 38 Mad 643
('35) AIR 1935 All 853 (854)

Note 25

[illegible] allegation formal defect without specifying the same—Not sufficient)
('28) 32 Cal W N 1244 (1245) (Formal defect—*Not referred to by lower Court—Withdrawal* [illegible]

5. [illegible]

6 ('18) AIR 1918 All 425 (426) 40 All 7
('94) 16 All 279 (283)
[*See also* ('69) 12 Suth W R P C 43 (44) (P C)]

7. ('07) 29 All 471 (476)

O. 23 R. 1
Notes 25-26

plaint for presentation to the proper Court under Order 7 Rule 10, and cannot act under this rule [8]

The following are instances of defects which are *not* formal within this rule —

(1) Where the suit is barred by limitation [9]

(2) Non joinder of parties The defect in this case can be remedied by the addition of the necessary parties [10]

(3) Omission to include all the causes of action which the plaintiff has against the defendant [11]

(4) Where a suit for a declaration of a public right of pathway is instituted without taking steps under Section 91 or O 1 R 8 or proving special damage [12]

26. "Other sufficient grounds." — Courts in India have no general power of allowing a suit to be withdrawn with the liberty of suing again, apart from the provisions of the present rule[1] and the Court before granting leave under this rule must satisfy itself that the conditions therein specified exist [2] In *Watson* v *Collector of Rajshahe*,[3] their Lordships of the

There is a proceeding in the
the suit without barring the right
seems to be limited to cases of m
suit to cases in which a material
proper stamp, and to cases in which
suit In all those cases the suit f

This passage from the judgment of their Lordships of the Privy Council conclusively shows that the failure of the plaintiff to prove his case is no ground for allowing him to withdraw his suit with the liberty of suing again for the same subject matter [4] The object of the rule is not to enable a plaintiff after he has failed to

8 ('19) AIR 1919 Mad 1071 (1075) 41 Mad 701
9 ('18) AIR 1918 Sind 6 (8) 13 Sind L R 1
[*See also* ('10) 6 Ind Cas 285 (285) (Mad)

principal no ground—Grant of leave prejudicial to defendant)
12 ('25) AIR 1925 Cal 711 (713)

Note 26

1 ('17) AIR 1917 Cal 830 (830)
('20) AIR 1920 Pat 63 (64)
('35) AIR 1935 Pat 433 (438)
('35) AIR 1935 Pat 251 (252) (Order of withdrawal

2
(1
in what way the grounds for withdrawal bring

particular pro note — After evidence ... finding it to be based on the other note — He cannot be allowed to withdraw)
('14) AIR 1914 P C 249 (252) (P C) (Damages claimed in plaint — Inability to prove same— Party not to be given liberty to bring fresh action)
('26) AIR 1926 Cal 432 (432) (Failure of claim on account of mistaken view of law—Withdrawal cannot be permitted)
('25) AIR 1925 Cal 711 (712)
('31) AIR 1931 Cal 107 (108)
('25) AIR 1925 Nag 101 (102) (Plaintiff ...

plaintiff s side closed — Failure to state ... relationship as reversioner—Pedigree not given —Not formal defect—No withdrawal)
('26) AIR 1926 Pat 123 (125)

conduct his suit with proper care and diligence, and after his witnesses have failed to support his case, to obtain an opportunity of commencing the trial afresh in order to avoid the result of his previous bad conduct of the case so as to prejudice the opposite party.[5] The defect in the suit must be one not affecting the merits of the case, but having the effect of shutting out a fair trial on the merits and arising out of some error made in good faith by the plaintiff which can only be effectively set right by a trial *de novo*.[6] The defect must not be due to the plaintiff's own fault[7] nor one curable by amendment of the pleadings.[8] Further, after a judgment has been passed in the suit, the Court has no jurisdiction to allow the suit to be withdrawn with permission to the plaintiff to bring a fresh suit on the same cause of action.[9] **O. 23 R. 1 Note 26**

It has also been held in a series of cases that the expression "other sufficient grounds" should be construed *ejusdem generis* with "formal defect" in clause (a) of the sub rule,[10] although the opinion has also been expressed that the expression should be

('25) AIR 1925 Oudh 291 (293) 27 Oudh Cas 231 (Non-inclusion of prayer for possession in suit for possession — Suit cannot be allowed to be withdrawn with liberty to sue afresh.)
('18) AIR 1918 Cal 213 (213) (Failure to prove case—No ground to allow withdrawal with leave for fresh suit on alternative case.)
('19) AIR 1919 Cal 534 (535) 46 Cal 168.

('14) AIR 1914 All 457 (458)
('29) AIR 1929 Bom 320 (320)
('25) AIR 1925 Oudh 61 (62)
('13) 21 Ind Cas 76 (76) (All)
('18) AIR 1918 Mad 699 (699)
('69) 12 Suth W R P C 43 (44) (P C)
('74) 21 Suth W R 291 (291)
('10) 6 Ind Cas 629 (631) (Cal) (Dismissal of suit by first Court on the ground that there is no evidence—Court of Appeal cannot grant permission for withdrawal with liberty to institute a

('13) 21 Ind Cas 23 (24) 37 Bom 682 (Failure to produce documents is not sufficient ground under this rule.)
('19) AIR 1919 Cal 129 (129) (Party desiring to adduce additional evidence is not sufficient ground to withdraw suit or appeal under this rule.)
('16) AIR 1916 Cal 255 (256) 44 Cal 367 (Inability to produce necessary evidence in time,

suit must fail if proceeded with—*Quære*)]

6. ('17) AIR 1917 Nag 121 (122)
7. ('31) AIR 1931 Cal 107 (108)
('35) AIR 1935 Oudh 495 (495) (Failure of plaintiff to produce document at proper time or any other default on his part cannot be regarded as sufficient ground.)
8. ('18) AIR 1918 Oudh 163 (163) 21 Oudh Cas 66
('27) 1927 Mad W N 851 (851, 852)
9. ('31) AIR 1931 Cal 336 (336)
('29) AIR 1929 Cal 88 (89) 55 Cal 1067
('11) 10 Ind Cas 813 (813) 35 Bom 261
('75) 24 Suth W R 23 (23)
(1865) 2 Suth W R 297 (299)

('30) AIR 1930 Lah 175 (176)
('29) AIR 1929 All 683 (685)
('28) AIR 1928 Oudh 482 (484) 3 Luck 403
('26) AIR 1926 Pat 128 (128)
('25) AIR 1925 Oudh 291 (293) 27 Oudh Cas 231.
('18) AIR 1918 Lah 329 (330)
('17) AIR 1917 Cal 409 (410)
('16) AIR 1916 Cal 255 (256) 44 Cal 367
('18) AIR 1918 Mad 499 (499)
('18) AIR 1918 Pat 261 (262) 3 Pat L Jour 651
('22) AIR 1922 Cal 58 (59)
('10) 6 Ind Cas 629 (630) (Cal)
('10) 8 Ind Cas 868 (869) (Mad)
('09) 3 Ind Cas 61 (63) 5 Nag L R 88
('15) AIR 1915 Mad 480 (481)

O. 23 R. 1
Note 26

given a wider meaning[11] Thus, it has been held that clause (b) is not confined to cases in which the Court considers that the suit must necessarily fail[12]

The following have been held to be "sufficient grounds" for allowing the plaintiff to withdraw his suit with liberty to sue afresh —

(1) The omission to file a power of-attorney.[13]

(2) Evidence being not available, for no fault of the plaintiff[14]

(3) The suit being premature and the cause of action accruing pending the suit[15]

(4) Where the plaintiff has failed to put in evidence, an important document essential to the success of his case In this respect there is a distinction between a case where a plaintiff wants to get time in order to produce a large body of fresh evidence to counteract the defendant's evidence and a case where a plaintiff merely wishes to give formal proof of a document[16]

(5) Where two suits are brought and both are sought to be withdrawn to be consolidated into one and there is an apprehension that the second of the two suits would be barred under O 2 R 2[17]

(6) Where the plaintiff had been misled by the absence of a specific denial in the written statement[18]

(7) Where a material document has been rejected as not properly stamped[19]

(8) Where the plaintiff finds that the defendant is absent and that even if a decree is passed it cannot be executed[20]

For other instances, see the undermentioned cases[21]

('35) AIR 1935 Pat 251 (252)
('38) AIR 1938 Lah 582 (583)
('35) AIR 1935 Pat 438 (438)
('38) AIR 1938 Lah 294 (294)

('38) AIR 1938 Rang 389 (390) 1938 Rang L R

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of such claim— Leave may be granted with liberty to sue again)

13 ('26) AIR 1926 All 294 (294, 295)

14 ('31) AIR 1931 Cal 263 (269)
('71) 16 Suth W R 100 (100)

15. [See ('26) AIR 1926 Mad 594 (595) (Only course where plaintiff brings his suit before cause of action arises is to dismiss the suit

18 ('14) AIR 1914 Cal 842 (843) (Plaintiff was allowed to abandon portion of claim with liberty to sue afresh)

19. ('69) 13 Moo Ind App 160 (170) (PC)

20 ('91) 15 Bom 160 (164)
[But see ('92 96) 1892 1896 Upp Bur Rul 261 (Court should not ask the plaintiff to withdraw his suit if he does not know the address of the defendant)]

21 ('10) 8 Ind Cas 962 (962) 5 Low Bur Rul

Wards, permission granted to guardian to withdraw)
('73) 20 Suth W R 163 (163, 164) (Where plaintiff had a good claim for contribution and the best evidence to determine the proportion payable by the various defendants had not been given)
('72) 17 Suth W R 164 (165) (Plaint containing prayer for separate possession instead of for joint possession)
('12) 17 Ind Cas 395 (396) (Mad) (Facts set out with no clear conception of the exact nature of

('21) AIR 1921 Cal 611 (612) (Claim for enhancement of rent on the ground of excess area under S 52, Bengal Tenancy Act — Case sought to be

In the following cases it has been held that there are no sufficient grounds for allowing the plaintiff to withdraw his suit with liberty to institute a fresh suit —

(1) Where the parties are ready for trial, and a withdrawal will prejudice the defendant[22]

(2) Where the plaintiffs are not ready to go on with the case[23]

(3) Where notices on *the heirs of a deceased defendant could* not be served[24]

(4) Where owing to the mistake of the writer who drew up the plaint, some important items were left out[25]

(5) Where the plaintiff deliberately and grossly undervalues his suit and pays insufficient court fee[26]

For other instances, see the undermentioned cases[27]

In the undermentioned case[28] it was held by the Allahabad High Court that where on an application by the plaintiff for permission to withdraw his suit, the Court refers the matter to the other side and on the other side stating that it has no objection provided that its costs are paid, permits the suit to be withdrawn with liberty to bring a fresh suit, the Court does not act without jurisdiction. The decision proceeds on the ground that the Court would be called upon to go into the question whether a formal defect or other sufficient ground existed only if the opposite party denied its existence. But where the opposite party did not deny it, there would really be nothing for the Court to examine

27. "May grant permission."—The Court can pass an order under the rule *suo motu* An application by the plaintiff is not necessary[1] Although the rule does not specifically mention anything about notice, still "it is an elementary rule of universal application and founded upon the plainest principles of justice that a judicial order *which may possibly affect or prejudice any party cannot be made unless he has been* afforded an opportunity to be heard" Hence, if the Court allows a plaintiff to withdraw his suit with liberty of bringing a fresh suit on the same cause of action, without giving notice to the defendant, the High Court will interfere in revision[2] The permission under the rule extends only to *one* suit A plaintiff was allowed to withdraw his suit with permission to bring a fresh suit, on condition of his paying defendant's

proved on the basis of contract—Case not framed

claim —Leave may be granted with liberty to

('34) AIR 1934 All 137 (138, 139) (Plaintiff not prepared to meet defendant s case, is no ground for withdrawal)

'18) AIR 1918 Nag 93 (94) (Plaintiff who has misunderstood his case is not entitled to the indulgence)

('18) AIR 1918 Cal 797 (797) (Reliefs not properly asked for)

('25) AIR 1925 Oudh 718 (718). (Amendment of plaint at late stage refused as necessitating new trial — Withdrawal with liberty also not [illegible]

28 ('38) AIR 1938 All 450 (451). (Order not open to revision)

Note 27

1. ('27) AIR 1927 Nag 302 (303). 10 Nag L R 142.
(38) AIR 1938 Mad 865 (876)
[See however (37) 1937 Oudh W N 1146 (1149)]

2. ('17) AIR 1917 Cal 633 (633) . 44 Cal 454.
(30) AIR 1930 Nag 151 (151, 152).
('73) 5 N W P H C R 116 (117).
('84) 6 All 211 (213).

O. 23 R. 1
Note 26

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The following have been held to be "sufficient grounds' for allowing the plaintiff to withdraw his suit with liberty to sue afresh —

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(4) Where the plaintiff has failed to put in evidence, an important document essential to the success of his case In this respect there is a distinction between a case where a plaintiff wants to get time in order to produce a large body of fresh evidence to counteract the defendant's evidence and a case where a plaintiff merely wishes to give formal proof of a document [16]

(5) Where two suits are brought and both are sought to be withdrawn to be consolidated into one and there is an apprehension that the second of the two suits would be barred under O 2 R 2 [17]

(6) Where the plaintiff had been misled by the absence of a specific denial in the written statement [18]

(7) Where a material document has been rejected as not properly stamped [19]

(8) Where the plaintiff finds that the defendant is absent and that even if a decree is passed it cannot be executed [20]

For other instances, see the undermentioned cases [21]

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might lose altogether the right to sue in respect of such claim— Leave may be granted with liberty to sue again)

13 (26) AIR 1926 All 294 (294 295)

14. (31) AIR 1931 Cal 268 (269)
(71) 16 Suth W R 100 (100)

15 [See (26) AIR 1926 Mad 594 (595) (Only course where plaintiff brings his suit before cause of action arises is to dismiss the suit

18. (14) AIR 1914 Cal 842 (843) (Plaintiff was allowed to abandon portion of claim with liberty to sue afresh)

19. (69) 13 Moo Ind App 160 (170) (PC)

20. (91) 15 Bom 160 (164)
[But see (92 96) 1892 1896 Upp Bur Rul 261 (Court should not ask the plaintiff to withdraw his suit if he does not know the address of the defendant)]

21.

Wards, permission granted to guardian to withdraw)
(73) 20 Suth W R 163 (163, 164) (Where plaintiff had a good claim for contribution and the best evidence to determine the proportion payable by the various defendants had not been given)
('72) 17 Suth W R 164 (165) (Plaint containing prayer for separate possession instead of for joint possession)
(12) 17 Ind Cas 395 (396) (Mad) (Facts set out with no clear conception of the exact nature of

with court fee under the Court-fees Act.[9]

29. Dismissal of suit with liberty to bring a fresh suit. — A Court cannot *dismiss* a suit with liberty to the plaintiff to bring a fresh suit on the same cause of action [1] See Note 28.

30. Liberty to withdraw two suits in order to bring a consolidated suit. — Where a plaintiff files two suits and then prays for permission to withdraw both the suits with leave to bring a fresh suit in respect of the subject matter of both the suits so as to obviate any danger of the claim comprised in the second suit being barred by O 2 R 2, the application may be granted although, in fact, O 2 R 2 may not be applicable to the case [1] See also Note 26.

31. "On such terms as it thinks fit." — A defendant should ordinarily be granted his costs where the plaintiff is granted permission to withdraw the suit with liberty to bring a fresh suit [1] Where the payment of costs is made a condition of withdrawal with liberty, the order should limit the time for such payment and should further direct that on default of such payment the suit should stand dismissed with costs [2] Where such direction has not been given and the plaintiff fails to pay the costs within the time fixed, there is a conflict of opinion as to whether the second suit is barred According to the High Courts of Calcutta,[3] Lahore[4] and Patna,[5] the second

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9. (1884) 8 Mad 15 (17) (Reference under Stamp Act)

Note 29

1

('87) 9 All 690 (697)
('89) 11 All 187 (189)
('23) AIR 1923 Oudh 242 (245)
('37) AIR 1937 Rang 508 (510) 1937 Rang L R 432
[*See* (1864) 1 Suth W R 322 (322) (When suit by permission is withdrawn under this rule proper order to be recorded is not of dismissal but a simple order in terms of the rule)]

Note 30

1. ('24) AIR 1924 Rang 249 (255) 2 Rang 66
[*See* ('20) AIR 1920 Mad 1026 (1032) (Permission to consolidate withdrawn suit with a pending suit — Consolidation alone to be made — Fresh suit barred)]

Note 31

1. ('23) AIR 1923 Bom 206 (206) 47 Bom 559

on
be
allowed)]

2. ('18) AIR 1918 Pat 171 (171, 172) 3 Pat L

may be paid subsequently)
3. ('14) AIR 1914 Cal 207 (208)
('11) 10 Ind Cas 6 (6) (Cal) (Notwithstanding the provision that otherwise suit should stand dismissed)
('04) 31 Cal 965 (968)
2 Hyde 212 (213, 214)
('12) 15 Ind Cas 159 (160) (Cal) (Suit must be taken to be instituted on the day the costs were paid)
('20) AIR 1920 Cal 897 (897) (Withdrawal allowed on condition of payment — Dismissal on default not directed—Fresh suit should only be stayed until payment)
('38) AIR 1938 Cal 13 (15) ILR (1938) 1 Cal 273. (Letters Patent appeal affirming 164 Ind Cas 603)
('38) 68 Cal L Jour 75 (81)

[**But see** ('05) 2 Cal L Jour 480 (484) (Order was that the suit should stand dismissed on default)
('18) AIR 1918 Cal 749 (750) (Payment of costs made condition precedent to the institution of suit—Order *held* to be strictly complied with)
('34) AIR 1934 Cal 433 (435) (Where costs are not paid within the time fixed, the order granting permission stands cancelled)]

4. ('27) AIR 1927 Lah 159 (160) (Order of the Court not directing definite time for payment — Fresh suit not bad *ab initio* for default, but can be entertained if costs are paid before suit comes on for trial)

5. ('26) AIR 1926 Pat 409 (410) : 5 Pat 306.
('26) AIR 1926 Pat 472 (473)

O. 23 R. 1
Notes 31-32

suit is not barred, whether a date has been fixed for the payment or not, or whether or not such payment has been made a condition precedent to the institution of a fresh suit These decisions proceed on the view that until the costs are paid the original suit itself cannot be deemed to have been withdrawn but must be taken to be pending till such costs are paid, that inasmuch, therefore, as the second suit must be taken to have been filed at the time when the first suit was pending, it should be stayed under Section 10 of the Code, and that, when the costs are actually paid the first suit will be deemed to be withdrawn on the date of such payment and the second suit can be proceeded with The High Court of Allahabad[6] has held that where the order of the Court is that the amount should be deposited by a certain date and that date expires, a subsequent deposit would in no way comply with the order granting leave to withdraw But in regard to cases where no date is fixed, it follows the Calcutta view mentioned above[7] The Judicial Commissioner's Court of Nagpur[8] has held that where a suit is allowed to be withdrawn with liberty, on payment of costs before the institution of the fresh suit, the failure to pay such costs is only an irregularity which does not entail *ipso facto* a dismissal of the suit, and that, if the costs are paid before the hearing the irregularity is cured The Calcutta view as to the original suit being pending till the costs are paid was not accepted by this Court But the second suit must be treated as having been instituted on the day the costs are paid and if the costs are paid after the period of limitation for the suit expires, the suit must be dismissed[9] According to the High Courts of Bombay,[10] Madras[11] and Rangoon,[12] the costs must, where the time for payment is *specified*, be paid before the specified date, and, where no time is specified, before the *institution of the suit*, otherwise, the second suit will be barred According to this view, the permission means a permission *to bring a fresh suit* and not a permission to *withdraw* from the first suit, and that the first suit does not continue pending till the costs are paid, but is withdrawn immediately *on the order for withdrawal.*

Where it is impossible for the plaintiff to pay the costs within the time fixed, it has been held that the Court can extend the time for such payment[13]

Where a plaintiff suing for redemption is allowed to withdraw his suit with liberty to sue again within two years from the date of the withdrawal but sues after the expiry of the two years, his suit is not barred, provided it is within limitation It is not open to the Court in which the first suit is instituted, to curtail the period of limitation which the law allows to the plaintiff within which to bring his second suit for redemption[14]

32. Fresh suit must be between the same parties — The bar under

7. (33) AIR 1933 All 810 (812) 56 All 10 (AIR 1929 All 692, Not followed)
[But see (29) AIR 1929 All 692 (695)]
8. (29) AIR 1929 Nag 135(136) 25NagLR 171
(35) AIR 1935 Nag 56 (56) 31 Nag L R 266
9 (35) AIR 1935 Nag 56 (57) 31 Nag L R 266 (This does not mean that Court is bound to keep the second suit pending until period of limitation expires)

of costs not condition precedent [illegible] 1939
12. ('39) AIR 1939 Rang 378 (350, 351)

14. [illegible]

Note 32

1. (28) AIR 1928 All 689 (694 695) (Suits by shebait representing idol — The idol need not be

Thus, where the second suit is against a different defendant it is not barred under this rule[2] Similarly, the withdrawal without the leave of the Court of a suit by a Hindu reversioner, challenging an improper alienation by a Hindu widow, is no bar to another suit by another presumptive reversioner for the same purpose as the reversioners do not claim through each other[3] **O. 23 R. 1 Notes 32-33**

33. Same subject matter. — Sub rule (3) provides that where a plaintiff withdraws his suit without the permission of the Court under sub rule (2), he shall be debarred from bringing a fresh suit in respect of the same subject matter The term "subject matter' means the plaintiff s *cause of action* for his suit[1] and a suit on a different cause of action is therefore not barred under this rule[2] even though the suit may relate to the *same property*[3] Conversely, a suit based on the same cause of action as the first one is barred[4]

Illustrations

(1) A suit for *declaration of title* to a war bond is a bar to a suit for the recovery *of the bond*[5]

(2) A suit for recovery of plots A and B and which is withdrawn with reference to plot B will bar a second suit for recovery of plot B as the cause of action with reference to both the plots is the same[6]

(3) A suit for the ejectment of the defendant as a *trespasser* will not bar a second suit for the ejectment of the same defendant as a *tenant*, after notice to quit[7]

(4) A suit claiming *ownership* of land is no bar to the institution of a suit claiming an *easement* over the same land[8]

(5) Where during the lifetime of a Hindu widow, a reversioner sues for a *declaration* that an alienation made by the widow is not binding on him and he then withdraws the suit without the permission of the Court to sue again a subsequent suit by him after the widow s death, for *possession* of the property is *not* barred[9]

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represented by the same shebait)
(17) AIR 1917 Pat 543 (544) (Principle of bar does not apply to a stranger)
(27) AIR 1927 Bom 87 (88) (Same person claiming but in a different capacity—Principle of bar does not apply)
2. (82) 8 Cal 871 (874)
3 ('18) AIR 1918 Mad 495 (496)

Note 33

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(32) AIR 1932 Lah 138 (139 140) (Suit under

3 ('24) AIR 1924 Oudh 180 (181)
(34) *AIR 1934 Cal 433 (436) (Suit for possession* against tenants at will — Suit withdrawn for want of proper notice without permission for fresh suit — Subsequent suit after proper notice is not barred)
(33) AIR 1933 Lah 943 (944) 15 Lah 1 (The word 'subject matter' does not mean property but refers to right in property which a person seeks to enforce)
(1900) 4 Cal W N 110 (112)
(94) 21 Cal 265 (268)
4 (30) AIR 1930 Lah 755 (756)
(39) AIR 1939 All 584 (586)
5. ('24) AIR 1924 Rang 127 (131) 1 Rang 618
6 (18) AIR 1918 Cal 23 (26)

permission to file a fresh suit—Subsequent suit after proper notice is not barred under this rule)]
8. (06) 2 All L Jour 59 (61)
9 (17) AIR 1917 Mad 512 (517) 39 Mad 987 (F B)
(33) AIR 1933 Lah 943 (944) 15 Lah 1 (Even if plaintiff in the subsequent suit adds prayer in regard to the alienation it may be treated as a surplusage)
06) 9 Oudh Cas 164 (166)
[But see (10) 8 Ind Cas 1066 (1067) (Mad)
(15) AIR 1915 Mad 1190 (1190)]

O.23 R.1
Notes 33-34

(6) Where a suit is withdrawn in view of a compromise between the part , a subsequent suit to enforce the terms of the compromise is not barred[10]

(7) On the attachment of a house in execution of a d cree, the plaintiff sued to e tablish her title Meanwhile the executing Court refused to confirm the sale Thereupon the plaintiff withdrew her suit But the sale was afterwards confirmed in appeal It was held that a fresh suit by the plaintiff was not barred as th re was a fresh cause of action[11]

(8) The wi hdrawal of a suit for po ses ion is no bar to the in titut on of a suit for ren [12]

(9) The withdrawal of a suit for partition is no bar to a fre h suit for partition by the same plaintiff and of the same property, as the cau e of ac on for a uit f r partition is a *recurring* one[13]

For other instances, see the underment oned cases[14]

It has been held by the Madras High Court[15] that the withdrawal of a suit instituted by partners who have not been registered as a firm under the Partnership Act is no bar to a fresh suit filed by them on the same cause of action after they g themselves regi tered as a firm, because the later suit would be technically by a different plaintiff

34. Additional relief in fresh suit. — The withdrawal of a suit *without* the permis ion of the Court to institute a fresh suit operates as a dismissal *thereof* Hence, O 2 R 2 will be a bar to the institution of any suit in respect of any port on of the claim which the plaintiff may have omitted in the previous suit in such a case[1] But where the withdrawal is with the Court's permission to bring a fresh suit, *O 2 R 2* is no bar to the inclusion in the second suit of any port on of the plaintiff s claim or of any relief which the plaintiff might have included but did not include in h s first suit[2] When a suit is withdrawn with permission to bring a fresh suit on the same cause of action, it is not necessary to allege in the subsequent suit the same title as in the first[3]

10 (05) 1905 Pun Re No 3
(67) 2 Agra 135 (159)
(65) 3 Agra 135 (136)

in wrongful possession in his own right—Second

14 ('26) AIR 1926 Cal 175 (175) (Redemption suit—Claim for mesne profits withdrawn — Suit for mesne profits from payment under decree to delivery of possession is not barred)
('27) AIR 1927 Cal 365 (371) (Different portion

('26) AIR 1926 All 34 (34) (Right to sue for ejectment under the Agra Tenancy Act is a recurring one from year to year)
('29) AIR 1929 All 67 (67, 68) (Withdrawal of suit to eject year to year tenant is no bar to suit for ejectment with eject from a subsequent year)
('17) AIR 1917 Cal 112 (113) (Withdrawal of suit for dec aration that defendant s name was wrongly entered as owner of certain share is no bar to suit for declaration of title and recovery of possession)
('39) AIR 1939 All 534 (535) (Suit against co-sharers for recovery of joint possession of certain plots — Some plots being in posse sion of co-sharers as mortgagees, suit in respect of these plots dismissed—Subsequent suit for redemption

withdrawal and no permission to bring fresh suit granted — Subsequent suit on another promissory note executed for same consideration as original note and in respect of same subject matter is barred)
15. ('36) AIR 1936 Mad 697 (698) (Suit by partners of firm not registered under Partnership Act —Withdrawal—Fresh suit after registration not barred)

Note 34

1. (05) 2 Cal L Jour 450 (451)
2. ('17) AIR 1917 Lah 414 (416, 417) 1917 Pun Re No 65
('11) 9 Ind Cas 956 (956, 957) (Lah)
('25) AIR 1925 Rang 118 (119)
(76) 1 All 324 (325)
('95) 17 All 53 (55)
(85) 7 All 624 (626)
(87) 10 Mad 160 (164)
3 (05) 9 Bom 546 (552)

35. Effect of withdrawal without permission.— The effect of the withdrawal of a suit without the Court's permission to bring a fresh suit is to debar the plaintiff from filing such a suit [1] Thus, where a plaintiff unconditionally withdraws his suit in view of the matter in dispute being referred to arbitration, he cannot subsequently sue again in respect of such matter, although the arbitration may have become infructuous [2] The fact that the plaintiff states at the time of withdrawal that he reserves to himself the liberty of bringing a fresh suit does not remove the bar under the rule [3] Even the *defendant's consent* to the withdrawal of the suit at the time of such withdrawal will not remove the bar under the rule [4] But an illegal order for withdrawal without liberty being reserved to the plaintiff to bring a fresh suit does not bar a fresh suit [5] Similarly, where the second suit has been *already filed* at the time of the withdrawal of the first suit, the withdrawal does not bar the trial of the second suit [6] The rule merely bars a remedy but does not extinguish the right [7] Where a creditor sues both the principal debtor and the surety in the same suit and later on withdraws the suit as against the former, though he cannot file a fresh suit against the principal debtor he can continue the suit as against the surety [8] The bar of a fresh suit in respect of the same subject matter where a former suit has been withdrawn without the permission of the Court is not based on the principle of *res judicata* (because there is no *decision* of the Court in such a case) but is due to the express provision contained in sub rule (3) [9]

Where the suit property is partly within the Court s jurisdiction and partly without, the withdrawal of the suit with reference to the former portion is no bar to the continuance of the suit with reference to the latter [10]

In the undermentioned case [11] the Madras High Court held that it was ' very doubtful whether the prohibition of a fresh suit under this rule where the previous suit was withdrawn without the permission of the Court can apply to cases where the summons had not been served on the defendant at all

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suit is mandatory)
(38) AIR 1938 Rang 210 (211)
[*See* (35) AIR 1935 Cal 744 (746) (Where the defendants have failed to prove that the with drawal of previous suit was without permission

[**But see** (97-01) 2 Upp Bur Rul 284]
3 (28) AIR 1928 Rang 273 (274) 6 Rang 494
4 (15) AIR 1915 All 32 (33)
(35) AIR 1935 Cal 157 (158)
(1900) 4 Cal W N 110 (112) ((1865) Bourke s Rep Part 7 page 162 Doubted)
(38) AIR 1938 Rang 210 (211)
5 (88) 1888 Pun Re No 147
6 (30) AIR 1930 Lah 599 (600)
(26) AIR 1926 Mad 490 (491) (Withdrawal with out permission does not prevent the trial of a subject matter so long as such trial is not affected by the principle of *res judicata*)
(28) AIR 1928 Lah 710 (712)
7 (20) AIR 1920 Mad 545 (545)
(39) AIR 1939 P C 110 (112) 1939 Rang L R 358 66 Ind App 198 (P C)
8 (39) AIR 1939 P C 110 (114) 1939 Rang L R 358 66 Ind App 198 (PC) (Reversing A I R 1937 Rang 309)
9 (37) AIR 1937 Mad 718 (719) (Explanation 5

—It precludes only second suit on same cause of action)
10 (89) 12 Mad 350 (356)
11 (35) AIR 1935 Mad 909 (912)

The prohibition enacted by sub rule (3) applies to *suits* and not to *defences*. Thus, where a defendant raises a plea of set off but withdraws it without the permission of the Court, he will not be precluded from raising the same plea again by way of a defence to a subsequent suit against him [12]

36. Erroneous order granting permission. — An order for withdrawal of a suit with liberty to institute a fresh suit, contrary to the provisions of this rule, cannot be treated as an order made without jurisdiction, such order is consequently not null and void and a fresh suit instituted upon leave so granted is not incompetent. Further, the Court trying the subsequent suit is not competent to enter into the question whether the Court which granted the plaintiff permission to withdraw his first suit had *properly made such order* [1] The undermentioned cases[2] in which a contrary view was held are not good law. But where there are a number of plaintiffs and the Court allows *some* of them alone to withdraw the suit without the consent of the others, the Court acts without jurisdiction and there should be deemed to be no withdrawal at all within the meaning of Order 23 Rule 1 [3]

37. Effect of reversal of order granting permission. — Where after a fresh suit is filed the order permitting the withdrawal of the previous suit with *leave to* institute a fresh suit is reversed by the High Court in revision, the proper procedure is to declare the fresh suit null and void and to direct the lower Court to go on with the first suit from the stage at which the order set aside was passed [1]

38. Power of Court of Small Causes to allow withdrawal.— A Presidency Small Cause Court which, after dismissing a suit, has granted a new trial, is seized of the case, not as a Court of revision but as an *original* Court and can allow the suit to be withdrawn under this rule [1] But where a decree has been passed in favour of the plaintiff contingent on the opinion of the High Court on a certain question which is referred to it and the High Court decides against the plaintiff, the suit cannot be permitted to be withdrawn with liberty to sue again. The Small Cause Court must, in such a case pronounce judgment in favour of the defendant [2]

39. Appeal. — No appeal lies from an order allowing withdrawal of a suit with liberty to bring a fresh suit. Such an order is neither a decree nor an appealable order under Section 104 or O 43 R 1 [1] Nor does an appeal lie from an order as to

12 (34) AIR 1937 Oudh 394 (395) 13 Luck 323

Note 36

1 (23) AIR 1923 Cal 269 (269)
(21) AIR 1921 Cal 34 (38) 48 Cal 138 (F B)
('12) 14 Ind Cas 175 (175) (All)
(18) AIR 1918 Mad 1093 (1095)
(71) 16 Suth W R 276 (276)
(75) 23 Suth W R 345 (346)
(22) AIR 1922 Pat 44 (46) 1 Pat 90 (F B).
(81) 3 All 528 (529) (Plea as to order allowing withdrawal being bad cannot be raised for first time at the hearing of second appeal in the subsequent suit)
(20) AIR 1920 Mad 1026 (1032)
(20) AIR 1920 Lah 494 (496) (Application for probate and susequent suit)
(35) AIR 1935 Cal 739 (740) (Objection that previous suit had abated before leave to withdraw was granted to plaintiff)
[*See also* (55) 1855 All W N 151 (151)

2 (18) AIR 1918 Pat 575 (577) 3 Pat L Jour 401
(20) AIR 1920 Pat 63 (64)
(16) AIR 1916 Cal 295 (296) 44 Cal 207 (Overruled by *AIR 1921 Cal 34 (F B)*)
3. (22) AIR 1922 Pat 489 (490, 491) *1 Pat 2 3*

Note 37

1. (18) AIR 1918 Pat 452 (454) 3 Pat L Jour 400

Note 38

1. (02) 29 Cal 239 (241)
(66) 3 Mad H C R 27 (28) (Can, but not bound to allow withdrawal)
2. (96) 24 Cal 129 (132, 133)

Note 39

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(93) 1893 All W N 204 (204)

costs under this rule[2] Where the Court refuses to permit a suit to be withdrawn with liberty to sue again, its order is not one affecting the decision of the case within the meaning of Section 105 and is therefore not open to attack in the appeal from the decree in the suit[3] But where a Court, while dismissing a suit reserves a right to institute a fresh suit, an appeal lies from the former part of the decree because the appeal in such a case is not from an 'order' but from a decree[4] So also where the trial Court allows a suit to be withdrawn and, on the defendant appealing the lower Appellate Court sets aside the order and dismisses the plaintiff s suit the order of the lower Appellate Court amounts to a decree and is appealable to the High Court[5]

40. Letters Patent Appeal. — An order of a single Judge of a High Court refusing to set aside in revision an order of the lower Court allowing a plaintiff to withdraw his suit with liberty of bringing a fresh suit is a 'judgment within the meaning of Clause 15 of the Letters Patent and hence is appealable[1] So also, an order of a single Judge of a High Court allowing the withdrawal of a suit with leave to sue afresh is a judgment and is appealable as such[2]

41. Revision. — *An order allowing the withdrawal of a suit with liberty to* sue afresh is a decision of a case within the meaning of Section 115[1] and is therefore open to revision if it is made on grounds not covered by O 23 R 1[2] So also an order permitting a partition suit to be withdrawn after the preliminary decree in the suit has been passed is open to revision[3] Similarly if the lower Court has not exercised a judicial discretion or has not applied its mind at all to the question in ordering a

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(28) AIR 1928 Mad 416 (418 419) 51 Mad 664

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re a suit is
d the cases
where the Courts though allowing the suit to be withdrawn add that the suit is d smissed)
[**But see** (86) 8 All 82 (84)
(04) 29 Bom 13 (18)]

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drawal)

3 (25) AIR 1925 Cal 711 (713)

4 (17) AIR 1917 All 134 (135 136)
[*See also* (04) 29 Bom 13 (18)]

(488)
under
ndrawn

Note 40

1 (07) 30 Mad 311 (312)

2 (21) AIR 1921 Bom 267 (268) 45 Bom 847

Note 41

1 (22) AIR 1922 Cal 58 (59)
(18) AIR 1918 Pat 372 (373) 2 Pat L Jour 682 (Question left open)
[**But see** (15) AIR 1915 Cal 100 (100) 41 Cal 632]

2 (25) AIR 1925 Oudh 596 (597)
(88) 11 Mad 322 (323)
(93) 15 All 169 (170)
(84) 6 All 211 (213)
(22) AIR 1922 Cal 58 (59)
(18) AIR 1918 Pat 485 (486) 3 Pat L Jour 630.

(13) 21 Ind Cas 23 (24) 37 Bom 682
(25) AIR 1925 Oudh 291 (292 293) 27 Oudh Cas 231
(35) AIR 1935 Oudh 495 (495)
(35) AIR 1935 Pat 251 (252)

3 (35) AIR 1935 Mad 445 (446)

O. 23 R. 1 Note 41

suit to be withdrawn with liberty the High Court can interfere in revision on the ground that the lower Court s order is vitiated by material irregularity in the exerc se of its jurisdiction[4] Thus it has been held that if the lower Court orders a su t to be withdrawn with leave to sue afresh *without giving any reasons* it acts wi h material irregularity and its order is liable to be set aside in revision[5] But where the lower Court has exercised a judicial discretion and allowed a suit to be withdrawn and the reasons assigned by it are within the scope of the rule the High Court will not interfere with its discretion merely because the High Court itself might have taken a different view of the matter[6] An order for withdrawal made *ex parte*[7] or made without any enquiry as to the circumstances justifying such withdrawal[8] is liable to be set aside in revision But where the Court upon an application being made to it for permission to withdraw the suit referred the matter to the other side and the other side stated that it had no objection provided that it got its costs and the Court thereupon allowed the application of the plaintiff, it was held that it could not be said that the Court had not applied its mind to the question and that hence no revision lay[9] An order refusing permission to withdraw a suit with liberty to bring another suit is *interlocutory* in nature and is not open to revision[10]

4 (12) 14 Ind Cas 97 (98) (All)
(35) AIR 1935 All 381 (382)
(34) *AIR 1934 All 137 (139)*
(34) AIR 1934 Cal 59 (60)
(25) AIR 1925 Oudh 140 (141)
(31) AIR 1931 Cal 336 (336)
(26) 95 Ind Cas 556 (556) (All)
(26) 92 Ind Cas 1030 (1031) (All)
(22) AIR 1922 All 185 (185)
(25) AIR 1925 All 466 (466) 47 All 919

[**But see** (02) 29 Cal 230 (241) (Order not containing ground specified in S 3 3—It does not be

5 (88) 11 Mad 322 (323)
(31) AIR 1931 All 19 (19) (Order of lower Court should be in such terms as to make it possible for the High Court to be satisfied that there was *prima facie* at any rate proper ground for the Court s order)
(22) AIR 1922 All 185 (185)
(31) AIR 1931 Cal 336 (336)
(18) AIR 1918 Nag 93 (94)
(28) 117 Ind Cas 864 (864) (Cal)
(18) AIR 1918 Pat 372 (373) 2 Pat L Jour 682
(16) AIR 1916 Mad 674 (674)
(17) *AIR 1917 Cal 744 (744)*
(12) 17 Ind Cas 647 (648) (All)
(29) AIR 1929 All 683 (684)
(31) AIR 1931 Cal 107 (108)
(22) 64 Ind Cas 82 (82) (Cal) (Plaintiff s allegation of misjoinder — Found against—No other
d vague
fic—No

rightly)
(*See* (12) *14 Ind Cas 414* (415) (All) (Where the order was held to be not open to objection as it

7 (17) AIR 1917 Cal 633 (633 634) 44 Cal 454
8 (18) AIR 1918 Pat 452 (454) 3 Pat L

or other sufficient cause there was nothing the Court to examine)
10 (30) AIR 1930 Lah 589 (589)

See also the undermentioned case [11]

As to powers of a special Judge appointed under Section 54 of the Dekkhan Agriculturists Relief Act (XVII of 1879), see the undermentioned case [12]

See also Section 115 for a general discussion of the powers of the High Court in revision and Note 25 above

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R. 2. [S 374] In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted

Limitation law not affected by first suit

[1877, S. 374, 1859, S 97]

1. Limitation. — Under the present rule, a plaintiff withdrawing a suit under O 23 R 1 with liberty to sue again and instituting a fresh suit is not entitled to deduct from the period of limitation applicable to his second suit the time taken up by the withdrawn suit [1] Section 14 of the Limitation Act does not apply where a suit is *withdrawn* by a plaintiff [2] The rule provides that the law of limitation shall apply in the *same manner* as if the prior suit had not been brought Hence a plaintiff is not deprived of the benefit of Section 31 of the Limitation Act merely because he has withdrawn a prior suit relating to the same subject matter under O 23 R 1 [3] This rule applies only to a suit withdrawn under Rule 1 but that rule also does not apply except to cases *properly pending* in a Court in which the leave is granted Therefore where a Court has *no jurisdiction* to try the suit its order granting leave to withdraw the suit with libe tv to file a fresh suit does not fall within Rule 1 Hence this rule does not apply to such a case and Section 14 of the Limitation Act is applicable [4]

Further the present rule applies only where a period is fixed by the *law of limitation* Hence where a plaintiff who is required by the order of a Revenue Court to institute a suit within three months does so within the three months but withdraws the suit with liberty to sue again his subsequent suit brought on the basis of such liberty is not barred though it may be instituted after the expiry of three months from the Revenue Court s order [5]

See also Notes to S 14 in the Authors Commentaries on the Limitation Act

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11 (38) AIR 1938 Cal 615 (618) (D cree holder s

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t ff to w thdraw su t with liberty to sue again)

Order 23 Rule 2 — Note 1

1 (13) 20 Ind Cas 205 (206) (Cal)
(34) AIR 1934 All 688 (691)
(88) 12 Bom 625 (633)
(37) AIR 1937 All 124 (1?6)
(38) AIR 1938 Bom ?81 (282) I L R (1938) Bom 327

2 (28) AIR 1928 All 402 (403)
(34) AIR 1934 All 688 (692)
(32) AIR 1932 All 37? (378) (*Ob ter*)
(05) 29 Bom 219 (25)
(16) AIR 1916 Mad 944 (945) 39 Mad 93
(37) AIR 193 All 124 (126) 1936 All W R 1014 (1015)
(35) AIR 1935 Bom 259 (260)
(38) AIR 1938 Bom 281 (282) I L R (1938) Bom 327
(39) AIR 1939 Cal 625 (625 626) (Order 23 Rule 2 is apparently an exception engrafted on the provisions of S 14 Limitation Act)

3 (12) 14 Ind Cas 175 (176) (All)

4 (08) 35 Cal 924 (928) (Suit filed with leave of Registrar under Cl 12 of the Charter—Leave bad—Withdrawal of suit—*Ultra vires*)
[*See also* (90) 13 Mad 451 (453) (Suits by some of obligees in one Court and others in another—One suit dismissed — Another withdrawn with permission to file fresh suit — Time saved by S 14 Limitation Act)]

5 (14) AIR 1914 All 400 (401)
[*See* (2?) AIR 1927 All 93 (93) (The subsequent suit is a continuation of the prior suit)]

O.23 R.3

Compromise of suit.

R. 3. [S. 375.] Where it is proved to the satisfaction of the[6] Court that a suit has been adjusted[7] wholly or in part by any lawful agreement or compromise,[8] or where the defendant satisfies the plaintiff[16] in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded,[17] and shall pass a decree in accordance therewith so far as it relates to the suit.[18]

[1877, S. 375; 1859, S. 98. See S. 96 (3) and O. 20.]

Local Amendments

OUDH

Add the following proviso

"Provided that no agreement, compromise or satisfaction shall be recorded in a suit instituted under Section 92, Code of Civil Procedure, unless previous notice of the same has been given to the Legal Remembrancer to Government, and the Court, after hearing him, if he desires to be heard, decides to accept it"

RANGOON

For Rule 3 the following shall be *substituted*, namely

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall either pass a decree in accordance therewith or shall decree that all further proceedings in the suit shall be stayed upon the terms of the said agreement, compromise or satisfaction with liberty to the parties to apply for the purpose of carrying the same into effect

Provided that before recording an agreement, compromise or satisfaction in a suit instituted under the provisions of Section 92, Civil Procedure Code, the Court shall direct notice returnable within a reasonable time to be given to the Advocate-General, Burma, or the officer with whose consent the suit was instituted, of the agreement, compromise or satisfaction proposed to be recorded The Advocate General or such officer as aforesaid may thereupon appear before the Court and be heard in the matter of such agreement, compromise or satisfaction"

Synopsis

Other Topics (miscellaneous)

1. Legislative changes. —

1 The words "where it is proved to the satisfaction of the Court that" are new. See Notes 2 and 6 below.

2 The words "the Court shall *order* such agreement, compromise or satisfaction to be recorded" have been substituted for the words "such agreement, compromise or satisfaction shall be recorded " This makes it clear that in every case of a compromise decree, there should be an *order* recording the compromise from which an appeal is provided by Order 43 Rule 1 (m).

3. The words at the end of Section 375 "such decree shall be final so far as it relates to so much of the subject-matter of the suit as is dealt with by the agreement, compromise or satisfaction" have been omitted and a new sub section has been added to Section 96, providing that no appeal lies from a consent decree

2. Scope of the Rule. — After the institution of a suit it may be adjusted by the parties either *wholly* or *in part* by any lawful agreement or compromise The defendant may also *satisfy* the plaintiff in respect of the *whole* or *any part* of the subject matter of the suit In such cases, on the application of the parties the Court *shall order* such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith *so far as it relates to the suit* Where the agreement *or compromise relates to matters entirely extraneous to the suit, no decree can be* passed in terms of such agreement or compromise under this rule

The *Court must be satisfied that there has been a lawful agreement or* compromise, and when one of the parties disputes the legality of the compromise or agreement, the Court should investigate the matter, and, if it finds that there has been a lawful compromise, should pass a decree in terms thereof so far as such compromise relates to the suit [1]

The word "compromise" is more comprehensive than the word "agreement" It means an adjustment of claims in dispute by mutual concessions, and also a mutual promise of two or more parties at difference, to refer the ending of their controversy to arbitrators [2]

3. Applicability to Revenue Courts. — The rule applies to revenue as well

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Order 23 Rule 3 — Note 2

: ' All 426 *(See* (34) AIR 1934 Pat 360 (381))

2 See Wharton s Law Lexicon, 13th Edn , p 193.

'Mad 892.

('37) AIR 1937 Pat 11 (12) 15 Pat 379.

(27) AIR 1927 Bom 565 (567, 578) 51 Bom 903.
(31) AIR 1931 Oudh 127 (129) 6 Luck 591
('39) AIR 1939 Nag 186 (187) I L R (1939) Nag 250 (F B)

O.23 R.3
Notes 3-6

as civil proceedings[1] It does not, however, apply to proceedings for the appointment of common manager under Section 93 of the Bengal Tenancy Act[2] Nor does it apply to a rent suit under that Act, though a compromise in such suits can be recorded by the Court under Section 147A of that Act which is identical in terms with this rule[3] The rule does not, likewise, apply to proceedings under some other special Acts[4]

4. Applicability to mortgage suits. — The rule applies also to suits on mortgages so that it is open to the Courts to decree such suits on terms settled between the parties, instead of in the form directed by Order 34[1] Similarly, the proceedings for a final decree after the preliminary decree has been passed, are proceedings in *suit* and can be compromised[2] See Note 14 to O 34 R 5 for a full discussion So also, the rule applies to the adjustment of the claim of a mortgagee for a personal decree against the mortgagor under O 34 R 6[3] But a mere agreement to *extend the time* given by the preliminary decree for the payment of the mortgage money does not amount to an adjustment of the suit[4] This rule cannot be extended by analogy to proceedings under Section 83 of the Transfer of Property Act[5]

5. Applicability to divorce suits. — Where a decree *nisi* has been passed in a suit for dissolution of marriage it is competent to the Court, where the parties consent, not to make the decree absolute[1]

6. " Where it is proved to the satisfaction of the Court." — These words are new Under the old Code there was a conflict of decisions as to whether, where a compromise was alleged by one party and denied by the other, or where one of the parties to the compromise was not willing to abide by the compromise, the Court had the power to record the compromise and pass a decree thereon On the one hand, it

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Note 3

1 (18) AIR 1918 Oudh 412 (417) 21 Oudh Cas 346

2. (06) 4 Cal L Jour 564 (565)

3. (20) AIR 1920 Pat 602 (604) 4 Pat L Jour 667

4 See S 196 of the Orissa Tenancy Act (II of 1913) and S 199 of the Madras Estates Land Act (I of 1908)

Note 4

1 ('21) AIR 1921 Pat 320 (321)

(37) AIR 1937 All 108 (112) (Final decree for foreclosure based on a preliminary decree which had been passed as a result of a compromise) [*See* (34) AIR 1934 Oudh 44 (45) 9 Luck 387]

)

between O 34 R 5 which requires payment under preliminary mortgage decree to be made into Court and this rule which recognizes payment recorded It is submitted that the [illegible] drawn does not seem to be correct. This rule if it applies at all, will apply whether the payment is admitted or not and the Court has power under this rule to investigate the dispute and determine whether the alleged payment has been made or not)

[illegible] 59 All 565

(

(39) AIR 1939 All 174 (175)

[illegible] 231 (232) (Such

[illegible]

3

4

5. [illegible]

Note 5

1. (88) 10 All 553 (562, 563)

O. 23 R. 3
Note 6

was held by the High Courts of Madras,[1] Calcutta[2] and Bombay,[3] the Chief Court of the Punjab[4] and the Judicial Commissioner s Courts of Nagpur[5] and Oudh[6] that the Court had the power to enquire into the matter, to record it if proved, and to pass a decree thereon on the other hand, it was held by the High Court of Allahabad[7] that under Section 375, the Court could record a compromise and pass a decree thereon only when *at the time of moving the Court* the parties were agreed as to the compromise and the decree to be passed on it The present rule makes it clear that the Legislature has adopted the former view, *viz*, that the Court has jurisdiction in the case of a dispute between the parties as to the compromise, to enquire into and decide whether there has been a lawful compromise in terms of which the suit should be decreed [8] The provision in this rule for an inquiry about the fact and lawfulness of a compromise of a suit in the suit itself is a speedier alternative to a separate suit for specific performance of the contract to compromise the suit on certain terms [9] As to whether and when *appeal* lies from a decree passed under such circumstances see Note 15 to Section 96 *ante*

The onus of establishing that a suit has been adjusted in a lawful manner is on the person who alleges the same [10] It is open to the Court to decide the matter by taking evidence in the usual way or upon affidavits [11] The agreement compromising the suit may be written or oral,[12] and may be proved by oral[13] or documentary evidence The compromise need not be presented by the parties themselves [14] A compromise otherwise unobjectionable is not vitiated by the want of signature of a party [15] A compromise disallowed by the Court cannot be again set up in execution of the decree in the suit [16]

Note 6

1 (96) 19 Mad 419 (421 422)
(1900) 23 Mad 101 (104 105)
(86) 9 Mad 103 (106 107)
(85) 8 Mad 482 (463)
2 (97) 24 Cal 908 (915) (Overruling 11 Cal 250)
3 (96) 20 Bom 304 (308)
(92) 16 Bom 202 (208 209)
(83) 7 Bom 304 (308)
4 (96) 1896 Pun Re No 8 page 21
(88) 1888 Pun Re No 182 page 477
5 (99) 12 C P L R 56 (58)
6 (99) 2 Oudh Cas 67 (72)
(02) 5 Oudh Cas 49 (53)

compromise)
(29) AIR 1929 Pat 102 (102)
(38) AIR 1938 Bom 85 (86)
(37) AIR 1937 Pat 39 (40)
[*See also* (35) AIR 1935 Cal 239 (240) 62 Cal 229]
[But see (34) AIR 1934 Cal 643 (644)]

9 (33) AIR 1933 Pat 306 (403) 12 Pat 359
10 (37) AIR 1937 Pat 11 (12) 15 Pat 379
11 (83) 7 Bom 304 (309)
(02) 5 Oudh Cas 49 (53)
(99) 2 Oudh Cas 67 (72)
(96) 20 Bom 304 (308)
(36) AIR 1936 Mad 347 (350)
[*See* (36) AIR 1936 Sind 59 (61) 29 Sind L R 437 (The general rule that evidence should be recorded before a decision is made and not after should also be followed in cases in which the Court records compromise arrived at between the parties)
[*See also* (38) AIR 1938 Bom 85 (86) (Record

case of complicated compromise it is more desirable that its terms should be drawn up

compromises sought to be proved by oral evidence when one party denies the compromise)]
14 (17) AIR 1917 Lah 282 (283) 1917 Pun Re No 78
15 (14) AIR 1914 Lah 130 (131) (In this case the person who later on objected to the compromise was a party to the suit and was also represented by another person who had a power of attorney in his favour)
16 (71) 3 N W P H C R 81 (81)

O. 23 R. 3
Note 7

7. "Has been adjusted." — In order that the rule may apply, there must be a *completed agreement* between the parties[1] and the agreement *must amount to an adjustment*, in whole or in part of the suit[2] The following cases will show when a suit can be said to be adjusted and when not —

(1) Where a case is adjourned on the ground that the parties contemplated compromising the matter out of Court, there is no adjustment of the suit within the rule[3]

(2) Where parties agree that the suit should be disposed of in one way if a certain simple fact was found to exist and in another way if it was found *not to exist* it has been held by the High Court of Calcutta that it amounts to an adjustment of the suit[4] The High Court of Allahabad has taken a contrary view[5] See also the undermentioned decision[6]

(3) An agreement between the parties to a suit to abide by the final decision which may be made in another proceeding amounts to an adjustment when that decision is actually passed[7]

(4) *(a)* An agreement *between the parties* that a dispute is to be settled in one way or the other in accordance with the statement of a third person *is an* adjustment[8]

(b) But an agreement between the parties *to refer their disputes* to a third party s decision and abide by his terms is not an adjustment, till the terms are stated and *accepted*[9]

Note 7

1. (16) AIR 1916 Pat 159 (160) (Parties making mutual concession with a view to terminate the litigation—Agreement)
(11) 9 Ind Cas 426 (427) (Oudh) (Mere offer of certain terms by plaintiff which are rejected by defendant not enough)
(20) AIR 1920 Mad 13 (18) (Mere agreement to draw up a formal document does not prevent the

[illegible]

by one of the parties on the ground that he does not understand whether a particular matter is included in those terms or not)
(30) AIR 1930 Sind 217 (218) (Inchoate agreement — Evidence of completion is necessary — Agreement is ineffective without it)
(24) AIR 1924 P C 200 (201) (P C) (Parties not

[illegible] at that [illegible] regard to certain land he should purchase the land from the defendant for a certain price does not amount to an adjustment of the suit)
(30) AIR 1930 Sind 217 (217) (Rule applies to adjustment of whole or part of suit)
(23) AIR 1923 Pat 293 (294) (Partial adjustment —Suit must proceed in usual way in respect of

said to have been adjusted by lawful agreement or compromise)
3 (31) AIR 1931 Cal 205 (206)
(29) AIR 1929 Mad 416 (417)
4 (17) AIR 1917 Cal 327 (328)
5 (92) 14 All 141 (144) (Agreement to make disposal of suit depends upon a certain fact i e g found upon a certain document or not — Agreement is not adjustment as it leaves something to be done by the Court)
6 [illegible]

decreed—Defendant will be estopped from [illegible] from agreement apart from question of adjustment)
7 ('19) AIR 1919 Mad 546 (547) (Distinguishing 15 Ind Cas 378 on ground that terms of agreement in that case were not clear)
[But see (35) AIR 1935 Rang 482 (482) (Agreement between parties that damages claimed by [illegible]

[illegible] case the same principle was held app[illegible] an agree[illegible]nt of the defendant to be bound by [illegible]

(c) When a dispute is referred by the parties to a third party's decision there is a *locus pœnitentiæ* to withdraw from such agreement till the third party functions[10]

(5) A compromise which either party has the option of repudiating afterwards is not an adjustment of the suit[11]

(6) An agreement to abide by the decision of the Court whether right or wrong amounts to a compromise within this rule[12]

(7) An agreement for making the decision of Court depend on contingencies *beyond* the control of parties is not an adjustment,[13] while it will be an adjustment if the contingency is within the power of the parties themselves[14]

(8) The abandonment of an issue does not amount to a compromise[15]

(9) It has been held by the Allahabad High Court[16] that an agreement that the suit should be decreed if a certain witness eats food served by the plaintiff is binding on the parties and if the witness eats the food the suit should be decreed as per the agreement In the above case it was held that the present rule did not apply to it In an earlier case of the same High Court it was held that such an agreement concluded the matter only with reference to one of the issues in the case *viz*, that of legitimacy and that the other issues should be tried on the merits[17] According to the Oudh Judicial Commissioner s Court[18] such an agreement does not constitute an adjustment within this rule but the agreement and its performance would be evidence on the issue of legitimacy In the undermentioned case[19] it was held by the Madras High Court that an agreement by a party that the suit should be decided in a particular way if a certain event should happen will *estop* him from resiling from the agreement afterwards apart from the question of adjustment The Rangoon High Court in the undermentioned case[20] held that an agreement that the suit should be decided according to the decision in another suit then pending is not an adjustment but is binding on the parties

It has been held that a suit may be compromised even after a preliminary decree provided that the final decree has not been passed[21] Similarly, it has been held that there can be a 'satisfaction (under this rule) of the plaintiff s claim between the preliminary and final decrees in a suit[22] For full discussion, see Note 14 to O 34 R 5

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11 ('14) AIR 1914 Lah 306 (307) 1914 Pun Re No 24
12 ('25) AIR 1925 All 559 (559) 47 All 921
('21) AIR 1921 All 310 (310) 43 All 26?
('2?) AIR 19?? Oudh 451 (452) 5 Luck 391
('28) AIR 1928 All 497 (498) (Judge deviating from ordinary procedure on the strength of agreement between parties and deciding on question of fact—Findings of fact are binding on the parties)
13 ('27) AIR 1927 Oudh 222 (2?3)
('24) AIR 1924 Oudh 3?7 (3?8) 27 Oudh Cas 157
('28) AIR 1928 Cal 109 (110) (Parties agreeing to withdraw their respective pleas on certain contingency — Contingency not occurring — There is no compromise within O 23 R 3)
14 ('05) 17 Mad L Jour 37 (38) (Agreement that suit should be dismissed if within a given time the plaintiff failed to convey the suit lands to the defendant)
15 ('99) 22 Mad 538 (546)
16 ('25) AIR 1925 All 271 (272) 47 All 456
17 ('24) AIR 1924 All 911 (912)
18 ('24) AIR 1924 Oudh 367 (368) 27 Oudh Cas 157
19 ('36) AIR 1936 Mad 856 (857)
20 ('35) AIR 1935 Rang 482 (482)
21 ('36) AIR 1936 Oudh 320 (320 321) 12 Luck 260 (Appeal against preliminary decree pending — Trial Court can entertain application to record compromise unless Appellate Court has stayed proceedings)
22 ('35) AIR 1935 Pat 395 (395) 14 Pat 489 (There is nothing in the rule which makes it inapplicable to a suit after the preliminary decree and before the final decree)

O. 23 R. 3
Note 8

8. "By any lawful agreement or compromise." — The rule restricts the power of the Court to record agreements or compromises, to such agreements as are *lawful* and the Court is therefore bound to enquire into the question whether the compromise it is asked to record is a lawful one or not[1] If a *part* of the compromise is unlawful and it can be separated from the rest, the Court can record that portion of the compromise which is lawful[2] Ordinarily, when investigating the fact and lawfulness of a compromise under this rule, it is irrelevant to examine the strength or weakness of the suit itself[3]

The expression 'lawful' refers to the *legality* of the terms of the agreement and not to its *binding character* Therefore, an agreement or compromise may be lawful within this rule although it may not be *binding* on one of the parties on the ground of its having been brought about by coercion, undue influence or fraud[4] The word lawful means lawful within the meaning of the Contract Act, that is to say, the rule requires an agreement which is legally enforceable, but it is not necessary that in order to enable a Court to record a compromise the terms, which are to be complied with after decree should be specifically enforceable under the Specific Relief Act[5]

The following have been held to be agreements which are *unlawful* within the meaning of this rule —

(1) Agreements *prohibited* by law such as an agreement to transfer a property which is inalienable in law[6]

(2) Agreements which are *opposed to public policy*, such as an agreement for the alienation of a religious office[7] or an agreement relating to a public trust

Note 8

(35) AIR 1935 Bom 54 (64)
[*See* (33) AIR 1933 Pat 306 (399) 12 Pat 359 (Grossly unfair compromise will raise presumption of unconscionableness and fraud and may be relieved against)]

2 (10) 6 Ind Cas 857 (659) (All)
(28) AIR 1928 Pat 495 (496) (Compromise was held not illegal inasmuch as the substantial portion of it was not against the law of the locality)
[*See also* (19) AIR 1919 Cal 458 (458) (Separate petitions by both parties to a suit for a decree — *Held* not a compromise under this rule)]

3 (33) AIR 1933 Pat 306 (339) 12 Pat 359

4 (28) AIR 1928 All 494 (496) 50 All 748
(35) AIR 1935 All 137 (138 139) 57 All 426 (Party executing compromise cannot avoid it under O 23 R 3 on ground of fraud)
(32) AIR 1932 All 478 (479) (The fact that the ... d party will ...

(25) AIR 1925 All 266 (267)
(36) AIR 1936 Mad 347 (350) (Mere fact that the compromise is voidable is no reason for Court refusing to record it)

... ful as defined in the Contract Act but ... agreements which on the face of them are void)]
[**But see** (27) AIR 1927 Lah 546 (549) (In the peculiar circumstances in the case it was held that the compromise which *had been* brought about by undue influence was unlawful and could not be recorded)]

5. (33) AIR 1933 Pat 306 (405) 12 Pat 359

6 (19) AIR 1919 Mad 429 (431) (*Mortgage* invalid under Section 4 of the Madras Impartible Estates Act)
(20) AIR 1920 Nag 35 (37) (Compromise involving sale of *thekadars* interest the transfer of which is prohibited by law)
(20) AIR 1920 Pat 159 (160) (Compromise amounting to a clear violation of statutory rules is not lawful)
(10) 5 Ind Cas 236 (238) (Cal) (Compromise in excess of powers conferred by S ..0 of the Probate and Administration Act is *unlawful*)

7. (15) AIR 1915 Mad 561 (568) 38 Mad 5..0
(02) 26 Mad 31 (33)

which is detrimental to its interest,[8] or an agreement which amounts to a breach of trust [9]

(3) Agreements which involve injury to a third party.[10]

(4) According to the High Courts of Allahabad[11] and Madras[12] an agreement amounting to the transfer of a *spes successionis* which is prohibited by Section 6 of the Transfer of Property Act, is not lawful According to the High Court of Calcutta[13] an agreement between expectants to divide a particular property in a certain way on the happening of a particular contingency is lawful. Where certain reversioners executed a sale deed of a *spes successionis* before the death of the limited owners but entered into a compromise as to it *after the limited owner's death*, it was held by the Chief Court of Oudh that the compromise was not unlawful [14]

For other instances, see the undermentioned cases.[15]

A compromise containing an agreement for the withdrawal of a prosecution for a *compoundable offence*,[16] or for allowing a relief which is barred by limitation,[17] is not unlawful Nor is a compromise unlawful merely because the parties do not get the shares to which they would be legally entitled[18] or because it contains a penal provision [19] A compromise in which one party transfers his right to another is not bad on the ground of *lis pendens* [20]

A *promise* to do a thing can be a good consideration for the adjustment of a suit, it is not necessary that the promise should have been carried out before the adjustment can be recorded under this rule [21] The rule contemplates an adjustment by *act of parties* and not an adjustment which has a statutory operation Hence, a scheme of arrangement which when sanctioned by the Court acquires a statutory

8. ('30) AIR 1930 Mad 629 (630) 53 Mad 398
('22) AIR 1922 Mad 429 (432) (Compromise relating to public trust is not necessarily unlawful But Court must scrutinize compromise to see if it is not detrimental to trust)
('15) AIR 1915 Mad 915 (919) (Compromise by *matadhipathi* under influence of indirect motive, viz , to avoid appearing in Court as a witness is breach of duty and not lawful)
('27) 106 Ind Cas 645 (646) (Pat) (Agreement by mahant to transfer *mutt* property for no necessary purpose is unlawful)
('01) 6 Cal W N 404 (405, 406) (Decree for removal of mahant — Appeal pending — Parties compromising suit not lawful)
[*See* (07) 34 Cal 249 (255, 256) (Compromise by shebait for benefit of endowment is valid and binding)]
[*See also* ('15) AIR 1915 Cal 193 (194) (Suit relating to public trust under S 92, C P C, cannot be compromised)
[**But see** (20) AIR 1920 Mad 508 (509) (*Bona fide* compromise by trustee of public trust is ignoring the rights of the other defendants.)
(23) AIR 1923 Oudh 252 (253) (Compromise between plaintiff and one defendant prejudicial to other defendants)
(24) AIR 1924 Cal 159 (160) (*A* suing *B*, the mortgagor and *C* the puisne mortgagee—*A* and *B* compromising whereby *A* agrees to pay *B* more than what was due)
11 ('09) 2 Ind Cas 865 (873) (All)
12. (07) 30 Mad 255 (263).
13. (82) 8 Cal 138 (145)
14. (29) AIR 1929 Oudh 63 (64) 4 Luck 181
15 (35) 61 Cal L Jour 88 (90) (Agreement which purports to deal with the rights of certain minors who are not parties to the suit is not a lawful agreement as it involves and implies injury to the property of minors)
('36) 38 Pun L R 283 (283, 284) (Compromise affecting the rights of a person who is not a party to it cannot be considered to be lawful)
16. (30) AIR 1930 Lah 660 (661)

...

to worship in a temple against the settled custom)
10. (19) AIR 1919 Pat 146 (155) 4 Pat L Jour 560
('19) AIR 1919 Pat 325 (328)
('05) 32 Cal 561 (566) (Compromise between the plaintiffs and the executors in administration suit
18. (20) AIR 1920 Cal 269 (269)
19. (26) AIR 1926 All 278 (280)
20. (35) AIR 1935 Bom 54 (64)
21. (37) AIR 1937 Pat 33 (39) (Defendant agreeing to execute sale deed in consideration of plaintiff agreeing to have suit decided in parti-

O. 23 R. 3
Notes 8-9

operation under Section 153, sub section (2) of the Companies Act cannot be said to be a lawful agreement or compromise within the meaning of this rule [22]

9. Submission to award, if a valid adjustment. — Under the *old Code* it was held that where the parties to a pending suit referred the matter to arbitration the award could be filed as an adjustment under this rule [1] The present *Code*, however, contains a new Section, namely Section 89, which provides as follows

> "Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by *any other law* for the time being in force all *references* to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder *shall be governed by the provisions contained in the Second Schedule*"

The question has arisen whether, in view of this Section a submission to arbitration by parties without the intervention of the Court and the award passed by the arbitrators on such submission can be filed as an adjustment by way of compromise under this rule On this question there is a conflict of opinion According to the High Courts of Calcutta,[2] Lahore,[3] Nagpur[4] and Rangoon,[5] the words "any *other* law in force' cannot include the *provisions of the Code itself*, and therefore cannot include the provisions of this rule Hence, in view of Section 89 such a matter must be governed only by the provisions of the Second Schedule, and the submission and the award cannot be filed as an adjustment under this rule On the other hand, the High Courts of Allahabad,[6] Madras[7] and Patna,[8] the Chief Court of Oudh[9] and the Judicial Commissioner s Court of Sind[10] are of the opinion that the words "any *other* law in force include the provisions of this rule and that therefore such submission and award can be filed as an adjustment by way of a compromise within the meaning of this rule The High Court of Bombay has reached the same conclusion but on a

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cular way—Sale deed need not have been executed before defendant can apply under this rule)

22. (37) AIR 1937 Cal 381 (382)

Note 9

1. (97) 21 Bom 335 (341)
(96) 20 Bom 304 (308)
(01) 24 Mad 326 (330)
(02) 26 Bom 76 (78 80 81)

2 (22) AIR 1922 Cal 404 (406) 49 Cal 608
(35) AIR 1935 Cal 239 (241) 62 Cal 229
(34) AIR 1934 Cal 643 (644) (But otherwise if consented to by parties)
(21) AIR 1921 Cal 238 (239)
(27) AIR 1927 Cal 887 (888) 55 Cal 538 (*But otherwise if consented to by parties*)
[But see (20) AIR 1920 Cal 269 (269)]

3 (21) AIR 1921 Lah 232 (233) (But otherwise

overruled AIR 1931

5 04) 1930 Rang L R 260 (F B) (Overruling AIR 1931 Rang 58)

6 (25) AIR 1925 All 503 (506, 508) 47 All 637 (F B)

7. (28) AIR 1928 Mad 1025 (1028) 51 Mad 800 (F B)
(25) AIR 1925 Mad 50 (51)
(27) AIR 1927 Mad 1126 (1127)
(23) AIR 1923 Mad 576 (576 577) (Partial award not invalid)

8 (32) AIR 1932 Pat 205 (205) 11 Pat 23
[But see (35) AIR 1935 Pat 243 (245 247)

9. (31) AIR 1931 Oudh 127 (129 131) 6 Luck 591
(22) AIR 1922 Oudh 189 (190) 25 Oudh Cas 213

10 (13) 19 Ind Cas 450 (450) 6 Sind L R 106
(29) AIR 1929 Sind 107 (109) 23 Sind L R 349 *(Obiter)*
(25) AIR 1925 Sind 266 (269) 18 Sind L R 111
('21) AIR 1921 Sind 65 (67, 70) 16 Sind L R 174 *(F B)*
(35) AIR 1935 Sind 184 (185) (*But if the plaintiff wants a decree for certain reliefs granted to him under the award which according to the tenor of the award are enforceable under the provisions of the Arbitration Act and not by virtue of any decree which might be passed in the suit the application of the plaintiff for the reference and award being recorded as an adjustment of the suit under O 23 R 3 should be disallowed*)

somewhat different reasoning According to it, the words "any other law in force" mean only any other law of *arbitration* for the time being in force, such as Section 152 of the Companies Act or Sections 43 to 45 of the Dekkhan Agriculturists Relief Act or the Co operative Societies Act or the general law of contracts whereby parties may agree to refer their disputes to arbitration, and that they do not include this rule It is, however, of opinion that the words in Section 89 of the Code "shall be governed by the provisions of the Second Schedule" are totally inapt to convey a *prohibition* and that they mean no more than that in those arbitrations which are dealt with by the Second Schedule the procedure of that Schedule shall be followed Where, therefore, a submission and award are not covered by the provisions of the Second Schedule, as where the reference is made in a *pending suit* without the intervention of the Court, Section 89 has no application at all and the award can therefore be recognized as an adjustment of the suit by way of compromise under this rule [11] In the undermentioned case of the Bombay High Court,[12] Rangnekar, J, sitting as a single Judge, was inclined to agree with the Calcutta view The observations were, however, *obiter* Where both the parties *accept* the award of the arbitrators, the award becomes a compromise and can be recorded under this rule [13]

The Court acting under this rule (in cases where it has been held that an award can be pleaded in a compromise) can enquire into any alleged misconduct of the arbitrator [14] Further, if a party does not raise any objection to the recording of a submission and award as a compromise under this rule, he is estopped from questioning the Court's power to do so [15] But a *mere agreement* to refer to arbitration has been held not to be a compromise within this rule [16] Nor can an award under an invalid reference be accepted as a compromise or adjustment under this rule [17]

10. Agreement to take oath. — The Oaths Act does not provide for the *adjustment* of a suit in an arbitrary way by the oath of a party Hence an agreement to be bound by the oath of the opposite party does not amount to an adjustment of the suit but the oath amounts only to a *conclusive proof*, as against the party agreeing to be bound, of the matter stated [1] Similarly, if a party has agreed that if he fails to take a certain oath the suit should be decreed or dismissed, his failure to take the oath does not justify the disposal of the suit under the present rule Under Section 12 of

11. ('27) AIR 1927 Bom 565 (574 577) 51 Bom 908 (F B) (Overruling by necessary implication A I R 1916 Bom 125)
(21) AIR 1921 Bom 310 (314, 316) 45 Bom 245
(30) AIR 1930 Bom 431 (435) 54 Bom 606
(13) 19 Ind Cas 786 (787) 37 Bom 639
12. (30) AIR 1930 Bom 98 (105) 54 Bom 197.
13 (30) AIR 1930 Lah 860 (861)
(26) AIR 1926 Mad 1211 (1211, 1212)
(12) 15 Ind Cas 959 (960) 6 Low Bur Rul 55
(37) AIR 1937 Rang 287 (290) 14 Rang 766
(39) AIR 1939 Rang 300 (301) 1939 Rang L R 280 (F B).
14. (23) AIR 1923 Bom 401 (401).
15. (29) AIR 1929 Bom 1 (6) 53 Bom 75
16 (03) 30 Cal 218 (228 229)
(82) 1882 Pun Re No 130 page 397
(22) AIR 1922 Bom 436 (437) 46 Bom 854
(25) AIR 1925 P C 70 (73) (PC)
(11) 12 Ind Cas 372 (375) 36 Mad 353
(12) 16 Ind Cas 478 (482) (Mad)
(14) AIR 1914 Sind 95 (96) 8 Sind L R 187.
(14) AIR 1914 Bom 184 (186) 38 Bom 687.
(17) AIR 1917 Cal 327 (328)
17 (08) 33 Bom 69 (76)
(21) AIR 1921 Mad 709 (709)
(31) AIR 1931 Bom 343 (346) 55 Bom 503
[**Compare** (26) AIR 1926 Mad 366 (366)]

Note 10

1 ('99) 22 Mad 234 (237)
(79) 2 Mad 356 (360)
(22) AIR 1922 All 160 (161) 44 All 117.
(92) 14 All 141 (145)
(18) AIR 1918 Lah 126 (126) 1918 Pun Re No 83
[*See* (33) AIR 1933 All 956 (957) (Reference of dispute to arbitration—Defendant s subsequent statement on oath— Decree might be passed as prayed for in plaint—Plaintiff making required statement on oath—There is no compromise as defined in O 23 R 3 and arbitrator was not deprived of his powers to give whatever award he thought proper)]
[*See also* (33) AIR 1933 All 463 (464) 55 All 298]

O. 23 R. 3
Note 17

parties to a suit [3] The Court cannot refuse to record the compromise merely because the Court considers it too favourable to one side[4] or that the working of it would give trouble [5]

It has been held by the Madras High Court[6] and the Chief Court of the Punjab[7] that till judgment is delivered in open Court, the Court has jurisdiction to record a compromise In a Calcutta case[8] where an appeal had been dismissed for default, both parties being absent and they then presented a petition asking that the case should be decreed in terms thereof, it was held that the Court ought to restore the case giving effect to the petition of compromise Where an *ex parte* decree is set aside by suit on the ground of fraud, the original suit is restored as on the date of the *ex parte* decree and any compromise entered into before the decree should be recorded [9] But there can be no consent decree unless the case has come on the cause list of the Court [10]

Where a plaintiff, in pursuance of a compromise, merely asks for a withdrawal of suit, the Court is not bound to record the compromise [11] Where the parties enter into a compromise outside Court, but a compromise decree is not duly passed under this rule, and a decree is passed in the usual way, the terms of the agreement between the parties cannot be enforced [12] If the Court s order does not embody the whole compromise but embodies only a portion of it, the compromise is not enforceable [13] But the rule does not require that the order should set out the compromise *verbatim* It is enough if the terms of the compromise are indicated with sufficient clearness [14] An order of adjournment incidentally noting the fact of an agreement made out of Court between the parties as a ground of adjournment is not a record of the compromise [15] Where the claim is beyond the jurisdiction of the Court it cannot pass a compromise decree It can only return the plaint under O 7 R 10 [16]

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3. ('23) AIR 1923 P C 98 (101) (P C)
('33) AIR 1933 Pat 306 (406) 12 Pat 359
('30) AIR 1930 P C 158 (162) 57 Ind App 133 57 Cal 1311 (P C)
('28) AIR 1928 Oudh 48 (48)
('35) AIR 1935 P C 119 (120) 14 Pat 545 62 Ind App 196 (P C) (If there is no separate record of the compromise the decree ought to recite the fact of a compromise and its terms and then proceed to set out the orders made by the Court to enforce the decree)
('39) AIR 1939 Nag 233 (238) I L R (1939) Nag 607 (F B)
('36) AIR 1936 Mad 347 (350)
('36) AIR 1936 All 433 (433)
('36) AIR 1936 Pat 401 (401) 15 Pat 456 (Passing of decree based on compromise may be postponed but not actual recording of compromise)
('36) AIR 1936 All 9 (10) 58 All 565
[*See also* ('32) AIR 1932 Bom 466 (467)]
4. ('98) 22 Bom 238 (240)
('30) AIR 1930 Mad 629 (630) 53 Mad 399
('36) AIR 1936 Mad 347 (350) (Court has no jurisdiction, except in the case of minors etc , to investigate the fairness or unfairness of a compromise which has been accepted by the parties)
5. ('10) 6 Ind Cas 857 (858) (All)
('33) AIR 1933 Pat 306 (405) 12 Pat 359 (It is not the business of the Court to speculate on the difficulties that may arise at the time of execution)
6 ('21) AIR 1921 Mad 690 (690 691) (Though result of suit announced on notice board)
7. ('08) 1908 Pun W R 67 (*Though judgment already written*)
8. ('23) AIR 1923 Cal 319 (319).
9 ('19) AIR 1919 Cal 993 (994)
10. ('79) 5 Cal L Rep 464 (464).
11 ('16) AIR 1916 Cal 80 (81)
('17) AIR 1917 Nag 1 (4) (Dismissal at party s request amounts to withdrawal of suit without leave to sue afresh)
12 ('21) AIR 1921 Lah 248 (249) 1 Lah 445
('24) AIR 1924 Nag 325 (327)
[**But see** ('74) 8 Mad H C R 1 (5) (Suit lies on the agreement against the party violating its *terms*)]
13. ('29) AIR 1929 Lah 291 (292) 10 Lah 655
14. ('28) AIR 1928 Nag 51 (51) 23 Nag L R 124
('32) AIR 1932 Lah 24 (24, 25) (A reference to the agreement in the order *held* sufficient record of its terms)
15. ('16) AIR 1916 Mad 849 (849)
16. ('21) AIR 1921 Mad 696 (699).

18. "Shall pass a decree in accordance therewith so far as it relates to the suit." — A decree on a compromise under this rule can be passed only so far *as it relates to the suit* [1] The question whether a particular term of a petition of compromise relates to the suit must be decided from the frame of the suit, the relief claimed and the relief allowed by the decree on adjustment by lawful agreement The mutual connection of the different parts of the relief granted by a consent decree is an important element for consideration in each case in deciding whether any portion of the relief is within the scope of the suit No hard and fast rule can be laid down and each case must be governed by its own facts [2] Where the suit is merely for the recovery of specific properties, the compromise must relate to such properties only But where the suit is not merely for the recovery of the property, but to establish particular rights, the facts have to be looked at as a whole to decide whether matters that do not relate to the suit have been introduced In such cases, all terms which *form the consideration for the adjustment* of the matters in dispute, whether they form the subject matter of the suit or not, become related to the suit, and can be embodied in the decree [3]

The following are instances in which the compromise was held to ' relate to the suit" within the meaning of this rule —

(1) The compromise of a suit for a money decree may provide for a charge being created on the defendant s immovable property for the payment of the amount agreed on [4]

Note 18

1 (95) 18 Mad 410 (414)
(86) 13 Cal 170 (171)
(20) AIR 1920 Lat 159 (160)
(99) 2 Oudh Cas 330 (334)
(22) AIR 1922 Cal 358 (361 362) 49 Cal 220
(36) AIR 1936 Pat 401 (401) 15 Pat 456
(35) AIR 1935 All 127 (129)
(39) AIR 1939 All 454 (456) I L R (1939) All 435 (Where the compromise does not relate to the suit the presumption is that the rule implies that the Court should not pass a decree in regard to it)
(35) AIR 1935 P C 119 (122) 14 Pat 545 62 Ind App 196 (P C) (Matter compromised collateral to suit—Court not to pass decree in respect of such matter under this rule)
2 (03) 35 Cal 837 (841)
(15) AIR 1915 Mad 210 (215) 38 Mad 959
(32) AIR 1932 Bom 47 (48 to 51)
(40) AIR 1940 Oudh 27 (29)
(37) AIR 1937 Pat 232 (233) (Whether a particular matter is the subject matter of or relates to suit is primarily a question of fact)
(37) AIR 1937 Sind 190 (192) 31 Sind L R 153 (Whether compromise does or does not relate to suit is question of fact depending upon particular facts of each case)
3 (21) AIR 1921 Cal 202 (207) 48 Cal 1050
(34) AIR 1934 Lah 623 (625) (Demolition of wall not in suit consideration for abandoning claim of wall in suit—Compromise as to former wall is deemed as relating to suit)
(33) AIR 1933 Pat 176 (178) ('Matter relating to the suit means either relating to the suit or not collateral to the suit)
(18) AIR 1918 Pat 507 (512) 3 Pat L Jour 255 (S B)
(32) AIR 1932 Bom 466 (467)
(15) AIR 1915 Mad 210 (215) 38 Mad 959
(15) AIR 1915 Mad 322 (323)
(15) AIR 1915 Mad 683 (684)
(18) AIR 1918 Pat 139 (142) 3 Pat L Jour 43
(32) AIR 1932 Bom 47 (51)
(31) AIR 1931 Bom 295 (296)
(25) AIR 1925 Mad 1101 (1104)
(20) AIR 1920 Pat 602 (604) 4 Pat L Jour 667
(09) 33 Mad 102 (105) (Relief granted under O 23 R 3 (S 375) can extend to what is not prayed for in the plaint)
(22) AIR 1922 Low Bur 22 (24) 10 Low Bur Rul 349 (The words so far as it relates to the suit mean so far as it relates to the adjustment or

(38) AIR 1938 Oudh 103 (105)
(37) AIR 1937 Pat 232 (233)
[But see (95) 5 Mad L Jour 145 (147) (The compromise should be confined to the relief that could be given in the same suit if decided in the regular course)
(40) AIR 1940 Oudh 27 (29) (Mere fact that certain matters of compromise formed consideration of it does not mean that those matters become related to suit The test to apply is what is the relief which would have been granted by the Court in the suit if the compromise had not intervened)]
4 (30) AIR 1930 Nag 17 (18)
(29) AIR 1929 Nag 164 (167, 168) 25 Nag L R 110
(25) AIR 1925 Mad 1101 (1103 1104)
(18) AIR 1918 Mad 1307 (1308)
(07) 30 Mad 478 (480 481)

O. 23 R. 3
Note 18

(2) The compromise of a suit for a declaration may include a term as to the payment of a sum of money by one of the parties to the others[5]

(3) Where one co tenant who has paid the entire rent of the land sues the other co tenant for contribution, the suit may be compromised by providing that the defendant should give up his share of the land in favour of the plaintiff[6]

(4) Where a suit is for the recovery of certain property, a compromise providing that the defendant should redeem a certain house under mortgage and deliver it to the plaintiff is one relating to the suit[7]

(5) *A* and *B*, a lessee from *A*, sued *C* asserting *A*s title to certain land The suit was compromised by providing that *C*, the defendant should recognize the lease granted by *A* to *B* and that, in consideration for this, was to be entitled to a half share of the rent paid by *B* The compromise was held to be one relating to the suit[8]

See also the undermentioned cases[9]

The following are instances in which the compromise was held *not* to relate to the suit —

(1) A consent decree in a partition suit between brothers cannot deal with the rights in their mother s share after her death[10]

(2) Plaintiff claimed a certain sum with interest at nine and a half per cent per annum The suit was compromised by the defendant agreeing that he would pay a smaller sum within a fixed time and that on default he would pay the amount with interest at a very much higher rate It was held that the stipulation as to the higher rate of interest did not relate to the suit[11]

(3) A suit for damages for crops misappropriated was compromised by the amount of damages being settled and also by a provision being made that the defendant should hold the land under the plaintiff at a certain rent It was held that the agreement as to tenancy was outside the scope of the suit[12]

(4) Plaintiff sued to restrain the defendant from building a house in such a way as to interfere with the plaintiff s enjoyment of light and air The suit was compromised by providing that the defendant should not build his house higher than it originally was and also that the defendant should not let water into the passage between the houses The agreement as to the passage was held to be beyond the scope of the suit[13]

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(08) 35 Cal 837 (843)
(07) 17 Mad L Jour 200 (201) (Suit on mortgage bond and for accounts compromised—Mortgage decree for the whole amount including the sum not forming part of the mortgage amount may

L R 55
(33) AIR 1933 Pat 176 (178)
6 (20) AIR 1920 Cal 194 (195)
7. (09) 2 Ind Cas 430 (430) (Mad)
8 (09) 33 Mad 102 (105 106)
9 (09) 1 Ind Cas 572 (572) (Cal) (Suit by *A* against his landlord for possession of leased land —*B* impleaded as party — Real contest being between *B* and landlord—Compromise of suit—*A* abandoning suit and *B* agreeing to pay rent to landlord — Compromise is one relating to suit)
(37) AIR 1937 Pat 232 (234) (Suit for account —Agreement by plaintiff to take only her share of income of certain villages in consideration of her giving up her rights to an account is one relating to suit)
10 (21) AIR 1921 Cal 202 (207) 48 Cal 10 9
11 (18) AIR 1918 Pat 635 (636) 2 Pat L Jour 673
12 (07) 5 Cal L Jour 15 (17)
13 (83) 7 Bom 304 (309)
[*See also* (37) AIR 1937 Sind 190 (191 19) 31 Sind L R 153 (Suit for injunction against defendant restraining him from building house in such a manner as to block certain apertures of plaintiff s house and thus keep out light and air —Compromise between parties preventing defendant from raising certain structure — Compromise giving plaintiff

Although it is obligatory upon a Court, under this rule, to pass a decree in terms of a compromise, after it has been recorded, it is not necessary that the decree should be passed *simultaneously* with the order recording the compromise There is nothing to prevent the Court from postponing the passing of a decree in a proper case.[14] Also, the Court is not bound to pass a decree in the exact form which the parties propose [15] Further, the decree is not vitiated merely because it does not recite *verbatim* the compromise [16] A Court acting under this rule cannot make a *declaratory* decree inasmuch as, not having heard the case on the merits, the Court is not in a position to form its own opinion as to the merits of the case [17] As the decree should be in accordance with the compromise, where the latter does not provide for a personal remedy, the decree also cannot grant it [18] If a suit has been compromised by the original parties thereto, a third party cannot be allowed to intervene and oppose the passing of a decree on the compromise [19]

19. Where compromise includes matters not relating to the suit. — It has been seen that a decree can be passed under this rule only so far as the compromise relates to the suit But a compromise which includes matters extraneous to the suit is not unlawful[1] and cannot be rejected in its entirety by the Court [2] Where a compromise comprises matters unconnected with the suit, the proper course for the Court is to recite the compromise as a whole in its decree or in the form of a schedule to the decree for purposes of reference but to restrict the operative part of the decree to those terms of the compromise which relate to the suit In such a case the decree would be executable only in respect of the matters that relate to the suit [3] The remaining terms of the compromise i e, those which are not incorporated in the operative part of the decree, may be enforced by means of a separate suit [4]

Where a compromise which includes matters extraneous to the suit has been entered into on condition that it should be given effect to as a whole, the Court should not dismiss the suit,[5] but should permit the parties to suitably enlarge the scope of the suit by means of amendment of pleadings, so as to enable the compromise to be passed into a decree [6]

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adequate relief and not full relief—Decree based on compromise—Compromise falls within scope of suit—Decree on such compromise can be executed under O 23 R 3)

14. (30) AIR 1930 Pat 395 (399 400) 9 Pat 314
(36) AIR 1936 Pat 401 (401) 15 Pat 456

15 (29) AIR 1929 Bom 350 (352)
[*See also* (97 01) 1897 1901 Upp Bur Rul 256 (Court to ascertain terms of compromise and decree accordingly)]

16 (29) AIR 1929 Lah 527 (528)

17 (29) AIR 1929 Bom 350 (352)

18. (26) AIR 1926 Nag 20 (21)

19 (26) AIR 1926 Mad 341 (341 342)
(32) AIR 1932 All 478 (479 480)

Note 19

1. ('17) AIR 1917 Lah 282 (284) 1917 Pun Re No 78

2 (17) AIR 1917 Lah 282 (284) 1917 Pun Re No 78

3 (19) AIR 1919 P C 79 (81) 46 Ind App 240 47 Cal 485 (PC)
(33) AIR 1933 All 649 (651) 55 All 775 (FB)
(01) 5 Cal W N 485 (487)
('18) AIR 1918 Pat 507 (512) 3 Pat L Jour 255 (SB)
(32) AIR 1932 Bom 466 (467)
(21) AIR 1921 Cal 500 (500)
('28) AIR 1928 Rang 43 (43 44) 5 Rang 662
(39) AIR 1939 All 454 (456) I L R (1939) All 435
('36) AIR 1936 Cal 446 (448)
(40) AIR 1940 Oudh 27 (32) (Merely saying that compromise is made part of decree is not embodying it in operative part of it)
[*See* (20) AIR 1920 Bom 358 (359)]
[*See also* (36) AIR 1936 Pat 300 (301 302) (Compromise decree—Reference to property not subject of dispute in compromise — Operative part of decree not dealing with such property but dealing with subject-matter of dispute only —Compromise operates as bare agreement — It does not create title)

4. (19) AIR 1919 Mad 305 (310)
(98) 2 Cal W N 663 (664)
(09) 2 Ind Cas 430 (430 (Mad)
(05) 2 All L Jour 680 (681)
(32) AIR 1932 Bom 466 (467)
(39) AIR 1939 All 454 (456) I L R 1939 All 435

5. (99) 22 Mad 214 (216)
(03) 1903 Pun Re No 77, page 359

6. (87) 9 All 229 (230)

O. 23 R. 3
Notes 19-20

As to whether, where a decree erroneously includes in the operative part of it, terms extraneous to the suit, the executing Court can refuse to execute the decree with respect to those terms and whether a separate suit lies in respect of them, see Note 27.

20. Parties to the compromise. — A compromise to which some of the parties to a suit alone are parties is not necessarily invalid[1] though on good cause being shown by any of the other parties, the Court has a discretion to reject such a compromise[2] Thus, where a partial compromise would be prejudicial to the interests of the parties not joining it, it cannot be recognized[3] Similarly, where the interests of the several parties to a suit are *inseparable*, it is not open to some of them alone to compromise the matter[4] Thus, a suit for partition cannot be compromised by some only of the parties to it[5]

A compromise between some parties alone cannot affect the position of the other parties to the suit They are neither bound by it nor are entitled to enforce it[6] In the undermentioned case,[7] however, it was held by the Oudh Chief Court that where certain defendants were *ex parte* and the Court passed an *ex parte* decree against them in the terms of the compromise that had been entered into between the other defendants and the plaintiff, the decree was not a nullity as against the *ex parte* defendants A party is not bound by an unauthorized compromise entered into by his agent[8] But a person who is suing or is being sued in a representative capacity can enter into a *bona fide* compromise and thereby bind the persons represented[9] See also Note 23 to Order 1 Rule 8

Where a compromise includes, as parties thereto, some persons who are not parties to the suit and the terms affecting the parties to the suit are not separable from

Note 20

1 ('27) AIR 1927 PC 57 (59) 51 Bom 442 54 Ind App 111 (PC)
('34) AIR 1934 Lah 34 (35) (Party having no interest — His consent to compromise is not [illegible]

[illegible] ... ise in valid against minors but valid against the plaintiff)
[*See also* ('36) AIR 1936 Lah 971 (971) (Some defendants contested claim—Others confessing judgment—Plaintiff should be given advantage of confession as against latter)]

2. ('26) AIR 1926 Cal 193 (198)

3. ('23) AIR 1923 Oudh 252 (253, 254)
('05) 32 Cal 561 (566)

4 ('19) AIR 1919 Cal 727 (728)
('25) AIR 1925 Lah 280 (280)
('27) AIR 1927 Oudh 222 (223)

[illegible]

L R 245 (Some only of the partners in a part- [illegible]

6 [illegible]

('95) 1895 Pun Re No 48, page 203
('19) AIR 1919 Cal 1043 (1043, 1044)

[illegible]

('36) AIR 1936 All 1 (2)
[But see ('01) 5 Cal W N 386 (390, 391)

[illegible]

7. ('35) AIR 1935 Oudh 358 (361, 362) [illegible] 187 (FB)

8. ('04) 31 Cal 357 (362)
('14) AIR 1914 Lah 112 (113) 1914 Pun Re No [illegible]
('16) AIR 1916 Cal 479 (482) (Though agent entrusted with the general conduct of the litigation)

9. ('13) 18 Ind Cas 369 (371, 372) (Mad) (Person [illegible]

[illegible] by compromise entered into by judgment [illegible]
('10) 8 Ind Cas 91 (95) (Cal) (Compromise by purchaser with regard to title to property binds vendor)

those affecting the non parties the Court cannot pass a decree under this rule [10] Where a consent decree between some of the parties alone is sought to be enforced in execution against the other parties to the suit who however are not parties to the compromise and such persons object to the execution of the decree against them on the ground that the consent decree is not binding on them the dispute falls within Section 47 of the Code [11]

A purchaser *pendente lite* is bound by a compromise decree [12]

Where a party has no further interest in the property which is the subject matter of the suit and the compromise (he having parted with his interest in favour of another party to the suit) his consent is not necessary for a compromise of the suit [13]

21 **Compromise by minor's guardian** — See Notes to Order 32 Rule 7

22 **Compromise by Hindu widow** — A *bona fide* compromise by a Hindu widow as representing her husband s estate binds the reversioners [1]

23 **Compromise by pleader** — See Note 7 to O 3 R 4 *ante* and also the undermentioned cases [1]

24 **Effect of consent decree and admissibility in evidence** — As has been seen in Note 114 to Section 11 a compromise decree does not operate as *res judicata* though it will create an estoppel between the parties and is as much binding upon them as a decree *in invitum* [1] Hence a compromise decree is admissible in evidence in a later suit between the same parties for the same purposes for which an ordinary

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some of the plaint ffs and some of the defen dants alone will not bind the rest)]

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11 (35) 8 Mad 4 3 (4 5)

12 (10) 6 Ind Cas 750 (751) 13 Oudh Cas 93
(10) 6 Ind Cas 1(8 (169) (All)
[See however (11) 18 Cal 188 (195 196) (Aff r ned by Pr vy Co cil in 22 Cal 909)]

13 (34) AIR 1934 Lah 34 (3.)

Note 23

1 (32) AIR 1932 Cal 231 (233) 59 Cal 31
(34) AIR 1234 Oudh 417 (417)
(35) AIR 1935 Rang 150 (150) 13 Rang 319 (Court will refuse to give effect to compromise when it finds that there has been some misunderstanding bet veen party and counsel as to the terms of the compromise)

L R 35

ae decree pronounced cannot be re-opened by ei her party)

O. 23 R. 3
Notes 24-25

decree would be admissible under the provisions of the Evidence Act[2] Where a suit is terminated by a compromise decree a breach of its terms does not restore the parties to the rights which they had prior to the decree[3] But a compromise decree is a creature of the *agreement* on which it is based and is subject to *all the incidents of such agreement*[4] A compromise decree is but a contract with the command of a Judge superadded to it[5] Hence such a decree is of no greater validity than the contract on which it is based[6] It can therefore, be set aside on any of the grounds such as fraud mistake misrepresentation etc, on which a contract may be set aside[7] (See Note 28 *infra*) For the same reason where a compromise decree contains any term which is in the nature of a penalty under Section 74 of the Contract Act or of a forfeiture it is open to the Court to grant relief against the forfeiture incurred under such penal clause[8] As a minor s contract is void, a decree on a compromise with a minor is a nullity[9] See also the undermentioned cases[10]

25 Registration, if necessary — Under Section 17 (2) (vi) of the Registration Act before the amendment thereof by Act XXI of 1929 a de reo or o der of a Court was exempt from registration, even though it may otherwise come within the scope of

(82) 8 Cal 138 (141)
(30) AIR 1930 Bom 431 (4
(14) AIR 1914 Mad 70 (77
(13) 21 Ind Cas 538 (539) (
(11) 9 Ind Cas 875 (881)
decree operates as a waive
cedure not going to root c
(19) AIR 1919 Mad 305 (3
(20) AIR 1920 Oudh 258 (264) 23 Oudh Cas 303
(19) AIR 1919 Mad 177 (179)
(18) AIR 1918 Mad 1331 (1332)
(17) AIR 1917 Mad 578 (580) 40 Mad 177
(15) AIR 1915 Cal 464 (467)
(24) AIR 1924 Nag 180 (183) (Terms attacked as contrary to Hindu law—Compromise still bind

(Com promise decree between landlord and tenant settling rate of rent)
(36) AIR 1936 Sind 99 (104) 29 Sind L R 455
(36) AIR 1936 Bom 301 (303 304) (Even if the

decree passed in contravention of S 29 of the Be gal Te ancy Act is b nding in subsequent suit until vacated)
(34) AIR 1 34 Cal 799 (801) (Party to decree including collusive compromise decree is bound by it—But third party affected by such decree is ot bound)
(35) AIR 1935 All 771 (3) (Compromise given effect to in decree—It is not collusive unless it is fraud o rights of third parti s)]
[*See al o* (06) 4 Cal L Jour 323 (327) (Compro mise will not be set aside on the ground that it gave to one party more than he would have got if he h d obtained judgment)
(34) AIR 1934 Lah 218 (219) (Compromise not

(1864) 1 Suth W R 265 (266)
(66) 1 Agra 1 (6) (FB)
[*See also* (09) 31 All 429 (436) (Where the

barred)]
4 (30) AIR 1930 Lah 937 (*941*)
(15) AIR 1915 Cal 464 (467)
(01) 24 Mad 265 (270)
5 (24) *AIR 1924 Pat 231 (232)* 2 Pat 749
(33) AIR 1933 Pat 306 (402) 12 Pat 359
(35) AIR 1935 Pat 123 (125)
6 (17) AIR 1917 Mad 578 (580) 40 Mad 177
(37) AIR 1937 Nag 413 (414)
7 (39) AIR 1939 Lah 439 (*451*) I L R (1939) Lah 433
(37) AIR 1937 Nag 413 (414)
8 (07) 31 Bom 15 (22) (FB) (Overruling 10 Bom 435)
(60) 8 Moo Ind App 239 (*261*) (*PC*)
(37) AIR 1937 Nag 413 (414)
[*See also* (84) 10 Cal 305 (314) 10 Ind App
9
1

(73) 1 Ind App 157 (166) (P C) (Compro based on the assumption that there was an antecedent title of so e l nd in the part es—Suit on compromise did not rest on contract only but also on t tle)

sub section (1) of Section 17 which made the registration of certain types of documents obligatory Hence, a compromise decree was held exempt from registration,[1] even in cases where the compromise which it embodied affected matters extraneous to the suit [2] Under the Section as amended, a compromise decree comprising properties *extraneous* to the suit is not exempted from registration under Section 17, sub section (2) As to whether a compromise decree requires registration in cases falling under clauses (a) and (d) of Section 17 of the Registration Act, there is a conflict of opinions, for which see the undermentioned cases [3] A compromise in so far as it is not incorporated in a decree, is not exempt from registration if it is otherwise compulsorily registrable [4]

A petition to the Court, which merely recites the compromise arrived at between the parties and prays for an order recording the compromise, does not come within the provisions of the Registration Act regarding compulsory registration of documents,[5] even though the compromise may include terms affecting matters extraneous to the suit [6] Where the compromise does not transfer or declare any rights in immovable property but merely provides for the temporary management of the property, registration is not necessary [7] Even where a compromise is compulsorily registrable the doctrine of part performance applies to such a compromise and where it has been acted upon, parties cannot resile from it [8] (See Section 53A of the Transfer of Property Act as amended in 1930)

When both the parties are agreed in stating that the suit has been adjusted, the Court has no option but to record the compromise In such a case, it does not

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Note 25

1 (99) 3 Cal W N 485 (489) 22 Mad 508 26 Ind App 101 (PC)
(35) AIR 1935 Mad 232 (234) (Suit for money compromised — Charge created over attached properties—Property relates to subject matter of [illegible]

(27) AIR 1927 Lah 156 (157) (Compromise embodied in decree of Revenue Court—Registration not necessary)
(30) AIR 1930 Lah 937 (940)
(32) AIR 1932 Lah 24 (24)

[illegible]

[But see (19) AIR 1919 Lah 400 (402) 1919 Pun Re No 31
(15) AIR 1915 Cal 170 (172)]

3 (32) AIR 1932 Pat 97 (100) 11 Pat 98 (Requires registration)
(10) 3 Ind Cas 701 (706) 33 Mad 102 (Registration is not necessary)
(33) AIR 1933 Pat 457 (460) (Where the party is already a lessee and the compromise merely varies the terms of the tenancy compromise [illegible]

[illegible] suit is dismissed in accordance with the terms of a deed of compromise if that compromise has not been recorded under the provisions of O 23, R 3 the deed is not exempt from registration under S 17 (2) (vi) Registration Act)
[*See also* (37) AIR 1937 Lah 353 (359 360)]

5 (05) 1 Cal L Jour 388 (406) (Per Mookerjee J)

6 (18) AIR 1918 Pat 507 (517, 519, 520) 3 Pat L Jour 255
(17) AIR 1917 Pat 9 (10) 1 Pat L Jour 208
[**But see** (03) 30 Cal 783 (787)
(02) 25 Mad 553 (555)]

7. (26) AIR 1926 Bom 24 (25)

8 (14) AIR 1914 P C 27 (29) 42 Cal 601 42 Ind App 1 (P C)

O.23 R.3
Notes 25–27

matter whether the compromise, though requiring registration under the law, was embodied in an unregistered document, because the admissions of the parties constitute in themselves the "proof" required by this rule It is only when the matter is in dispute that the *writing* has to be used as evidence and the question of registration becomes material [9]

26. Stamp. — A *solenamah* on stamped paper is not necessary for a compromise decree to be passed under this rule [1]

See also the undermentioned cases [2]

27. Execution of consent decree. — A consent decree is executable in the same manner as an ordinary decree [1] Thus, a consent decree providing for the execution of a document by one of the parties may be enforced under O 21 R 34 [2] But where the decree is *incapable of execution*, as for instance, where it merely creates a charge on property and does not confer the power of sale, a separate suit is necessary to enforce the right created by the decree [3] Similarly, a decree can be executed only in respect of the terms included in the *operative part* thereof Hence, where certain terms of a compromise are not included in the operative part of a decree as being concerned with matters extraneous to the suit, such terms cannot be enforced in execution [4]

With regard to the power of an executing Court to go behind a consent decree, the question has arisen with reference to three matters as noted below —

(1) *Where the decree gives effect to an unlawful compromise* — In such a case, the executing Court is entitled and bound to refuse to execute the decree [5]

(2) *Where the operative part of the decree gives effect to terms of a compromise which do not relate to the suit* — On this question there is a conflict of decisions On the one hand, it has been held by the High Courts of Madras,[6] Allahabad,[7] Lahore[8] and Patna[9] and by the Chief Court of Oudh[10] that the executing Court cannot refuse to execute the decree in such a case The reason, according to the Madras High Court, is that an objection to the decree cannot be allowed to be raised in the executing Court

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9 ('39) AIR 1939 Nag 233 (238) I L R (1939) Nag 607 (F B)

Note 26

1. ('15) 29 Ind Cas 511 (512) (U P B R)
('08) 12 Cal W N 59 (60)

2. ('69) 12 Suth W R 376 (376)
(1862) 1 Hyde 149 (149)
2 Hay 213

Note 27

1. ('22) AIR 1922 Oudh 150 (152) 25 Oudh Cas 53
('21) AIR 1921 Cal 227 (229)

3. ('95) 22 Cal 813 (816)
('95) 22 Cal 859 (863, 864)

4 ('18) AIR 1918 Mad 1331 (1332)
('16) AIR 1916 Mad 550 (550)
('24) AIR 1924 Cal 49 (51)

5. ('10) 5 Ind Cas 236 (238, 239) (Cal)
('24) AIR 1924 Nag 84 (85) 20 Nag L R 1.

('30) AIR 1930 Mad 305 (314) 53 Mad 805
('03) 26 Mad 31 (33)
[**But see** ('33) AIR 1933 Bom 293 (301) (Objection in execution on the ground of want of registration of compromise and decree— Objection should have been taken before decree and cannot be taken in execution)]

6. ('15) AIR 1915 Mad 683 (684)
('07) 30 Mad 421 (423)
('32) AIR 1932 Mad 557 (558)

7. ('87) 9 All 229 (231)
('33) AIR 1933 All 649 (652) 55 All 7[illegible]5 (FB)

8 ('34) AIR 1934 Lah 623 (625)
[**But see** ('19) AIR 1919 Lah 400 (40[illegible]) 1919 Pun Re No 31)]

9 ('34) AIR 1934 Pat 203 (203) 13 Pat 17

10. ('27) AIR 1927 Oudh 33 (33) *29 Oudh Cas* [illegible]

[illegible] under O 23 R 3 —

[illegible] compromise though erroneous is not without jurisdiction and would be binding on the parties unless set aside in appeal)]

but must be taken by way of appeal[11] The High Court of Calcutta,[12] on the other hand, has held that such a decree is inoperative and invalid and cannot be executed in so far as it gives effect to the terms of a compromise not relating to the suit The High Court of Bombay seems to take the latter view[13]

(3) *Where the decree contains any provision in the nature of a penalty* — A compromise decree being of no greater validity than the contract on which it is based, an executing Court can, in the exercise of its equitable jurisdiction, relieve against any forfeiture incurred under any penal clause in a consent decree[14]

It follows from the differences in views noted above that in respect of the terms of a consent decree which do not relate to the suit, a separate suit, according to the Calcutta High Court, can be brought on the *contract*,[15] while according to the Allahabad High Court, the question in such a case is one relating to execution and hence a fresh suit is barred under S 47 of the Code[16] Where, however, any terms of a compromise *are not embodied* in the operative part of a decree, the bar of S 47 cannot apply to a suit to enforce such terms and such a suit will therefore lie[17]

Where a consent decree orders the sale of any property, it can be executed and the property can be sold without the formality of an attachment[18] Similarly, a consent decree in a mortgage suit can be executed without any final decree being passed (unlike the case of an ordinary preliminary decree on the mortgage)[19]

See also the undermentioned cases[20]

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11. ('15) AIR 1915 Mad 210 (215) 38 Mad 959
('07) 30 Mad 421 (423)

12. ('09) 36 Cal 193 (223)
('12) 14 Ind Cas 701 (701) 39 Cal 663
('05) 1 Cal L Jour 388 (399)
('07) 34 Cal 456 (463)
('25) AIR 1925 Cal 286 (288)
('21) 62 Ind Cas 653 (654 655) (Cal)
[*See also* ('36) AIR 1936 Cal 446 (448) 63 Cal 750 (A term in a compromise petition which goes beyond the scope of the suit has no force beyond that of an agreement, even though such term is made part of the consent decree which is passed on the compromise)]

13. ('32) AIR 1932 Bom 466 (467) (Compromise including extraneous matters—Executable only as to subject matter of suit — Extraneous matters to be enforced by separate suit)

14. ('11) 12 Ind Cas 334 (335) (Mad)
('33) AIR 1933 All 252 (255) 55 All 334 (FB) (Overruling A I R 1924 All 689)
('26) AIR 1926 Bom 81 (81)
('21) AIR 1921 Cal 356 (359)
('21) AIR 1921 Cal 565 (566)
('01) 24 Mad 265 (270, 271)
('20) AIR 1920 Cal 716 (717)
(1900) 28 Cal 557 (567) 28 Ind App 89 (P C) (Compromise decree in a mortgage suit and enforcement of its terms)
('16) AIR 1916 Mad 1006 (1006)
('16) AIR 1916 Mad 774 (774)
('33) AIR 1933 Lah 23 (24) (Court has no unrestricted power to relieve defaulting party

('35) AIR 1935 All 862 (868) 58 All 230.
[*See* ('34) AIR 1934 Oudh 44 (45) 9 Luck 387

to judgment debtor)]

15. ('07) 34 Cal 456 (463)
('25) AIR 1925 Cal 286 (288)

16 ('87) 9 All 229 (231)

17. ('19) AIR 1919 Mad 305 (310)
('94) 16 All 423 (436) (Suit for specific performance lies)

18. ('21) AIR 1921 Pat 320 (321)

19. ('26) AIR 1926 Oudh 385 (386) 29 Oudh Cas 26
('25) AIR 1925 Bom 509 (510)
('21) AIR 1921 Pat 320 (321)
[But see ('11) 10 Ind Cas 481 (485, 486) (All)

barred)
('04) 26 All 299 (309) 31 Ind App 116 (PC) (Suit based on compromise decree is not a suit for breach of contract)
('27) AIR 1927 Bom 87 (88) (Earlier suit brought in a different right is as if it was brought by a different person)

O.23 R 3
Note 28

28. Mode and effect of setting aside compromise decrees. — No appeal lies from a consent decree see Section 96 (3) and Note 31 below But an appeal lies from an order recording a compromise [O 43 R 1 (m)] and when such an order is set aside, the decree based on it also falls to the ground see Note 31 *infra* Apart from this, the two usual methods of setting aside a consent decree are (a) by suit and (b) by review[1] These two remedies are cumulative and not alternative, so that failure in an application for review is no bar to a suit to set aside the decree[2]

A consent decree being only the contract between the parties with a command of a Judge superadded to it, a suit lies to set aside the consent decree on any of the grounds on which the contract can be set aside, such as fraud, mistake, etc[3] In appropriate cases, a compromise decree may be set aside by means of an application under O 9 R 13 Thus, when such a decree is attacked on the ground that the compromise was not actually entered into by the defendants, that they were not duly served and that they were not present or represented at the trial, an application under O 9 R 13 is a proper remedy to set aside the compromise decree[4]

Note 28

1 (95) 1895 Pun Re No 48, page 203
(32) AIR 1932 Bom 615 (615, 616) 56 Bom 231
(99) 1899 Pun Re No 114 page 390

(33) 35 Bom [illegible] 82
(01) 5 Cal W N 877 (878)
(71) 6 Beng L R 648 (651) (PC) (Review application lies)
[*See* (33) 144 Ind Cas 82 (82) (Cal) (If fraud is relied on, suit is the remedy)
(36) AIR 1936 Rang 389 (390) (Review on ground of fraud or mistake is not permissible—

[illegible]

ing a consent decree the remedy [illegible] suit and not by way of an application)
(16) 3 Cal L Jour 119 (128, 129 130) (Remedy of minor seeking to set aside compromise decree on the ground of fraud is by suit and not by review)]
[But see (66) 5 Suth W R 226 (226) (Review of [illegible]

[illegible]

2. [illegible]

3 [illegible] set aside on the ground of mistake [illegible]

[illegible]

terms of a compromise by [illegible] — [illegible] aside decree lies without appealing against order under O 43 R 1 (m))
(35) AIR 1935 Pat 59 (61) (Money paid under such decree can be recovered when decree is rectified and execution proceedings can be set aside)
(34) AIR 1934 Pat 229 (231) 13 Pat 165 (Fraud on the party)
(33) AIR 1933 Sind 53 (55)
(23) AIR 1923 Pat 483 (486) 2 Pat 731
(25) AIR 1925 All 266 (267) (Consent decree can be set aside on the ground of undue influence or [illegible]

[illegible]

(35) 62 Cal 642 (649, 650)
(34) AIR 1934 Lah 393 (393) 15 Lah 626, (but suit does not lie to set aside compromise decree on ground that plaintiff was not consenting party — Remedy is to impeach decree by appropriate proceeding taken in suit in which decree was passed)
('39) AIR 1939 Bom 490 (491) 41 Bom L R 994 (996)
[*See* (12) 16 Ind Cas 611 (612) (Cal)]
[*See also* (09) 3 Ind Cas 4 (5) (All)
(34) AIR 1932 Pat 170 (177) 11 Pat 613 (Fraud must be specifically proved — Mere proof of inequality of division under compromise is not [illegible]

[illegible] Mad

[illegible]

aside, such as absence of consent [illegible] etc]]
4. (06) 3 Cal L Jour 158 (159)
(20) AIR 1920 Lah 403 (403) 1 Lah 344 (Or an application for review or an appeal to superior Court)
(25) AIR 1925 Lah 431 (432) (Or appeal)
('27) AIR 1927 Lah 602 (603 604) 9 Lah 213
(09) 3 Ind Cas 116 (117) (Cal)
('18) AIR 1918 Cal 322 (323)

But a consent decree cannot be set aside by rule on motion,[5] or by an application under Section 151 [6]

An interlocutory consent order can be set aside by application in the same suit [7]

Parties cannot rescind a consent decree as an ordinary contract by mutual agreement [8] So a consent decree cannot be varied by consent of parties [9]

Where by a mistake, the Court passes a decree which *purports* to be in accordance with the terms of the compromise between the parties but is not *actually* in accordance with such terms it has got power under Section 151 to correct its mistake and amend the decree so as to be in accordance with the agreement of the parties [10]

When a compromise decree is set aside, both the parties are restored to their original rights in the former suit when the compromise was effected and the suit can be proceeded with from that stage [11]

Ignorance of real facts when it was within the party s power to know them [12] or a mistake or ignorance of law[13] is no ground for setting aside a compromise decree A compromise decree cannot be set aside on the ground of the defendant s absence at the time when the compromise was recorded by the Court [14] See also the undermentioned case [15]

29. Compromise of appeal — The present rule applies also to appeals and an Appellate Court can pass a compromise decree if the appeal is compromised [1]

30. Compromise of execution proceedings — See Rule 4 *infra*

31 Appeal — See also Note 15 to Section 96 *ante* for a full discussion

An order recording or refusing to record a compromise is appealable under O 43 R 1 (m) [1] An order recording a compromise is appealable although a decree has

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(66) 6 Suth W R Misc 36 (37)

5 (11) 11 Ind Cas 568 (568) 36 Bom 77

(2) AIR 1932 Bom 615 (616) 56 Bom 231

(11) 11 Ind Cas 856 (857) (Bom)

(98) 25 Cal 649 (652) (Charges of fraud cannot properly be tried on affidavits)

6 (22) AIR 1922 Mad 446 (446)

(33) AIR 1933 Sind 29 (31 32) 26 Sind L R 395

(39) AIR 1939 Bom 490 (491) 41 Bom L R 994 (996)

[*See* (34) AIR 1934 Pat 229 (231) 13 Pat 165 (If fraud is practised on Court remedy is by application—But if practised on party remedy is by way of suit)]

[**But see** (26) AIR 1926 Oudh 315 (315) 1 Luck 341 (May be set aside under the inherent

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8 (11) 9 Ind Cas 8 5 (879) 35 Mad 75

9 (37) AIR 1937 Cal 222 (224)

[**See however** (38) AIR 1938 Oudh 103 (105) (Decree can be varied by consent of parties)]

10 (34) AIR 1934 Rang 108 (109)

[*See also* (33) AIR 1933 Pat 135 (135) (Compromise petition—Court passing order let suit be dismissed in terms of compromise —Defendant not paying within time—Plaintiff seeking execution—Order can be amended and execution allowed)]

11 (81) 6 Cal 687 (704)

(76) 2 Cal 184 (196) 3 Ind App 291 (PC)

(24) AIR 1924 Pat 758 (758)

[**But see** (85) 10 Bom 338 (340)]

Note 29

1 (02) 5 Oudh Cas 49 (53)

(25) AIR 1925 Lah 145 (146)

Note 31

(25) AIR 1925 Mad 606 (60?)

(36) AIR 1936 Sind 59 (60) 29 Sind L R 437

(36) AIR 1936 Nag 8 (10) 31 Nag L R (Supp) 72

O. 23 R. 3
Notes 31-33

been passed on the compromise[2] The High Court of Bombay[3] has held that where an order under this rule is made with the consent of the parties in the trial Court, there can be no appeal against the order under O 43 R 1. The reason is that there is no material before the Court on which a decision can be come to The Madras High Court[4] has, however, dissented from this view and held that an appeal will lie against an order recording a compromise, whether such order has been passed after contest or not It has been held by the High Court of Lahore[5] that that rule applies only where a compromise was actually made but the Court for some reason has refused to record it, and not where it has been found that there has been no *compromise at all* The Allahabad High Court has taken a contrary view[6]

32. Revision. — Although under this rule a Court has power only to record a "lawful' compromise, yet, where it requires evidence to be given of an illegal compromise, its order is not open to revision as such order is not likely to cause irreparable injury[1] It has been held by the Allahabad High Court[2] that no revision will lie against a decree on a compromise on the ground that the Court omitted to order the *recording* of the compromise

33. Construction of compromise decrees. — See the undermentioned cases[1]

O. 23 R. 4

Proceedings in execution of decrees not affected.

R. 4. [S. 375A.] Nothing in this Order shall apply to any proceedings in execution of a decree or order.

Synopsis

1. History of the Rule. | **2. Effect of the Rule**

Other Topics (miscellaneous)

Adjustment of decree See Note 2
Mesne profits—Compromise as to See Note 2
Order 21 Rule 90 — *Proceedings* under See Note 2

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2. ('36) AIR 1936 Mad 385 (386)
('34) AIR 1934 Cal 846 (846) 61 Cal 910
('38) AIR 1938 Lah 766 (766)
3 ('33) AIR 1933 Bom 205 (207, 208) 57 Bom 206
4. ('36) AIR 1936 Mad 385 (386)
('36) AIR 1936 Mad 347 (349)
5. ('24) AIR 1924 Lah 248 (249)
6. ('36) AIR 1936 All 433 (433)

Note 32

1 ('12) 16 Ind Cas 3 (4) (Cal)
2. ('35) AIR 1935 All 738 (739) (Defect cured by S 99 of the Code)

Note 33

against several *defendants—Joint* and several liability cannot be implied in the absence of

gagee—Mortgagor's remedy is not by execution only but he can sue to redeem)
('97) 20 Mad 256 (268) 24 Ind App 218 (P C)

('35) AIR 1935 Pat 123 (125) (Patent ... in consent decree — Evidence should not be allowed to construe it)

1. History of the Rule.—There was no provision in the old Code corresponding to the present rule Hence, there was a conflict of decisions as to whether, by virtue of Section 647 (now Section 141) the provisions of this Order could be applied to proceedings in execution, some cases holding that they could be so applied[1] and others holding that they could not[2] This conflict was set at rest by Act VI of 1892 which introduced Section 375A into the Code, by which the provisions of the Chapter were declared inapplicable to proceedings after the passing of the decree In 1894 the Privy Council in I L R 17 Allahabad 106[3] decided that irrespective of the changes made by Act VI of 1892, Section 647 (now Section 141) had not the effect of making the provisions of the Code relating to withdrawal and adjustment of suits applicable to execution proceedings The present rule states in explicit terms that Order 23 does not apply to execution proceedings[4] For fuller information, see Notes under Section 141

2. Effect of the Rule. — Order 23 Rule 1 relating to withdrawal and abandonment of a suit does not apply to execution proceedings But a decree holder may apply to have his application for execution dismissed[1] The Court has no power to allow an application for execution to be withdrawn with liberty of bringing a fresh application[2] Similarly, the withdrawal of an application for execution without the Court's permission to bring a fresh application is no bar to a fresh application for execution[3] Order 23 Rule 3 does not apply to execution proceedings and the Court has no power to pass a consent order in such proceedings[4] Order 21 Rule 2 and Section 47 provide a complete procedure for the adjustment of decrees out of Court[5] Where a decree leaves the amount of mesne profits to be ascertained in further proceedings, the suit being undisposed of the parties can enter into a compromise pending the proceedings for the ascertainment of mesne profits[6] But it has been held by the Rangoon High Court[7] that an agreement between a mortgagor and mortgagee after preliminary decree for sale and before the final decree for sale, whereby the mortgagor is to be given an extension of time for the payment of decretal amount, falls within O 21 R 2 and not under this rule The High Courts of Patna[8] and Lahore[9] hold that an application to set aside an execution sale, under O 21 R 90 is not a proceeding in execution and hence O 23 R 3 applies to such application According to the Bombay High Court,[10] where a preliminary decree is passed in a suit for partnership accounts and an enquiry is pending before the commissioner for taking the accounts, the parties can enter into a compromise, as the proceedings before the commissioner are not proceedings in execution

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Order 23 Rule 4 — Note 1

1. ('85) 7 All 359 (362)
('82) 6 Bom 681 (682)
('90) 12 All 392 (395) (F B)
('95) 19 Bom 546 (549)
('88) 11 All 228 (232)
2. ('86) 10 Bom 62 (64)
('91) 18 Cal 635 (639)
3. ('95) 17 All 106 (111) 22 Ind App 44 (P C)
4. ('24) AIR 1924 Lah 342 (343)

Note 2

1 …

3 ('14) AIR 1914 Mad 1 (1)
4. ('18) AIR 1918 Nag 110 (111)
('24) AIR 1924 Lah 342 (343)
('12) 17 Ind Cas 752 (752) (Mad)
('16) AIR 1916 Mad 604 (604)

6 ('09) 4 Ind Cas 1040 (1041) 33 Mad 78 (79)
7. ('28) AIR 1928 Rang 194 (195) 6 Rang 285
8 ('21) AIR 1921 Pat 107(108) 6 Pat L Jour 253
9. ('29) AIR 1929 Lah 886 (887)
10. ('02) 26 Bom 76 (82)

O. 23 R. 4 Note 2

Whatever its other effects may be, Rule 4 does not in any way affect the rule of estoppel[11] Thus, where an application for execution is allowed to be dismissed on the basis of a compromise which provides for a fresh application if the compromise was not carried out and the compromise is broken, the defendant is estopped from contending that as O 23 R 3 does not apply to applications for execution, the decree-holder cannot file a fresh application for execution as on the basis of the compromise[12]

A pre decree arrangement concerning the execution of the decree cannot be set up in bar of execution in the executing Court But it can be enforced by means of a separate suit[13]

ORDER XXIV.

PAYMENT INTO COURT

O. 24 R. 1

Deposit by defendant of amount in satisfaction of claim.

R. 1. [S. 376.] The defendant in any suit to recover a debt or damages may, at any stage of the suit, deposit in Court such sum of money as he considers a satisfaction in full of the claim.

[1877, S. 376; R. S. C., O. 22 R. 1.]

Synopsis

1. Scope of the Rule
2. Payment into Court.
3. Suit to recover debt or damages.
4. Suit for injunction.
5. Suits for accounts.
6. "At any stage of the suit."
7. Insolvency of defendant after payment into Court

Other Topics (miscellaneous)

Expression of willingness to pay See Note 2 — May deposit in Court See Notes 1 and 2

1. Scope of the Rule. — This rule deals with payments *into* Court in satisfaction of a claim *after* the institution of a suit and *before decree*[1] Payments made after decree are dealt with by O 21 R 1 This rule does not apply to payments made into Court under Section 83 of the Transfer of Property Act, *before the institution* of the suit,[2] nor to payments made in pursuance of the order of the Court under the provisions of O 9 R 13 setting aside an *ex parte* decree[3]

The rule contemplates an unconditional deposit of a sum of money *in Court* by the defendant[4] This is contrary to the corresponding English Rules of the Supreme Court (O 22 Rules 1 and 6), whereunder a deposit may be made coupled with a denial of liability

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11. ('12) 13 Ind Cas 81 (82) (Mad)
('30) AIR 1930 Pat 615 (617, 618) 10 Pat 173
('80) 6 Cal 27 (30, 31)
12. ('12) 13 Ind Cas 81 (82) (Mad)
13. ('29) AIR 1929 Cal 527 (530)

Order 24 Rule 1 — Note 1

1. See Note 6 below
2. [*See* ('11) 10 Ind Cas 393 (397) 35 Mad 209. to run) [*See also* (1859) 7 Moo Ind App 323 (35?) ('84) 6 All 39? (402)]

2. Payment into Court. — A mere expression of willingness to pay made in a written statement is not equivalent to a payment into Court[1] nor, it is conceived, will a payment into a post office by a money order be a valid payment under this rule unless and until it reaches the Court's hands [2] But a payment into Government treasury under rules framed by the High Court will be a payment into Court [3] Where moneys in the hands of the defendant were sought to be attached before judgment, and the defendant deposited the same into Court and the attachment was subsequently found not to have been validly made, the money deposited was construed to be a payment under this rule [4] O. 24 R. 1 Notes 2-7

3. Suit to recover debt or damages. — The rule applies to all suits to recover a debt or damages, though there may be other reliefs claimed in the suit.[1] It does not apply to a suit for a *return of goods* taken or their value [2]

4. Suit for injunction. — A suit for injunction for obstruction to light and air is not a suit to recover a debt or damages within the meaning of this rule, even though the Court may, in a proper case, allow damages in lieu of injunction According to the practice of the High Court of Bombay, however, where a defendant deposits money into a Court in a suit for injunction in satisfaction of the plaintiff's claim and the Court allows damages in lieu of injunction to the extent of the amount deposited, the Court should apply the provisions of Rule 4 in directing the payment of costs [1]

5. Suits for accounts. — The rule does not apply to suits for accounts.[1] But the Court has, in such suits, the power to direct the payment into Court of admitted sums in the possession of parties liable to account, or of persons in a fiduciary capacity, such a power is not, in any way, controlled by this rule [2]

6. "At any stage of the suit." — These words show that the payment must be made before decree [1] Note also the words "in full of the *claim*"

7. Insolvency of defendant after payment into Court. — According to English law where the defendant pays money into Court admitting liability to the plaintiff and then becomes a bankrupt, the plaintiff is secured creditor in respect of such amount When the liability is denied, he is a secured creditor to the extent to which the claim is admitted or proved [1]

R. 2. [S. 377.] Notice of the deposit shall be given through the Court by the defendant to the plaintiff, and the amount of the deposit shall (unless the Court *otherwise directs) be paid to the plaintiff on his application.* O. 24 R. 2

Notice of deposit.

[1877, S. 377; R. S. C, O. 22 R. 4.]

Note 2

1.
2.

3.

4. ('27) AIR 1927 Rang 278 (278) 5 Rang 753.

[illegible] son. [illegible] (The [illegible] unsecured debts—The rule applies to suits to enforce charge on mortgage)

(18[illegible]) 2 Ch D 93 (103, 105), Coote v. Ford

2. (1857) 1 H & N 572, Allan v Dunn

Note 4

[illegible]

Note 5

1. (1883) 22 Ch D 611 (613), Nichols v Evans

2. (1892) 3 Ch 226 (236), Hollis v Burton.

[*See also* (1878) 8 Ch D 84 (90), London Syndicate v. Lord]

Note 6

1. ('26) AIR 1926 Mad 1069 (1070).

Note 7

1. (1897) 2 Q B 516 (519, 520), Re Gordon

O. 24 R. 2
Notes 1-2

Synopsis

1 Form of the notice. | 2 "Unless the Court otherwise directs"

1. Form of the notice. — The words "in writing' which occurred in the old Code have been omitted as unnecessary in view of Section 142 of the present Code under which all notices under the Code should be in writing

Where the deposit made is on the challenge of the plaintiff and in the presence of the plaintiff, a separate notice is not necessary [1]

For form of notice, see Appendix H, Form No 3

2. "Unless the Court otherwise directs." — The Court has a *discretion* under this rule to refuse to allow the plaintiff to withdraw the money deposited in Court, but such discretion must be exercised reasonably "In a case where the money sued for is due on a promissory note, it would be unreasonable, in the absence of special circumstances, not to allow the plaintiff to take the money out"[1] But where the amount in deposit is *claimed by different parties*, no party can, without an order of the Court withdraw the amount[2] The money deposited to the credit of the plaintiff but not withdrawn by him should not be treated as the defendant's money and paid over to the person who attaches the same in execution of his decree against the defendant[3]

It is the practice of the Court to appropriate payment upon a bond first to the interest due, and then to the principal[4]

O. 24 R. 3

R. 3. [S. 378.] No interest shall be allowed to the plaintiff on any sum deposited by the defendant from the date of the receipt of such notice, whether the sum deposited is in full of the claim or falls short thereof.

Interest on deposit not allowed to plaintiff after notice.

[1877, S. 378.]

Synopsis

1 Scope of the Rule.
2. Tender without payment.
3. Execution proceedings.

Other Topics (miscellaneous)

Plaintiff, whether entitled to interest after notice of deposit See Note 1

Tender and payment, refusal to accept — Effect See Note 2

1. Scope of the Rule. — No interest can be claimed by the plaintiff after he receives notice of the payment into Court [1]

Order 24 Rule 2 — Note 1

1. (35) AIR 1935 Mad 342 (344) (Plaintiff is not entitled to interest in such a case between date of deposit and date when he gets formal notice)

Note 2

1. (99) 26 Cal 766 (769)
2. (92) 16 Bom 141 (150)
3. (91) 15 Bom 681 (684)
4. (05) 28 All 25 (27)

Order 24 Rule 3 — Note 1

1 (99) 26 Cal 766 (769, 769) [illegible]

[illegible] wrongly refusing to withdraw deposit— [illegible]

O.24 R.3
Notes 1-3

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not be pa . . .
and the plaintiff is entitled to interest even after the deposit [4]

2. Tender without payment — The general rule is that a creditor is not bound to accept a sum tendered which is less than what is due to him [1] This rule provides an exception to the general rule in that interest ceases to run on the deposit whether such deposit is in *full* satisfaction of the claim or *falls short* thereof But the plea of tender before action must in order to stop interest be accompanied by a payment into Court after the suit otherwise the tender is ineffectual [2] Where the defendant was restrained by an order of injunction not to pay the amount due by him on a bond to the plaintiff but the Court ordered him to deposit the amount *in Court* and he did not do so, he was held bound to pay interest from the date of the order [3] A deposit in Court before the due date, of money due upon a bond is not a valid tender of the debt [4] *nor is a mere offer to pay the amount a valid tender* [5] *A valid tender if* improperly refused stops interest [6]

As to the effect of a tender made to one of two joint promisees see the undermentioned cases [7]

3. Execution proceedings — This Order does not apply to proceedings in execution [1] But the benefit of this rule has been extended by way of analogy to judgment debtors and
the amount immedia
amount deposited is . .

O.24 R.4

R. 4. [S 379] *(1)* Where the plaintiff accepts such amount as satisfaction in part only of his claim, he may prosecute his suit for the balance; and, if the Court decides that the deposit by the defendant was a full satisfaction of the plaintiff's claim, the plaintiff shall pay the costs of the suit incurred after the deposit and the costs incurred previous thereto, so far as they were caused by excess in the plaintiff's claim

Procedure where plaintiff accepts deposit as satisfaction in part

tion suit—Mortgagor is entitled to interest from *service of summons on mortgagee*)]
2 (36) AIR 1936 Lah 76 (78)
Note 2
1 (78) 3 Cal 6 (16)
(78) 3 Cal 468 (471)
[See (78) 2 Cal L Rep 183 (184)]

6 (0?) 34 Cal 305 (323)
(03) 7 Cal W N ?20 (723) (No valid tender—
7
(
for the others nor give a discharge to the debtor)
( ) 16 Suth . . .
(?9) 12 Suth W R ?0 (52)
[But see (67) 7 Suth W R 20 (?0)]

O. 24 R. 4
Notes 1-2

Procedure where he accepts it as satisfaction in full.

(2) Where the plaintiff accepts such amount as satisfaction in full of his claim, he shall present to the Court a statement to that effect, and such statement shall be filed and the Court shall pronounce judgment accordingly; and, in directing by whom the costs of each party are to be paid, the Court shall consider which of the parties is most to blame for the litigation.

Illustrations

(a) *A* owes *B* Rs 100 *B* sues *A* for the amount, having made no demand for payment and having no reason to believe that the delay caused by making a demand would place him at a disadvantage On the plaint being filed, *A* pays the money into Court *B* accepts it in full satisfaction of his claim, but the Court should not allow him any costs, the litigation being presumably groundless on his part

(b) *B* sues *A* under the circumstances mentioned in illustration *(a)* On the plaint being filed *A* disputes the claim Afterwards *A* pays the money into Court *B* accepts it in full satisfaction of his claim The Court should also give *B* his costs of suits, *A* s conduct having shown that the litigation was necessary

(c) *A* owes *B* Rs 100, and is willing to pay him that sum without suit *B* claims Rs 150 and sues *A* for that amount On the plaint being filed *A* pays Rs 100 into Court and disputes only his liability to pay the remaining Rs 50 *B* accepts the Rs 100 in full satisfaction of his claim The Court should order him to pay *A* s costs

[1877, S. 379. *Cf*. R. S. C., O. 22 R. 6.]

Synopsis

1 "May prosecute his suit for the balance." | 2 Apportionment of costs.

1. "May prosecute his suit for the balance." — Where the plaintiff accepts the payment only in part satisfaction of his claim, he is entitled under this rule to prosecute the suit for the balance

2. Apportionment of costs. — The Court has a discretion under this rule in awarding costs[1] and, in exercising such discretion, the Court ought to find which of the parties is most to blame for the litigation[2] Where, at the settlement of issues, the defendant paid the amount into Court which plaintiff took out in part satisfaction and raised an issue as to damages and subsequently the plaintiff withdrew the suit accepting the same in full satisfaction of his claim, it was held that the plaintiff was entitled to his costs upto the settlement of the issues[3] Where the suit is not one "to recover a debt or damages' within the meaning of this rule, the Court has full discretion to apportion costs under Section 35 of the Code[4] In the undermentioned case[5] it was held that the principles of this rule applied to a suit for injunction and damages in respect of an infringement of a registered design

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Order 24 Rule 4 — Note 2

1. (12) 13 Ind Cas 200 (201) (Mad)
2 (12) 13 Ind Cas 188 (188) (Mad)
(94) 21 Cal 680 (683) (Defendant not blamable— He is entitled to his costs)
3. (1863) 1 Bom H C R O C 70 (71)
4. (97) 21 Bom 502 (509)

5 ... in ... prietor is liable to pay offender's costs after date of offer)

ORDER XXV.

SECURITY FOR COSTS

R. 1. [Ss 380, 382] *(1)* Where, at any stage of a suit, it appears to the Court that a sole plaintiff[11] is, or (when there are more plaintiffs than one) that all the plaintiffs are residing out of British India, and that such plaintiff does not, or that no one of such plaintiffs does, possess any sufficient immoveable property within British India other than the property in suit, the Court may, either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs, within a time fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant

When security for costs may be required from plaintiff

(2) Whoever leaves British India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of British India within the meaning of sub-rule *(1)*

Residence out of British India

(3) On the application of any defendant in a suit for the payment of money, in which the plaintiff is a woman, the Court may at any stage of the suit make a like order if it is satisfied that such plaintiff does not possess any sufficient immoveable property within British India

Local Amendments

ALLAHABAD

After the words property in suit *add* or that the plaintiff is being financed by a person not a party to the suit

MADRAS

The following shall be *inserted* as sub rule (4)

(4) In all cases in which an element of champerty or maintenance is proved the Court may on the application of the defendant demand security for the estimated amount of the defendant s costs or such proportion thereof as from time to time during the progress of the suit the Court may think just

NAGPUR

In Rule 1 (1) *insert* the words or that any plaintiff is being financed by a person not a party to the suit between the words other than the property in suit and the Court may

OUDH

Add the following as sub rules (4) and (5)

(4) Where the plaintiff has for the purpose of being financed in the suit, transferred or agreed to transfer any share or interest in the property in suit to a person who is not already a party to the suit the Court may order such person to be made a plaintiff to the suit if he consents and may either of its own motion or on the application of any defendant order such person within a time to be fixed by the Court

O. 25 R. 1
Note 1

to give security for the payment of all costs likely to be incurred by any defendant In case of his default, the Court may dismiss the suit so far as his right to, or interest in, the property in suit is concerned, or may declare that he shall be debarred for claiming any right to, or interest in, the property in suit

(5) If such person declines to be made a [illegible] a defendant and may order him, within a time [illegible] for the payment of all costs likely to be incurred by any other defendant In [illegible] default the Court may declare that he shall be debarred from claiming any right to or interest in, the property in suit "

RANGOON

Substitute the following

' *Costs and security for costs in special cases* —

1 (1) Where at any stage of a suit it appears to the Court that a sole plaintiff is or (when there are more plaintiffs than one) that all the plaintiffs are [illegible] plaintiff does [illegible] any sufficient immovable property withi[illegible] the Court may either of its own motio[illegible] the plaintiff or plaintiffs within a time [illegible] all costs incurred and likely to be incurred by any defendant

Residence out of British India

(2) Whoever leaves British India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of British India within the meaning of sub rule (1)

(3) On the application of any defendant in a suit for the payment of money, in which the plaintiff is a woman, the Court may at any stage of the suit make a like order if it is satisfied that such plaintiff does not possess any sufficient immovable property within British India '

Synopsis

1. Scope, object and applicability of the Rule — This rule provides for the taking of security for the *costs of the suit* and O 11 R 10 provides for the taking of security for the *costs of the appeal* Security for costs of the suit may, under this rule,

be ordered to be given in the following cases —

(1) Where the sole plaintiff is, or where there are more plaintiffs than one, *all* the plaintiffs are, residing outside British India and none of them has sufficient immovable property in British India other than the property in suit

(2) Where, in a *suit for money*, the plaintiff is a *woman* and she does not possess sufficient immovable property in British India

In *Bidhatree Dassee* v *Mutty Lall Ghose*,[1] Mr Justice Sale observed as follows

> ' The object of the Section clearly is to provide for the protection of defendants in certain cases *where in the event of success they may have difficulty in realising their costs* . But there are cases in which the plaintiff in a suit for money (the claim being real and open to no objection) cannot be rendered liable for the defendant s costs of suit In illustration I may refer to an administration suit by a creditor or legatee where the claim is admitted or to a suit on a mortgage or promissory note where there is no defence Is it to be supposed that it was intended that the defendant in such cases should be in a position to ask as a matter of absolute right that security may be given for costs that he may choose to incur needlessly ? '

And his Lordship held that no security should be demanded in such cases, even though the plaintiff is a woman having no sufficient immovable property within British India See also the undermentioned cases[2]

The provisions of the rule are wide enough to cover the case of *every* plaintiff, including a *minor* plaintiff[3] and will apply even though the defendant is himself a *resident outside British India*[4] *In the case of a pauper plaintiff, however, no security* should be ordered to be furnished except in exceptional circumstances, inasmuch as it virtually deprives the plaintiff of the benefit of the order made in his favour under Order 33 of the Code[5] As to when security for costs can be demanded from infants, see Note 8 below

The rule does not apply to a reference under the Revenue Jurisdiction Act as there is no *suit* before the Court[6] Irrespective of this rule, the High Court may, by Section 26 (3) of the Indian Patents and Designs Act, II of 1911, demand security for the costs to be incurred by the opposite party, from the person applying for the revocation of a patent, in proceedings under that Act[7]

2. Residence outside British India. — "Residence' should be residence *under such circumstances* as will afford reasonable probability that the plaintiff will be forthcoming when the suit is decided[1] A mere temporary residence at the time of the suit is not "residence within the meaning of this rule[2] Thus, a resident of a Native State temporarily staying in British India for the purpose of legal proceedings to get his wife back from the person who had enticed her cannot be said to be "residing" in British India[3] But where a subject of Bhopal, a Native State, was living for four years at Poona and there was nothing to show that he had come to Poona on a mere

Order 25 Rule 1 — Note 1

1. ('94) 21 Cal 832 (836).

[illegible]

O C 119)

3. ('98) 23 Bom 100 (101)

[illegible]

Act (II of 1911)

Note 2

1. ('78) 3 Bom 227 (229)
[*See also* ('32) AIR 1932 Sind 33 (34) 26 Sind [illegible]

[illegible]

O. 25 R. 1
Notes 2-6

temporary purpose, it cannot be said that he resides outside British India[4] Where there are several co-plaintiffs, *all* of them must reside outside British India, if one of them resides ordinarily within the jurisdiction no security will be ordered from any of them although the resident co-plaintiff may be a bankrupt[5] Where a plaintiff *leaves* the country before the case is decided, the proper course for the defendant is to apply to the Court to take security for costs before the case is decided.[6] But security will not be ordered on an affidavit that plaintiff is *about to* leave the country.[7]

3. "British India." — See Note 1 to Section 1.

4. Trading corporations. — Trading corporations comprise —

(a) chartered companies,

(b) companies incorporated by special Acts of Parliament, such as railway companies and the like including joint stock companies incorporated under special Acts, and

(c) companies incorporated under the Companies Act[1]

A trading corporation ought to have a place of foundation It may have more than one residence. But it "dwells" at the place where it carries on its general administrative business and not where it carries on even a considerable part of its other businesses[2] See Note 3 to Section 20.

5. Immovable property. — See Note 4 to Section 16, *ante*

A beneficial interest in a part of the surplus *income* derived from immovable property cannot be said to be immovable property[1] But a lease is a transfer of an interest in immovable property and a leasehold interest is therefore itself immovable property within the meaning of this rule.[2]

6. "The Court may . . . order." — The Court has a discretion under this rule to require or not, security for costs from the plaintiff.[1] There is no rigid rule for the exercise of such discretion, but the Court will not ordinarily make an order for security, unless it is shown that the exercise of power is necessary for the reasonable protection of the interests of the defendant[2] The order should be in the Judge's own handwriting[3] and should contain reasons for ordering such security.[4] No specific sum need, however, be mentioned in the order, for which security should be granted[5] A defendant asking that security may be taken from the plaintiff under this rule should

4. ('30) AIR 1930 Bom 220 (221)
5. (1755) 1 Dick 282 (282), Winthorp v Royal Exchange Co
(1801) 1 East 431 (432), McConnell v Johnston
(1882) 10 Q B D 13 (15), D Hormusjee v Grey
6. ('67) 8 Suth W R 217 (217)
7. (1795) 2 Anst 552 (553) 1 R R 201n, Adams v Colethurst

Note 4

1. Halsbury Laws of England, Vol 8, page 304
2. Halsbury Laws of England, Vol 8, page 312, paragraphs 702, 703

Note 5

1. ('94) 21 Cal 832 (835)
2. ('71) 7 Beng L R App 60 (60)

Note 6

1. ('90) 17 Cal 610 (613)
('99) 3 Cal W N 753 (754).
('04) 6 Bom L R 1072 (1072) (The principle on which the Court acts is to see whether, at first sight, the suit appears *bona fide* and whether the defence is such as is likely to succeed)
('05) 7 Bom L R 495 (497)
('39) AIR 1939 Cal 154 (154) ILR (1938) 1 Cal 633
('36) 164 Ind Cas 560 (560) (Cal)
2. ('94) 21 Cal 832 (836)
('36) 164 Ind Cas 560 (560) (Cal) (Court is not bound to exercise discretion provided requirements of the rule as to nature of property are satisfied)
('39) AIR 1939 Cal 154 (154) ILR (1938) 1 Cal 633
3. ('88) 1888 All W N 241 (241) (Decision under O 41 R. 10)
4. ('03) 7 Cal L Jour 312 (314).
5. ('96) 18 All 101 (105) (FB) (Decision under O 41 R. 10)

not be guilty of delay in making the application[6] He should supply full information on all necessary points[7]

An order for security will not be made before the defence has been filed[8] or after the judgment has been passed[9]

7. Poverty of plaintiff. — The mere poverty or insolvency of the plaintiff is not a sufficient ground for ordering him to give security for costs as a condition precedent to his going on with the suit[1] 'The general rule is,' said Bowen, L J, in *Cowell* v *Taylor*,[2] "that poverty is no bar to a litigant that, from time immemorial, has been the rule at common law, and also, I believe, in equity" There is, however, an exception to this rule introduced for the purpose of preventing abuse, that is, if an insolvent sues as *nominal* plaintiff for the benefit of somebody else, he must give security, in that case the nominal plaintiff is a mere shadow[3] Thus, where *A*, an undischarged bankrupt, and his daughter *B* sued *C* for damages for breach of promise of marriage and it was contended by *C* that the suit was brought really for the purpose of benefiting *A* out of his daughter s engagement and that the daughter *B* had no property within British India, it was held that an order for security should be made against *A*[4] But an insolvent plaintiff who is bound to hand over the fruits of his suit to the Official Assignee cannot be said to be a nominal plaintiff,[5] especially if the insolvent is also to benefit himself by the result of the suit as, for instance, where the suit is in respect of a sum earned by him subsequent to his adjudication and the amount claimed is in excess of the amount of his debt provable in insolvency[6]

8. Where plaintiff is a minor. — As has been seen already in Note 1 *ante*, the rule applies to *all* plaintiffs including minors But, save in exceptional circumstances neither a minor nor his next friend should be called upon to give security for costs[1] A suit on behalf of a minor plaintiff should not be stopped merely on the ground that the next friend is unable to give security for costs The other parties are sufficiently protected by the power they have in a proper case of moving the Court either to stay the suit as not being for the benefit of the minor or if there is a just cause other than the poverty of the next friend to have him removed[2]

9. Where the plaintiff is a woman — Sub-rule (3). — It has always been a principle of the law relating to security for costs that persons privileged from legal

6 ('84) 1884 All W N 99 (99)
('05) 7 Bom L R 495 (496) (About two years
)

apply before judgment)

Note 7

1. ('78) 3 Bom 241 (241)
('32) AIR 1932 Sind 33 (35) 26 Sind L R 21
('85) 7 All 542 (545 546) (Decision under O 41,

Note 8

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('15) AIR 1915 Cal 595 (595) (Decision under O 41,

O. 25 R. 1
Notes 9–11

process can be called upon to give security[1] and this sub rule has been enacted in view of the provisions of Section 56 of the Code which provide that a woman is exempted from arrest in execution of a decree[2] The Court has, however, a discretion in the matter and the principle to be adopted in the exercise of such discretion has been thus stated by Mr Justice Davar in *Sonabai* v *Tribhuvandas*[3] "I have always been most averse to making orders against women for depositing security for the defendant's costs when I find that such an order would embarrass them and hamper them in the conduct of their cases In the case of poor women, such an order amounts to a denial of justice to them Unless the suit is on the face of it vexatious, or is one which I feel is filed merely for the harassment of the defendant, I do not make an order against a woman plaintiff for security for defendant's costs — when she says she is not in a position to give such security and I believe her statement" This principle was approved in a later case[4] by the same High Court though it was recognized that "the discretion given by the rule is one of the most difficult that a Court can be called upon to exercise' In no case will a Court order a female plaintiff to give security unless grounds are made out tending to show that the defence is true[5]

A suit in which there are male and female plaintiffs, cannot properly be described as a 'suit in which the plaintiff is a woman'[6]

10. Where leave has been granted to sue as a pauper. — There is a conflict of opinions as to whether security can be ordered against a plaintiff who has been allowed to sue in *forma pauperis* On the one hand, it has been held by the High Court of Calcutta[1] that this rule does not apply to such cases and that the Court has no power to order security against a plaintiff suing in *forma pauperis*, the reason being that to do so would be to render the leave granted under O 33 R 8 nugatory The High Court of Bombay[2] has held that where an order is made against the plaintiff for security for costs and subsequently he is granted leave to sue as a pauper, the order as to security ceases to operate, provided the leave is granted before the time limited for giving security has expired On the other hand, it has been held by the High Courts of Lahore,[3] Madras[4] and Rangoon[5] that the rule is wide enough to cover the case of a pauper plaintiff also, though, as a rule, very special grounds must be shown for granting an order for security for costs against him

11. Inherent power to order security for costs. — There is a difference of opinion on the question whether, apart from the provisions of this rule, the Court can order security for costs against a plaintiff It has been held in the undermentioned cases[1] that the Court has such power to act in proper cases, as for example, where

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Note 9

1 (1834) 2 Myl & K 401 (403) Aldborough v Burton

her

('99) 3 Cal W N 753 (754)
[See also ('35) AIR 1935 Mad 230 (231) (Pauper

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clearly come within its purview)

Note 10

1. ('08) 7 Cal L Jour 312 (313, 314)
('72
2.
3 10)
4.
('35) AIR 1935 Mad 230 (231) (If pauper is a mere creature in the hands of persons able to find security, order for security can be passed.)
5 ('23) AIR 1923 Rang 244 (245)
[But see ('17) AIR 1917 Low Bur 163 (164) 8 Low Bur Rul 387)]

Note 11

1. ('32) AIR 1932 Sind 33 (35) 26 Sind L R 21.
('13) 20 Ind Cas 703 (704) (Cal)
('76) 2 Cal 233 (253) 4 Ind App 23 (P C)

the plaintiff suing is not the real plaintiff but a mere puppet in the hands of others A contrary view has however been expressed by Cuming, J, in the undermentioned case[3] to the effect that the Court has no inherent power to order security for costs *apart from the provisions of this rule* **O. 25 R. 1 Notes 11–14**

12. "Suit for the payment of money" — Sub-rule (3). — A suit which, though not exclusively for money, will result in a decree for money on the relief sought, is a "suit for the payment of money' within the meaning of this rule[1] Thus, a suit to recover possession of certain ornaments and other moveable properties, or in the alternative to obtain a decree for their value is a "suit for the payment of money"[2] Similarly, a suit by an actress for damages for wrongful dismissal[3] or a suit on which a claim is made for a share in a partnership business[4] is a "suit for the payment of money" But the main claim in the suit must be one for money, the other reliefs being only incidental A suit for dissolution of partnership and accounts and for the recovery of *stridhanam* property[5] or a suit for the administration of an estate consisting largely of immovable property and in which it may ultimately be necessary to sell the estate and distribute the proceeds in money,[6] is not a "suit for the payment of money" within this rule

13. Claim and cross-claim. — A defendant cannot as a general rule be ordered to give security for costs[1] inasmuch as he is a person *compelled* to litigate and take proceedings in defence of the claim[2] But where there is a *claim and a counter claim* the position is different The substantial position of the parties will have to be taken into consideration[3] If the claim and the cross claim arise out of *one subject-matter* a defendant setting up a cross claim will not be ordered to give security[4] If, however, the cross claim is in respect of a matter *wholly distinct* from the claim, an order for security may be made[5] In other words, if the counter claim is really in the nature of a *cross action* a defendant out of jurisdiction will as a rule be required to furnish security for costs,[6] but if a cross claim arising out of the same subject matter is, in substance, *the defence to the claim*, the Court has a discretion to refuse to order such defendant to give security[7]

14. Appeal.—No appeal lies under the Code from an order under this rule It is, however, appealable under Clause 15 of the Letters Patent as a "judgment"[1] Where

('74) 22 Suth W R 138 (148)
[*See also* ('38) AIR 1938 Bom 510 (512) I L R (1938) Bom 743 (Applications under Sec 115, ... order of the nature provided for in O 25 R 1)]
2. ('24) AIR 1924 Cal 251 (252, 254, 256) 50 Cal 853

Note 12
1. ('08) 32 Bom 602 (609, 611)
2. ('12) 14 Ind Cas 290 (290) (Cal)
('03) 27 Bom 100 (101, 103) (Suit for damages and return of presents)
('90) 17 Cal 610 (613)
('99) 23 Bom 100 (100)
3. ('13) 18 Ind Cas 217 (218) (Cal)
4. ('03) 5 Bom L R 661 (662)
5. ('23) AIR 1923 Cal 316 (317)
6. ('25) AIR 1925 Rang 300 (300) 3 Rang 311.
('05) 7 Bom L R 495 (496, 497)
('73) 10 Beng L R App 25 (25).

Note 13
1. (1815) 6 Taunt 379 (379), Baxter v Morgan (1876) 2 Ch D 531 (532), Re Percy v Mining ...

Note 14
1. ('08) 32 Bom 602 (609, 610).
('03) 26 Mad 503 (503)

O. 25 R. 1
Notes 14-18

the plaintiff deposits in Court security for costs and ultimately the suit is decreed in his favour, the defendant appealing against the decree is not entitled to an order for detaining in Court, the money deposited by the plaintiff, pending the appeal[2]

15. Revision. — A Court will be acting "illegally" in the exercise of its jurisdiction in ordering security for costs in a case to which this rule does not apply, as where it orders security for costs in an administration suit which is not a "suit for the payment of money" within this rule[1] Similarly, it will be acting with "material irregularity" in the exercise of its jurisdiction if it orders security for costs against a plaintiff suing as a pauper, in the absence of exceptional circumstances[2] In such cases, therefore, a revision will lie against the orders so passed See also the undermentioned case[3]

16. Other cases under the Code where security may be required. — The following are some of the other provisions of the Code under which security may be required by the Court —

(1) O 16 R 16 (Security from witness for his attendance)
(2) O 21 R 26 (Security from judgment debtor)
(3) O 22 R 8 (Insolvency of plaintiff)
(4) O 32 R 6 (Security from next friend or guardian *ad litem* of minor)
(5) O 37 R 3 (Summary suits on negotiable instruments)
(6) O 38 Rules 1, 2 and 5 (Arrest and attachment before judgment)
(7) O 40 R 3 (From receiver)
(8) O 41 Rules 5 and 6 (Stay of execution)
(9) O 41 R 10 (Security for costs of appeal)
(10) O 45 Rules 7 and 10 (In Privy Council appeals)
(11) O 45 R 13 (Stay of execution in Privy Council appeals)

17. Liability of a person standing surety. — *A* was surety for costs for *B*, and the surety bond provided that if *B* failed to obey the order of the Court, the property of *A* would be liable, and that if the property proved insufficient, *A* would be personally liable There was no provision for the principal debtor being proceeded against in the first instance It was held that a failure to execute the decree against *B* in the first instance did not amount to a release of the surety's liability[1]

18. Enforcement of security bonds given under this Rule. — The proper mode of enforcing a surety bond given under this rule is the one indicated in Section 145 (c) of the Code For decisions under the old Code, see the undermentioned cases[1]

O. 25 R. 2

R. 2. [S. 381.] *(1)* In the event of such security not being furnished within the time fixed, the Court shall make an order dismissing the suit unless the plaintiff or plaintiffs are permitted to withdraw therefrom.

Effect of failure to furnish security.

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2. ('70) 4 Beng L R O C 92 (93
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of jurisdiction and order is open to revision)

Note 17
1. ('26) AIR 1926 All 657 (658)

Note 18
1. ('80) 5 Cal 437 (438) (By assignment and institution of suit on assigned bond)
('94) 19 Bom 694 (696) (Do)
('03) 31 Cal 162 (165) (Do)
('01) 24 Mad 637 (639)

(2) Where a suit is dismissed under this rule, the plaintiff may apply for an order to set the dismissal aside, and, if it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from furnishing the security within the time allowed, the Court shall set aside the dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit

(3) The dismissal shall not be set aside unless notice of such application has been served on the defendant

[1877, Ss 380, 381, 1859, S 35]

Local Amendments

BOMBAY

The following shall be *added* as sub rule (4)

(4) The provisions of Section 5 of the Indian Limitation Act 1908 shall apply to applications under this rule

RANGOON

Substitute for Rule 2

Champerty and maintenance

2 Where it is proved to the satisfaction of the Court that the plaintiff is deriving assistance from or is being maintained by a person in consideration of a promise to give to such person a share in the subject matter or proceeds of the suit or in consideration of having transferred his interest in the subject matter of the suit the Court may either of its own motion or on the application of any defendant—

(a) award costs on a special scale to be decided by the Court and approximating to the actual costs reasonably incurred by the defendant

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Synopsis

1 Scope of the Rule	3 Notice
2 Dismissal under this Rule if res jud cata	4 Limitation
	5 Appeal

1 Scope of the Rule — The Court has power to extend the time for furnishing security under Section 148[1] Sub rule (2) enables the Court to restore a suit dismissed under sub rule (1)[2] The rule applies to a suit as a *whole* and not in regard to particular plaintiff or plaintiffs alone[3]

2 Dismissal under this Rule, if res judicata — A suit dismissed under this rule for failure to furnish security for costs cannot be said to have been heard and

Order 25 Rule 2 — Note 1

1 (84) 6 All 250 (252)
(7) 2 Cal 272 (273)
(84) 10 Cal 557 (561) 11 Ind App " (P C)
(76) 2 Cal 128 (129)
[*See also* (90) 17 Cal 512 (515) 1 Ind App 1 (L C) (Case of appeal)]

2 (86) 8 All 315 (319) 13 Ind App 57 (P C)

3 (37) AIR 1937 Cal 58 (59) 63 Cal 809 (Suit by male minor and mother— On default in furnishing security suit cannot be dismissed against mother only in such cases security should not be ordered)

O. 25 R. 2
Notes 2–5

finally decided" within the meaning of Section 11 of the Code and cannot operate as *res judicata* in a subsequent suit between the parties [1]

3. Notice. — The general principle is that no order affecting a party should be made without notice to him [1]

4. Limitation. — The limitation for an application to set aside a dismissal under this rule is thirty days from the date of the dismissal, under Article 163 of the Limitation Act, 1908

5. Appeal. — Under the old Code, an order under this rule was held to be a *decree* and appealable as such [1] Under the present Code, the order is only an *appealable order* [See O 43 R 1 (n)] No appeal will lie, however, from such an order passed in a suit in which a decree itself is not open to appeal See Section 104

Local Amendments

NAGPUR

After Rule 2, *add* the following new Rule 3

O. 25 R. 3 (Nagpur)

'3 (1) Where any plaintiff has, for the purpose of being financed in the suit, transferred or agreed to transfer any share or interest in the property in suit to a person who is not already a party to the suit, the Court may order such person to be made a plaintiff to the suit if he consents, and may either of its own motion or on the application of any defendant order such person, within a time to be fixed by it to give security for the payment of all costs incurred and likely to be incurred by any [illegible] ; furnished within the time fixed, [illegible] far as his right to, or interest in, [illegible] e shall be *debarred* from claiming any right to, or interest in, the property in suit

(2) If such person declines to be made a plaintiff the Court may implead him as a defendant and may order him, within a time to be fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any other defendant In the event of such security not being furnished within the time fixed, the Court may make an order declaring that he shall be debarred from claiming any right to, or interest in, the property in suit

(3) Any plaintiff or defendant against whom an order is made under this rule may apply to have it set aside and the provisions of sub-rules (2) and (3) of Rule 2 shall apply *mutatis mutandis* to such application "

RANGOON

Add the new Rule 3

O. 25 R. 3 (Rangoon)

"3 (1) In the event of security demanded under Rule 1 or Rule 2 not being furnished within the time fixed the Court shall *make* an order dismissing the suit unless the plaintiff is permitted to withdraw therefrom

Effect of failure to furnish security

(2) Where a suit is dismissed under this rule the plaintiff may apply for an [illegible]

(3) The order of dismissal shall not be set aside unless notice of such application has been served on the defendant "

Note 2
1 (02) 26 Bom 637 (640) (Suit)
(82) 6 Bom 482 (486) (Defence)

Note 3
1. (83) 5 All 350 (382)
(82) 5 Mad 265 (266)

Note 5
1. (86) 8 All 103 (111)

ORDER XXVI.

COMMISSIONS

Commissions to examine witnesses

Cases in which Court may issue commission to examine witness.

R. 1. [S. 383.] Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it. **O. 26 R. 1**

[1877, Ss. 383, 385; 1859, S. 175. See S. 75.]

Synopsis

1. Scope of the Rule. — *The grounds upon which a commission can be issued* are specified in this rule and in Rules 4 and 5 *infra*, they ought not to be relaxed or nullified because the witness is a man of rank or is a man of social status[1] and it will be derogatory to him to appear personally in Court [2]

The Court can issue a commission even after remand [3] The issue of a commission being a matter of *routine*, the successor of a Judge has power to cancel the issue of a commission made by his predecessor [4]

See also Note 1 to Section 75, ante

1a. Applicability to proceedings under other special or local Acts. — Rules 1 to 8 of this Order, dealing with the issue of commission for the examination of witnesses, have been made applicable to enquiries and proceedings under the undermentioned Acts [1]

Order 26 Rule 1 — Note 1

1. (17) AIR 1917 Bom 155 (157) 42 Bom 136 (08) 31 Mad 60 (61)
2. (05) 28 Mad 28 (35, 36)
3. (25) AIR 1925 Lah 39 (41) 5 Lah 252
4. (30) AIR 1930 Rang 315 (316)

Note 1a

1. The Punjab Sikh Gurdwaras and Shrines Act (VI of 1922), S 24 (4). The Official Trustees Act (II of 1913), S 20 The Madras Ganjam and Vizagapatam Act (XXIV of 1839) R. 16 The Administrator Generals' Act (III of 1913) S 46, The Bengal Tenancy Act (VIII of 1885) S 31 (b), The Presidency Towns Insolvency Act (III of 1909) S 37, The Indian Naturalisation Act (VII of 1926), S 11 The Charitable and Religious Trusts Act (XIV of 1920), S 11, The Chota Nagpur Tenancy Act (VI of 1908), S 265 (3).

O. 26 R. 1
Note 2

2. "May in any suit issue." — The general trend of opinion is that the issue of a commission is a matter of *judicial discretion*[1] The High Court of Madras, has, however, held in the undermentioned cases[2] that the word "may' must be read as equivalent to "is given authority to" and that a commission should issue as a *matter of right* unless the application for commission amounts to an abuse of the process of the Court As a general rule, an application will not be granted unless —

(1) the application is made *bona fide*,

(2) the issue in respect of which the evidence is required is one which the Court ought to try,

(3) the witness to be examined would give evidence material to the issue, and,

(4) there are some good reasons why the witness cannot be examined in Court[3]

But the Court has *not* the absolute discretion or inherent power to issue a commission except when authorized by the provisions of the Code, nor, according to the general trend of opinion, is the Court *bound* to issue a commission simply because all the conditions laid down in the rule exist Where the examination on commission may result in *manifest injustice* to any party, or where it is not calculated to permit of the evidence being *tested fairly*, or when the application is made to avoid cross examination before the Court, the Court is not bound to issue a commission[4] The difference between the examination of a witness on commission and a *viva voce* examination in open Court is so greatly to the disadvantage, almost invariably, of the opposite party that the Court should very jealously inquire, in every case, into the reason for the commission[5] The question is whether the Courts can be said to have acted with jurisdiction in taking away from a litigant the right which he undoubtedly has of having the witness brought before the Court in accordance with the normal procedure[6] Regard must always be had to the possibility of the witness not being a credible witness in which case the opportunity of noting his *demeanour*[7] and of hearing the exact and precise answers given by him would be lost[8] This is specially so in a case where a party accused of fraud seeks to examine himself on commission[9]

The fact that the witness sought to be examined is *interested*, or that the case of the party asking for the issue of the commission is improbable[10] or that the Judge thinks that no useful end would be attained by the evidence[11] is, however, no ground *per se* for refusing to issue a commission See also the undermentioned case[12]

As a matter of practice, notice ought to be given to the opposite party before ordering a commission[13]

Note 2

1. (99) 23 Bom 626 (629)

[illegible]

('11) 12 Ind Cas 74 (75) (Mad)
[*See* (35) AIR 1935 Mad 21 (21) 58 Mad 400 (Madras Civil Rules of Practice—R 59—Commission—Application for, not made at first hearing — It need not necessarily be refused if made afterwards—Party is entitled to commission subject to risk of not being completed and returned in time)]

3. (13) 19 Ind Cas 643 (644) (All)

4 (05) 28 Mad 29 (35, 36)

5 (73) 20 Suth W R 253 (255).
(99) 26 Cal 650 (652)

6 ('27) AIR 1927 Mad 524 (525)

7. (99) 23 Bom 626 (628)
(33) AIR 1933 Mad 48 (53) (In cases involving large amounts even women should rarely be examined on commission)

8. (24) AIR 1924 Cal 971 (972, 973)

9. (23) AIR 1923 P C 73 (76) (P C)

10 (30) AIR 1930 Sind 83 (86)

11. (71) 15 Suth W R 447 (448)
(11) 12 Ind Cas 74 (75) (Mad)

13. [illegible]

It is open to the Court to order the issue of commission on condition of the applicant depositing in Court security for the costs of the opposite party in regard to the commission [14]

3. "Who is exempted under this Code." — Section 132 of the Code recognizes the right of *pardanashin* ladies who according to their custom can claim the privilege of being examined on commission [1] The fact that an allegation of immorality is made against such a lady[2] or that she had appeared on a former occasion in public[3] or in Court,[4] is no ground for refusing to issue a commission In the undermentioned case[5] a commission was issued even though the lady was old and had entirely abandoned the *purdah*

But where no custom of not appearing in public is made out,[6] or the custom alleged is of a varying and uncertain character,[7] the Court will not issue a commission A *pardanashin* lady is not entitled to decline to be examined on commission at any place other than that of her choice [8]

A religious preceptor is not entitled to be examined on commission on the ground of his social status [9]

4. "Who is from sickness or infirmity unable to attend." — In the case of persons who, owing to illness, are unable to attend the Court, a commission ought not to be refused [1] If sickness or infirmity is alleged, the Court will, of course, have to take into account the character and gravity of the sickness and the risk consequent upon the refusal to issue a commission [2] Infancy, however, is not a ground for the issue of a commission [3]

5. Procedure where evidence is taken on commission. — It is the duty of the party obtaining the commission to take all such steps as are necessary to secure the attendance of the witnesses before the commissioner [1] The examination is on the same footing as that in Court[2] and the opposite party is entitled to cross examine the witnesses,[3] though where the cross examination is unnecessarily prolonged or amounts to an abuse of process the Court can fix a time limit and order the cross examination to be finished [4] But the commissioner has no power to disallow questions and give

14. (36) AIR 1936 Pat 33 (34)

Note 3

1 (28) AIR 1928 Cal 814 (815)
(25) AIR 1925 Mad 905 (906) (Plaintiff, a *gosha* lady applying for commission for examining herself—Application should be granted)
(33) AIR 1933 All 551 (553) 55 All 666 (Order insisting on personal attendance in Court, of *pardanashin* lady is wrong)
[See however (72) 18 Suth W R 230 (230) Where *pardanashin* lady can be examined in Court in a *palki*—Court can refuse)]
2 (01) 5 Cal W N ccxxxii (ccxxxii)
3. (99) 26 Cal 650 (652)

[illegible]

7. (90) 14 Bom 594 (596)
8 (21) AIR 1921 Cal 229 (231) 48 Cal 448 [See however (37) AIR 1937 Pat 21 (22)

[illegible]

regular exercise of jurisdiction)]
9 ('17) AIR 1917 Bom 155 (157) 42 Bom 136

Note 4

1. (23) AIR 1923 Mad 321 (322) 46 Mad 574

[illegible]

defendant in a suit)
3. 2 Hyde 152

Note 5

[illegible]

(24) AIR 1924 Pat 234 (235) (Commissioner can stop proceedings if cross-examination is abusive)

O. 26 R. 4

Persons for whose examination commission may issue.

R. 4. [S. 386.] *(1)* Any Court may in any suit issue a commission for the examination of —

(a) any person resident beyond the local limits of its jurisdiction ;

(b) any person who is about to leave such limits before the date on which he is required to be examined in Court ; and

(c) [a]*any person in the service of the Crown* who cannot, in the opinion of the Court, attend without detriment to the public service.

(2) Such commission may be issued to any Court, not being a High Court, within the local limits of whose jurisdiction such person resides, or to any pleader or other person whom the Court issuing the commission may appoint.

(3) The Court on issuing any commission under this rule shall direct whether the commission shall be returned to itself or to any subordinate Court.

[1877, Ss. 383, 384, 385, 386 ; 1859, Ss. 175, 176.]

a Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "any civil or military officer of the Government "

Synopsis

1. Scope and applicability of the Rule.
2. "May issue."
3. Plaintiff asking his evidence to be taken on commission.
4. Defendant asking his evidence to be taken on commission.
5. Commission to England to take evidence. See Rule 5
6. Second commission on failure of the first.
7. Appeal.
8. Revision.

Other Topics (miscellaneous)

Discretion of lower Court how far will be interfered with in appeal or revision See Notes 7 and 8
"Resident beyond the limits of its jurisdiction " See Note 1

1. Scope and applicability of the Rule. — The power of the Court is not more restricted under this rule than under Rule 1 [1] A party is entitled to the issue of a commission if it is clear that the witness is residing outside the jurisdiction of the Court [2] It is not for the Court, as has already been *pointed out in Rule 1,* to decide whether the party will be benefited or not, as it is a matter entirely for the party [3]

Where a commission is issued to a Court it should be addressed *to the Court of*

1. ('26) AIR 1926 Mad 132 (133)
2. ('26) AIR 1926 Mad 345 (346)
[See however ('67) 7 Suth W R 349 (352) (Commission issued to a Magistrate to examine
3. ('25) AIR 1925 Mad 6?? (???)
('11) 12 Ind Cas 74 (74) (Mad)
4. 17 W R H C Rules and Orders (Civil Circular Order No 7, page 3 (3))

This rule applies only to suits' and does not apply to execution proceedings[5]

2. "May issue." — As has been seen in Note 2 to Rule 1 *ante*, the word "may" in this rule as well as in Rule 1 has been construed in the undermentioned decisions[1] of the Madras High Court to mean is given authority to' and the issue of a commission is a matter of statutory right But according to the general trend of opinion, the Court has a discretion to grant or refuse a commission[2] The discretion must, however, be exercised *judicially*[3] See also Note 2 to Order 26 Rule 1, *supra*

3. Plaintiff asking his evidence to be taken on commission. — The general and accepted rule is that the evidence of a plaintiff in a case ought not to be taken on commission except for very strong reasons[1] The reason is that the plaintiff has had a *choice of the forum*, and having chosen to institute his suit in a particular Court, he cannot ask for his examination elsewhere[2]

4. Defendant asking his evidence to be taken on commission. — ' But the case is entirely different," observed Mr Justice Chitty in *Ross* v *Woodford*, (1894) 1 Ch D 38, "when it is the defendant's application, and particularly that of a *defendant* lawfully *resident out of* the jurisdiction, according to the ordinary course of his life and business and to compel these defendants to come over here at great expense to attend the trial, or give up their case would be oppressive and unfair, and in my opinion it would be wrong to apply to the case of a defendant the principles that are applicable to the case of a plaintiff asking for a commission to examine himself'[1] Thus, where a suit was instituted in Cuttack against a defendant residing at Colombo, a commission was issued for the defendant s examination at Colombo on the ground that it would be obviously unfair to compel him to come to Cuttack or practically give up his defence[2]

A defendant residing abroad should ordinarily be permitted to be examined on commission[3]

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rule does not apply)

Note 2

before the jury)

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Note 3

1. (20) AIR 1920 Low Bur 63 (64)
1 Ind Jur N S 357, Dowcett v Wise

(35) AIR 1935 Pat 220 (221 222) (Where it is risky to compel plaintiff to attend Court to give evidence commission may be issued for his examination on his paying costs of defendant for making arrangements for his cross examination)

2. (26) AIR 1926 Pat 277 (278)
(35) AIR 1935 Pat 220 (221, 222)

Note 4

1. (12) 16 Ind Cas 750 (751) (Cal).
(34) AIR 1934 Mad 399 (400) 57 Mad 705
(22) AIR 1922 Cal 42 (43, 44)

O. 26 R. 4
Notes 5-8

5. Commission to England to take evidence. — See Rule 5 *infra*

6. Second commission on failure of the first. — If the first commission fails for no fault of the party, a second commission can be issued[1] See also Rule 10 *infra*

7. Appeal. — A Full Bench of the High Court of Madras[1] overruling two earlier decisions[2] has held that an order under this rule directing or refusing to issue a commission is only an *interlocutory order* and not a "judgment" within Clause 15 of the Letters Patent and is not appealable The High Courts of Bombay,[3] Calcutta[4] and Rangoon[5] have also taken the same view as that of the Madras Full Bench

An order under this rule is *not an appealable order*. Nor will the Appellate Court interfere with the order in the regular appeal from the decree in the suit, unless the discretion is shown to have been improperly exercised which has prejudiced the party aggrieved[6]

8. Revision. — An order under this rule can be revised when the order is one made *without jurisdiction*, *e g*, in the absence of any of the grounds mentioned in the rule[1] or where the Court has acted with *material* irregularity, *e g*, in refusing to issue a commission to a defendant residing outside its jurisdiction[2] Where the refusal to *issue a commission would be tantamount to a denial of justice or would result in* manifest injury, the High Court can interfere in revision[3]

The High Court of Allahabad[4] has held that an order under this rule refusing to issue a commission is an interlocutory order and is not a case decided within the meaning of Section 115 *ante*

O. 26 R. 5

Commission or request to examine witness not within British India.

R. 5. [S. 387.] Where any Court to which application is made for the issue of a commission for the examination of a person residing at any place not within British India is satisfied that the evidence of such person is necessary, the Court may issue such commission or a letter of request.

[1877, S. 387; 1859, Ss. 177, 178.]

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application to examine on commission — Fact that defendant could have approached Court and asked it to record his evidence before he went abroad is not sufficient ground to refuse issue of commission)

Note 6

1 ('67) 8 Suth W R 448 (448)
('05) 9 Cal W N 268n (268n). (Commissioner examined witnesses *ex parte* — Court ordered a fresh commission on deposit of costs)

Note 7

1 ('10) 8 Ind Cas 340 (343, 344, 348, 349) 35 Mad 1
2 ('05) 28 Mad 28 (31)
('07) 30 Mad 143 (144)
3 ('09) 2 Ind Cas 157 (158) (Bom)
('34) AIR 1934 Bom 168 (169)
4 ('20) AIR 1920 Cal 894 (895)
5 ('26) AIR 1926 Rang 64 (64) 9 Rang 605
6. ('22) AIR 1922 Cal 42 (44)
('12) 16 Ind Cas 750 (751, 752) (Cal)

Note 8

under

574
fusal

to issue commission—Revisable)
('29) AIR 1929 Mad 192 (193)
('02) 5 Oudh Cas 151 (152) (But the discretion cannot be interfered with in revision)
3. ('25) AIR 1925 Cal 1118 (1119)
4 ('34) AIR 1934 All 37 (39) (Order of lower Court *held* to be unjustified—*But that* was not a ground for revision)

O. 26 R. 5
Notes 1-4

Synopsis

1. Evidence of witnesses not residing within British India.
2. Plaintiff in foreign territory asking for a commission to examine himself.
3. "Letter of request"
4. Revision.

1. Evidence of witnesses not residing within British India. — This rule deals with the issue of a commission for the examination of persons residing outside British India [1] For the definition of "British India," see Note 1 to Section 1 *ante* Bangalore is not within British India [2] Where the evidence of a person residing outside British India is necessary and an application is made for the issue of a commission for the examination of such person, the Court has no further discretion in the matter and the commission should be issued as a matter of course [3]

Where a commission is issued for taking evidence in England, the bill of costs with respect to such commission is to be taxed by the Taxing Master in India though it is to be taxed on the same principle as would be adopted in England [4] See also the undermentioned case [5]

2. Plaintiff in foreign territory asking for a commission to examine himself. — As noticed in Note 3 to Rule 4, the Court will be very reluctant to accede to the request of the plaintiff for the issue of a commission to examine himself abroad except upon very strong grounds The plaintiff is entitled to choose his own *forum* and having chosen the *forum*, he is not entitled to say "I reside outside the jurisdiction Therefore examine me on commission" [1]

3. "Letter of request." — These words are new As for the form of letter of request, see Appendix H, Form No 8

4. Revision. — Interlocutory orders passed in the exercise of discretion under this rule cannot be revised by the High Court [1] See also Notes to Section 115, *ante*

R. 6. [S. 388.] Every Court receiving a commission for the examination of any person shall examine him or cause him to be examined pursuant thereto.

O. 26 R. 6

Court to examine witness pursuant to commission

[*See also* ('37) AIR 1937 Lah 73 (74) (Court will be fully justified in satisfying itself that the evidence is really relevant and necessary for the purposes of the case before issuing process — But a party cannot be deprived of the opportunity of producing his evidence merely on the ground that it may involve some delay)]

4. ('91) 15 Bom 209 (211, 214, 215)

Vol I (1930))

Note 2

1. ('94) 1 Ch 38 (42), Ross v Woodford
('25) AIR 1925 Pat 125 (126) 3 Pat 863
('83) 25 Ch D 21 (29, 30), Nadin v Bassett

Note 4

1. ('86) 9 Mad 256 (257)
[*But see* ('38) AIR 1938 Mad 646 (648) (Order refusing issue of commission is revisable)]

O. 26 R. 7

Return of commission with depositions of witnesses.

R. 7. [S. 389.] Where a commission has been duly executed, it shall be returned, together with the evidence taken under it, to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order; and the commission and the return thereto and the evidence taken under it shall (subject to the provisions of the next following rule) form part of the record of the suit.

[1877, Ss. 389, 390; 1859, S. 179.]

Synopsis

1. Return of commission.
2. "Duly executed."
3. Commissioner can note demeanour of witness.
4. "Shall form part of the record."

1. Return of commission. — The return should show that the evidence was recorded as the law requires it, *viz*, in the language in ordinary use in the proceedings before the Court and duly read over and signed by the witness [1]

The time for the execution of the commission may be enlarged on the application of a party [2]

2. "Duly executed." — If a party to the suit dies before the examination of a witness on commission is completed and the fact of death is brought to the notice of the Commissioner, the proceedings after death are rendered illegal and consequently the commission cannot be said to have been *duly executed* [1]

3. Commissioner can note demeanour of witness. — A Commissioner is entitled by law to note his observation as to the *demeanour* of the witness examined by him [1]

4. "Shall form part of the record." — Evidence taken on a commission duly executed, subject to Rule 8, shall form *part of the record* and a party is entitled to refer to such evidence as a matter of record, though not tendered in evidence [1]

O. 26 R. 8

When depositions may be read in evidence.

R. 8. [S. 390.] Evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered, unless —

(*a*) the person who gave the evidence is beyond the jurisdiction

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Order 26 Rule 7 — Note 1
1. ('70) 14 Suth W R 269 (271)
2. ('70) 14 Suth W R O C 17 (18)

Note 2
1. ('29) AIR 1929 Pat 101 (101)

Note 3
1 ('18) AIR 1918 Cal 863 (379) (S B)

Note 4
1. ('08) 35 Cal 23 (32)
('26) AIR 1926 Sind 34 (35)
('83) 12 Cal L Rep 50 (52)
('72) 8 Beng L R App 102 (102)
('99) 26 Cal 591 (592)

of the Court, or dead or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in Court, or is a [a]*person in the service of the Crown* who cannot, in the opinion of the Court, attend without detriment to the public service, or

(b) the Court in its discretion dispenses with the proof of any of the circumstances mentioned in clause *(a)*, and authorizes the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same.

[1877, S. 390 ; 1859, S. 179.]

a Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for 'Civil or Military Officer of the Government '

Synopsis

1. Legislative changes
2. Evidence on commission, when may be read as evidence in the suit
3. Objection to admissibility of evidence.
4. Admissibility of documents.

Other Topics (miscellaneous)

"Shall not be read as evidence — See Note 2
Unless the Court in its discretion, dispenses" — See Note 2

1. Legislative changes. — The words ' or is a civil or military officer who cannot, in the opinion of the Court, attend without detriment to the public service" in clause (a) were newly introduced in the Code of 1908 For subsequent changes, see foot note to the text of the rule

2. Evidence on commission, when may be read as evidence in the suit. — The practice on the original side of the High Court of Calcutta is that evidence taken on commission does not become evidence in the suit, until the same has been tendered and read as evidence by the party on whose behalf it was taken,[1] while the practice of the mofussil Courts in Calcutta is that such evidence is treated as evidence in the suit, though it is not formally tendered in evidence as it is part of the record [2] See also the undermentioned case [3]

A party wishing to rely on evidence taken on commission cannot, without the consent of the party against whom he offers it, have it read as evidence in the suit, unless he is able to show that the circumstances mentioned in clause (a) exist at the time the evidence is sought to be read, or unless he is able to persuade the Court to dispense with the proof of such circumstances[4] Such evidence can be read at the

Order 26 Rule 8 — Note 2

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not necessary)

4. ('30) AIR 1930 Sind 89 (90)
('34) AIR 1934 Cal 116 (117) 60 Cal 1331 (It has to be accepted by Court after hearing opposite party)
('27) AIR 1927 Cal 43 (44) (Court has discretion to dispense with the proof of circumstances mentioned in clause (a))
('70) 5 Beng L R 252 (253)
('23) AIR 1923 P C 73 (76) (P C)
(74) 22 Suth W R 331 (333)
('28) AIR 1928 Cal 341 (343)

O. 26 R. 8
Notes 2-4

instance of *either* party to the suit and not necessarily by the party who applied for a commission[4]

The fact that the evidence was taken on commission in the absence of the opposite party is no sufficient ground for refusing to admit it in evidence[6] But if the commission was issued for examining a particular witness and in spite of objection by the other side *another* witness was also examined, the Court would be justified in ignoring the evidence of such person[7]

In the undermentioned case[8] it was held by the Calcutta High Court that the expression 'beyond the jurisdiction of the Court' has reference to the question whether the witness is within the reach of the compelling or disciplinary powers of the Court in his capacity of a witness or potential witness and that the matter therefore would fall within the purview of O 16 R 19 which lays down that no witness is to be ordered to attend in person unless he is resident within a certain distance from the Court which extends to as much as 200 miles provided that for five sixths of the distance there are adequate transport facilities for the witness in the way of railway or other communications Hence, it was held in the above case that the mere fact that the witness was resident beyond the territorial limits of the jurisdiction of the Court is not sufficient to hold that he is beyond the jurisdiction of the Court within the meaning of this rule

See also Note 1 to Section 75 *ante*

3 **Objection to admissibility of evidence.** — Objection to the admissibility of the deposition of witnesses examined on commission should be taken in the trial Court itself[1] See also the undermentioned case[2]

4. **Admissibility of documents.** — Where a document is produced before the Commissioner and no objection is taken as to its admissibility, no such objection can be taken after the return of the commission at the time of the trial of the suit[1] But if the document is objected to before the Commissioner, the party objecting is not precluded from urging other grounds of objection than those taken before the Commissioner at the time of trial[2]

('28) AIR 1928 Cal 421 (423) 55 Cal 748
('68) 10 Suth W R 385 (386)
('37) AIR 1937 Cal 163 (166) 63 Cal 914 (Evidence taken on commission—Before using it for any other purpose Court should first decide whether or not to use it as evidence in suit — Court should not use it to decide whether or not to order witness to attend in person)
('38) AIR 1938 Nag 530 (533) (Witness living beyond jurisdiction of Court, examined on commission—Consent of party not necessary to make it admissible)
[*See* ('33) AIR 1933 Sind 327 (327) 27 Sind L R 194 (Commissioner's report is only a piece of evidence — Objection to report should be considered even though the Commissioner is dead)]

5 ('26) AIR 1926 Sind 34 (35)

6 ('68) 10 Suth W R 236 (237)

7 ('20) AIR 1920 Cal 718 (720) 47 Cal 553

8. ('37) AIR 1937 Cal 163 (165) 63 Cal 914

Note 3

1 ('29) AIR 1929 Cal 591 (592)

2 ('33) AIR 1933 All 551 (554) 55 All 606 (Pardana hin lady while being examined on commission tutored by somebody — Court may exclude evidence but cannot insist on personal attendance of the lady)

Note 4

1 ('80) 6 Cal L Rep 109 (111 112)
[*See also* ('35) AIR 1935 Mad 553 (590) (Hundi exhibited before Commissioner — He giving identifying mark — Admissibility in evidence not considered — No objection raised — Issue of admissibility pending before Court— *Held* not admitted in evidence within Stamp Act)]

2 ('83) 9 Cal 933 (940 941)

R. 9. [S 392] In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or, annual net profits, the Court may issue[2] a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court O.26 R.9

Commissions to make local investigations

Provided that, where the ᵃ*Provincial Government* has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules

[1877, Ss 392, 393, 398, 399, 409, 1859, Ss 180, 306.]

a Substituted by the Government of India (Adaptation of Indian Laws) Order 1937 for Local Government

Local Amendment

CALCUTTA

Omit Proviso

Synopsis

1. Legislative changes — The words or proceeding which occurred in the old Section after the words in any suit and the words and the same cannot be conveniently conducted by the Judge in person have now been omitted

2. Scope of the Rule — The object of local investigation is not so much to collect evidence which can be taken in Court but to obtain evidence which from its peculiar nature can only be had on the spot[1] and to elucidate any point which is left doubtful on the evidence taken before the Court[2] Cases of boundary disputes and

—Commission must be issued under O 39 R. 7 and not under this rule)]

disputes about the identity of lands are instances when a Court may order a local investigation under this rule [3]

The Court has a *discretion* to order a local investigation or not, it is not bound to order it in all cases [4] An application under this rule should be made at the hearing of the suit [5] It cannot be made after the case is closed [6]

The presiding officer or officers in enquiries under the undermentioned Acts[7] have been empowered to issue commissions for local investigation in accordance with this rule

An Appellate Court has the power to issue a commission for a local investigation under this rule read with Section 107 [8]

Though this rule does not provide for the presence of the parties when a commission is issued, yet, natural justice requires that such commission should not be issued behind the back of one of the parties concerned [9]

3. Local investigation by the Judge. — See Order 18 Rule 18

By Section 144 of the Oudh Rent Act (XXII of 1886), the Court may, in inquiries under that Act, make a local investigation, instead of issuing a commission under this rule

4. Power of Commissioner to take evidence.—See Note 3 to Rule 10 *infra*

5. "Such person as it thinks fit." — Under the Code of 1859, a commission had to be issued, in the first instance, to an officer of the Court and only when *there* was no such officer, to any other suitable person [1] There is no such preference under this rule Under the General Rules of the Allahabad High Court, however, commissions other than commissions for the examination of witnesses or of accounts, should not be issued to persons other than Civil Court *amins* except when such a course is impracticable, and in every case a person other than a Civil Court *amin* is employed, the Court should record its reasons therefor [2]

3. (09) 2 Ind Cas 347 (348) 5 Low Bur Rul 1
(72) 17 Suth W R 472 (474) (Question of possession before date of suit — Local investigation ought not to have been ordered)
[*See* (72) 17 Suth W R 230 (232) (Court not justified in ordering local investigation when the issue is whether the parties are man and wife)]

4 (66) 5 Suth W R 248 (248)
(68) 10 Suth W R 43 (44)
(62) 1862 Suth W R 19 (20) (FB)
(1865) 3 Suth W R Act X, 153 (154) (Court not bound to order *suo motu*)
(86) 12 Cal 45 (47) (Do)
(38) AIR 1938 Nag 530 (532)
[*See also* (1864) 1 Suth W R 102 (103) (Successor of a Judge should not interfere with order for local investigation made by his predecessor)]

5 Bourke, O O 243

6 (19) AIR 1919 Oudh 126 (126)

7. The Chota Nagpur Tenancy Act (VI of 1909) S 265 (3), the Bengal Tenancy Act (VIII of 1885), S 31 (b) and S 158 (2), the Orissa Tenancy Act (II of 1913), S 36 (b) and S 210

8. ('32) AIR 1932 All 270 (271)

9. (38) AIR 1938 Nag 530 (532) (But defect is only irregularity curable under S 99 of the Code)

Note 5

1. (67) 7 Suth W R 27 (28)
(1864) 1864 Suth W R Gap 171 (172)
(67) 8 Suth W R 6 (7)
(70) 13 Suth W R 284 (284)
(70) 13 Suth W R 113 (114)
(66) 6 Suth W R Act X 81 (81)
(67) 8 Suth W R 331 (332) (Report by sheristadar—Ministerial officer)
(69) 12 Suth W R 209 (210) (Do)
(82) 11 Cal L Rep 533 (537) (The District Judge can appoint Munsif to be Commissioner)
(66) 6 Suth W R 62 (63) (Report by ministerial officer—Sheristadar)
(72) 17 Suth W R 200 (201) (But a Sub-Judge whose judgment is in appeal cannot be ordered to go and inspect)

2. (29) AIR 1929 All 446 (447)

The rule does not contemplate the issue of a commission to more than one person But if more than one is appointed provision should be made for meeting any difference in opinion that may arise between them[3] O. 26 R. 9 Notes 5-10

6. Admissibility of report of Commissioner. — See Note 4 to Rule 10

7. Interference with the report — See Note 10 to Rule 10

8 Form —For the form of commission for local investigation, see Appendix H, Form No 9

9 Appeal from order directing local investigation. — An order under this rule is not appealable under O 43 R 1 Nor is it a judgment within Clause 15 of the Letters Patent[1] The discretion exercised by the Court under this rule cannot be interfered with in appeal or second appeal[2]

10. Revision — According to the High Court of Patna[1] where the order directing a local investigation would be a calamitous waste of time and money and would be determining the rights of parties on an improper basis, the High Court would interfere in revision But the High Court of Madras in the undermentioned case[2] refused to interfere with an order directing a Commissioner to ascertain the mesne profits on the ground that the applicant had a remedy by way of appeal from the final decree

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R. 10. [S 393] *(1)* The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him to the Court O 26 R.10

Procedure of Commissioner

(2) The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit[3] and shall form part of the record[4]; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his

Report and depositions to be evidence in suit

Commissioner may be examined in person

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3 (91) 1 C P L R 160 (161)

Note 9

1 (25) AIR 1925 Rang 290 (291) 3 Rang 293
(67) 7 Suth W R 425 (425)
(1862) 1862 Marsh 469
2 (32) AIR 1932 All 270 (271)
(1862) 1 Ind Jour (O S) 8
(1864) 1 Suth W R 141 (142)
(74) 22 Suth W R 183 (184)
(1864) 1 Suth W R 249 (250)
(1864) 1 Suth W R 195 (196)
(69) 12 Suth W R 76 (76)
(94) 21 Cal 504 (512 513) 21 Ind App 39 (PC)
(12) 13 Ind Cas 194 (197) (Cal)

Court has only to see if subordinate Court exercises discretion judiciously or capriciously)
[*See also* (38) AIR 1938 Nag 530 (532) (Irregularity not causing prejudice to defendant — Decree cannot be varied in second appeal)]

Note 10

1 (24) AIR 1924 Pat 761 (764)
2 (23) AIR 1923 Mad 43 (43)

report, or as to his report, or as to the manner in which he has made the investigation.

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.

[1877, Ss. 392, 393, 398, 399; 1859, S. 180.]

Synopsis

1. Legislative changes. —

The words "or as to his report" have been added in the concluding part of sub rule (2) Sub rule (3) is new

2. Scope of the Rule. — Sub rule (2) is "intended to afford protection to the Commissioner who is a *quasi* judicial officer and such protection is afforded on grounds of public policy so as to make it impossible for either of the parties to subject the Commissioner to a vexatious examination "[1]

This rule applies to suits under the Tenancy Acts [2]

3. Functions and powers of the Commissioner.—The provisions of Order 26 do not amplify Section 75 of the Code and the Court cannot delegate to the Commissioner the trial of any *material issue* which it is itself bound to try [1] In other words, a Judge cannot depute to the Commissioner functions which he can and should discharge himself [2] All that the Court can depute a Commissioner to do is to inspect a disputed land, to prepare a map or to obtain information with regard to physical features of the property inspected [3] It is not the intention of the Legislature to allow witnesses to be

Order 26 Rule 10 — Note 2

1. ...

2. [*See* ('90) 17 Cal 277 (280)
('68) 1 Beng L R (S N) 2 (2)
('17) AIR 1917 All 70 (70) 39 All 694 (Agra Tenancy Act)]

Note 3

1. ...

('26) AIR 1926 Lah 145 (146)
('74) 21 Suth W R 280 (281)
('35) AIR 1935 Mad 888 (890)
[*See also* ('72) 17 Suth W R 469 (470)]

2. ('70) 14 Suth W R 190 (190)
('92) 17 Suth W R 473n (473n)
('75) 23 Suth W R 286 (287)
[illegible]

3. ('74) 21 Suth W R 281n (281n)

examined by the Commissioner in such cases, unless the nature of evidence is such that it ought to be taken only on the spot,[4] or unless the parties agree and accept the same [5] Thus, the statements regarding a right of way, made by village officers to a Commissioner appointed to prepare a map, are not evidence [6]

Any evidence taken by the Commissioner contrary to instructions cannot be looked into Thus, where a Commissioner who was appointed to ascertain the amount of mesne profits entered into the question of possession of the land, recorded evidence and arrived at a finding it was held that the procedure was *ultra vires* [8] If evidence is taken by him within the scope of his authority, such evidence should be reduced to writing Information given by witnesses and not reduced to writing is not legal evidence [9]

A Commissioner is bound to record the state of things as actually existing and not draw upon his own imagination or make surmises [10]

Notice should be given to the parties of the time when local investigation will be held [11]

4. Admissibility of the report of the Commissioner. — The report of the Commissioner together with the evidence if any, recorded by him is legal evidence in the suit [1] But the evidence alone without the report of the Commissioner cannot be received as evidence in the suit [2] The Court is not justified in refusing to consider the report unless the local investigation is incomplete or inconclusive [3]

The report however, is not *per se* evidence in *any other suit* unless its accuracy

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(72) 17 Suth W R 282 (283)
4 (68) 9 Suth W R 83 (86)
('72) 17 Suth W R 282 (283)
5. (21) AIR 1921 Cal 363 (367)
(69) 2 Beng L R App 3 (4)
6 (1900) 24 Bom 43 (45)
7. ('75) 24 Suth W R 208 (209)

giving Commissioner too extensive powers)
(67) 8 Suth W R 287 (288)
(69) 12 Suth W R 136 (136, 137)
('67) 7 Suth W R 43 (44) (It is not necessary that the Commissioner s report must have de-
positions attached to it to make it legal evidence)
(74) 22 Suth W R 350 (350)
(68) 9 Suth W R 601 (601)
(73) 19 Suth W R 213 (214)
(68) 9 Suth W R 494 (495)

9 (25) AIR 1925 Mad 145 (147) 47 Mad 800
10. (70) 14 Suth W R 269 (270)
11 (69) 12 Suth W R 139 (140)
[*See also* (34) AIR 1934 Mad 548 (549)

Note 4

(71) 15 Suth W R 291 (292)
(70) 14 Suth W R 493 (494) (Report only evidence on the point to which the commission refers)
(90) 17 Cal 281 (284) (Report cannot be rejected because amin s remuneration is not paid)

(36) 163 Ind Cas 36 (37) (Mad)
[*See also* (1864) 1 Suth W R 93 (93) (Court is at liberty to adopt a portion of the report and reject

case)]
2. (70) 14 Suth W R 397 (399)

[illegible] (Interfer-

O. 26 R. 10
Notes 4-8

is proved in the ordinary way[4]

5. Examination of the Commissioner. — The parties are entitled to take objection to the report of the Commissioner and substantiate the same by examining the Commissioner or other witnesses[1] But there must be some real ground for examining the Commissioner[2] If the report is attacked on grounds which require explanation, it is necessary that the Commissioner also should be examined[3] It is against established practice to find fault with his report behind his back and to reject it *in toto*[4]

6. Objections to Commissioner's report. — The Court must fix a date to enable the parties to file objections, if any, to the report of the Commissioner[1] and is bound to enquire into such objections when filed[2] unless the parties agree to, or accept the report[3] A party refusing to appear before the Commissioner has, however, been held not entitled to object to the report[4]

Objections to the report of the Commissioner should be taken in the trial Court and cannot be raised for the first time in appeal,[5] although the Appellate Court has power to consider whether the report was outside or within the scope of the warrant of commission[6]

7. Commissioner's report, how far binding on the Court. — A Commissioner's report is only *evidence* in the case It is in no way *binding* on the Court The Court has full power to arrive at its own conclusion even at variance with the report[1] In fact, the report ought not to be made the sole basis and foundation for the judgment in disregard of the other evidence in the case[2]

8. Further evidence after the Commissioner's report. — The rule does not contemplate the tender of further evidence after the receipt of the report of the Commissioner except the examination of the Commissioner himself It does not however prohibit further evidence The point has to be decided on general principles according to the facts and circumstances of each case[1] It was held that the party cannot at the

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4. (82) 12 Cal L Rep 50 (52)
('28) AIR 1928 Cal 63 (64).
(36) AIR 1936 Oudh 192 (192) (The report does not fall within S 35 of Evidence Act)
(34) *AIR 1934 Lah 890 (892) 16 Lah 377. (Do)*

Note 5

1. (17) AIR 1917 Lah 57 (58)
(29) AIR 1929 Lah 782 (783)
2. ('19) AIR 1919 Cal 946 (947)
3. (20) *AIR 1920 Cal 863 (864)*
(75) 24 Suth W R 342 (342)
('15) AIR 1915 Cal 280 (282) (Permission cannot be arbitrarily withheld)
4. (17) AIR 1917 Pat 278 (279)

Note 6

1. ('74) 21 Suth W R 2 (3) (Court should also give notice to parties of the date so fixed)
2. (69) 11 Suth W R 95 (95)
(67) 8 Suth W R 172 (173)
3 ('13) 19 Ind Cas 870 (871) 6 Sind L R 256.
(69) 11 Suth W R 155 (155)
('70) 14 Suth W R 418 (418)
[*See also* (70) 14 Suth W R 391 (392) (Neither party objecting to the map prepared by the Commissioner—Court cannot question its correctness)]
4. *(20) AIR 1920 Cal 863 (864)*
('66) 6 Suth W R 130 (130)
5. (74) 2 Ind App 34 (37) (PC)
(68) 9 Suth W R 267 (267)
(82) 1882 Pun Re No 161, page 455
6. ('29) AIR 1929 Mad 492 (492)

Note 7

1
('

conclusion and setting ... to do so)
(72) 17 Suth W R 270 (270)
('38) AIR 1938 Pat 569 (570) 17 Pat 353
2. ('75) 24 Suth W R 339 (338)
(67) 8 Suth W R 464 (464)
[*See also* (74) 21 Suth W R 281 (281) (Value of the report depends upon the evidence on which it is founded.)]

Note 8

1. (1900) 27 Cal 951 (960) 27 Ind App 110 (PC

last moment adduce fresh evidence after going on with the trial of the case without objection and with the knowledge that the investigation was carelessly done [2]

9. Sub-rule (3). — The Court has a discretion to order a fresh commission or not and is not *bound* to do so in every case where the result of the local investigation is found to be unsatisfactory it can decide the case on the evidence [1]

Sub rule (3) contemplates a *further enquiry* by the same Commissioner already appointed, it does not contemplate the issue of a fresh commission covering the same ground [2] But where the Court is so dissatisfied with the whole proceedings of the Commissioner that it thinks it better to discard the whole record and start afresh, it may do so [3] Thus where the Court is of opinion, on considering the objections of the parties, if any, that the Commissioner has so misconceived his duties as to render his report valueless, it may wipe out and supersede the first report by a specific order to that effect[4] and may issue a fresh commission [5] The mere filing of objections to the report is no ground for issuing a fresh commission [6] When the Court issues a fresh commission it is not bound to wipe out off the record the report of the first Commissioner [7]

10. Interference with the report. — The Court ought not to interfere with the result of a long and careful local investigation except upon clearly defined and sufficient grounds [1] It has been laid down by their Lordships of the Privy Council (and followed in a number of decisions of the High Courts in India) that an Appellate Court should not interfere with the finding of the trial Court based on a careful local investigation except upon very strong grounds [2] But disregard of the report of the

2. ('12) 16 Ind Cas 39 (40) (Cal)

Note 9

1 ('19) AIR 1919 Cal 96 (97)
('17) AIR 1917 Cal 573 (573) (The case was one which could not be decided without an investigation on the spot — The case was therefore remanded for further investigation)
('19) AIR 1919 Cal 673 (673) (No error of law is committed by decision on evidence on record and High Court will not interfere in second appeal)
('38) AIR 1938 Pat 569 (570) 17 Pat 358

2. ('29) AIR 1929 Mad 661 (663) (Issue of successive commissions condemned)
('33) AIR 1933 All 65 (65)
('29) AIR 1929 All 446 (447) (The practice of appointing successive Commissioners whenever objections are filed to their reports condemned)
('32) AIR 1932 Mad 482 (484) 55 Mad 656 (Issue of successive commissions condemned)
('30) AIR 1930 Mad 236 (238)
('31) AIR 1931 Mad 73 (74) 54 Mad 239
[*See also* ('35) AIR 1935 All 422 (423) (There is no error of law in appointing more than one Commissioner—If the report of one Commissioner is unsatisfactory in certain respect it is permissible for the Court to remit the case to the same Commissioner or to appoint another Commissioner)]

3 ('29) AIR 1929 Mad 661 (663)

4 ('31) AIR 1931 Mad 73 (76) 54 Mad 239
('30) AIR 1930 Mad 236 (238)
('75) 23 Suth W R 93 (93)

5 ('22) AIR 1922 Mad 219 (220) 45 Mad 79
('26) AIR 1926 Pat 159 (160)
('29) AIR 1929 Pat 101 (109) (Examination by Commissioner wrongly proceeded after the death of a party—Illegal—Fresh commission may be issued)
('33) AIR 1933 All 65 (65)
('29) AIR 1929 All 446 (447)

6 ('30) AIR 1930 Mad 236 (238)
('22) AIR 1922 Mad 219 (220) 45 Mad 79

7. ('37) AIR 1937 Pat 670 (671)

Note 10

[See however ('01) 5 Cal W N 632 (70...

O. 26 R. 10 Note 10

Commissioner is not such an error or defect "affecting the merits of the case" within *the meaning of Section 100 as to justify interference in second appeal*[3]

In *Kessowji Issur* v *G I P Railway Company*,[4] the Privy Council has held that an Appellate Court should not, as a result of an inspection of the spot of accident, reverse the decision of the trial Court based on recorded evidence

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COMMISSIONS TO EXAMINE ACCOUNTS

O. 26 R. 11

Commission to examine or adjust accounts

R. 11. [S. 394.] In any suit in which an examination or adjustment of accounts is necessary, the Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment.

[1877, Ss 394, 395, 400; 1859, S. 181.]

Synopsis

1. Commissioner to examine accounts.
2. "Is necessary."
3. Power of Commissioner to decide questions of law
4. Disobedience of order made by Commissioner.
5. Non-payment of Commissioner's fees
6. Appeal.
7. Form.

1. Commissioner to examine accounts. — In a suit for accounts the usual and proper procedure is first of all to ascertain whether the defendant is *liable* to account. If the accounts are complicated and require an examination, then the Court may appoint a commission under this rule[1] Where a case is remanded to the lower Court for taking accounts, it has got jurisdiction to appoint a Commissioner for such purpose[2]

The Court may issue a commission even without the consent of parties[3]

Under Section 265 of the Chota Nagpur Tenancy Act (VI of 1908), the Deputy Commissioner is empowered to issue commissions to examine accounts in any suit, appeal or proceeding pending before him

2. "Is necessary." — Before an order for the appointment of a Commissioner can be made, the examination or adjustment of accounts must be considered *necessary*[1]

3. Power of Commissioner to decide questions of law. — The Court cannot delegate its judicial powers to a Commissioner in the matter of taking evidence and

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3. (94) 21 Cal 504 (511, 512) 21 Ind App 39 (P C)
4 (07) 31 Bom 381 (392) 34 Ind App 115 (PC)

Order 26 Rule 11 — Note 1

1. ('81) 7 Cal 654 (656, 657)
('26) AIR 1926 Cal 349 (350)
('72 92) 1872 1892 Low Bur Rul 309
('97) 20 Mad 313 (316)
[*See* ('75) 24 Suth W R 70 (70) (The case lays down the procedure to be observed in a judicial inquiry into accounts)]
2. ('34) AIR 1934 Pat 35 (37).
3. ('74) 1 Ind App 346 (362) (PC)

Note 2

1 ('25) AIR 1925 Cal 1069 (1072) 52 Cal 766
('81) 6 Cal 754 (758) (*If taking of accounts by* Judge would occasion a waste of public time, Court can issue commission with necessary instructions)
('29) AIR 1929 Pat 626 (627) (Commission issued for taking accounts from a guardian of property)
('73) 19 Suth W R 14 (15) (*Held*, not necessary [illegible]
([illegible]
it is necessary to examine the accounts [illegible]

O. 26 R. 11
Notes 3-7

determining issues[1] Thus, it is for the Court and not the Commissioner to decide as to the truth or falsity of the account books[2] or as to whether a certain contract was or was not authorized[3] Similarly, the duty of determining in whose possession the account books are cannot be delegated to the Commissioner[4] So also, it is not open to the Court to refer to the Commissioner the question as to whether the dealings between the parties constituted in law, a mutual, open and current account between them[5] Their Lordships of the Privy Council[6] have held that it is irregular to appoint a Commissioner to give *findings* on mixed questions of law and fact, such as, for instance, the nature of a contract The Commissioner can determine *only the extent*, or the *quantum* and not the *factum* of liability[7] The function of the Commissioner is to place himself as an *assistant* to the Court so as to enable the Court to understand and appreciate the accounts and come to a decision[8]

A Commissioner has no power of review either under Section 151 or under Order 47 Rule 1[9]

The High Court of Bombay has held in the undermentioned case[10] that a Commissioner appointed by a Judge on the original side of the High Court can decide questions of law arising while accounts are taken

4. Disobedience of order made by Commissioner. — A Commissioner is an officer of the Court and the Court can issue an attachment to compel a party to obey his order[1]

5. Non-payment of Commissioner's fees. — The suit should not be dismissed for failure to deposit the Commissioner s fee[1]

6. Appeal. — An order under *this rule is not a decree* and is not appealable[1] nor is the order one appealable under O 43 R 1 The High Court of Calcutta has, however, held in the undermentioned cases[2] that an order giving directions to the Commissioner amounts to a decree and is appealable See Notes to Section 2, sub section (2)

7. Form. — For the form of a commission to examine accounts, see Appendix H, Form No 9

Note 3

1. (26) AIR 1926 Lah 145 (146)
2. (25) AIR 1925 Sind 265 (265)
3. (24) AIR 1924 Sind 9 (10) 17 Sind L R 316
[*See also* (24) AIR 1924 Mad 406 (408 409) (Powers and functions of Official Referee as compared to a commissioner under this rule discussed)]
4. (36) AIR 1936 Lah 458 (460)
5. (38) AIR 1938 Rang 270 (270 271) (All that can be referred to the Commissioner is an enquiry into the nature and course of dealings and the amount if any, due)
6 *(31) AIR 1931 P C 136 (140) 58 Ind App* 178 53 All 190 (PC)
7. (25) AIR 1925 Cal 1069 (1072) 52 Cal 766
(29) AIR 1929 Cal 418 (422)
[*See* (34) AIR 1934 Pat 35 (37, 38) (But if question of quantum involves question of liability Commissioner can determine both)]
8 (07) 6 Cal L Jour 105 (108)
9 (24) AIR 1924 Bom 231 (232) 47 Bom 593 (But if he re opens an inquiry, it must be on grounds analogous to those mentioned in O 47, Rule 1)
10. (16) AIR 1916 Bom 181 (182) 41 Bom 719

Note 4

1. (73) 10 Bom H C R O C 4 (6).

Note 5

1. (81) 3 Mad 259 (259)

Note 6

1. *(14) AIR 1914 Bom 36 (38)* 38 Bom 392 [*See also* (84) 8 Bom 287 (294)]
2. (96) 23 Cal 406 (408)
(02) 29 Cal 758 (766, 768) (FB)
(04) 31 Cal 722 (724) (Stay also can be granted)

O. 26 R. 12

R. 12. [S. 395.] *(1)* The Court shall furnish the Commissioner with such part of the proceedings and such instructions as appear necessary, and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his examination.

Court to give Commissioner necessary instructions.

(2) The proceedings and report (if any) of the Commissioner shall be evidence in the suit, but where the Court has reason to be dissatisfied with them, it may direct such further inquiry as it shall think fit.

Proceedings and report to be evidence. Court may direct further enquiry.

[1877, Ss. 394, 395, 400; 1859, S. 181.]

Synopsis

1. Scope of the Rule.
2. "Shall be evidence in the suit."
3. Objections to the Commissioner's report.
4. Powers and duties of the Appellate Court.

Other Topics (miscellaneous)

Commissioner's report, application to vary See Note 3
Evidentiary value of the Commissioner's report See Note 2.
Instructions to Commissioner See Note 1

1. Scope of the Rule. — The Court is bound to furnish the Commissioner with the requisite proceedings and issue definite instructions as to what he should do The Commissioner may, if necessary, apply for enlargement of time fixed for the return [1]

The rule contemplates the appointment of only *one* Commissioner But the appointment of more than one is only a mere irregularity [2]

2. "Shall be evidence in the suit." — The report of the Commissioner together with the evidence, if any, taken by the Commissioner is *evidence* in the suit[1] unless the Court is dissatisfied with it and directs a further enquiry. But the report has not the effect of a *decision* in the case [2]

The Court is not bound to take any other evidence than that furnished by the report, where it sees no reason to doubt its correctness [3]

3. Objections to the Commissioner's report. — A party is entitled to file objections to the report of the Commissioner and the Court is bound to give him a reasonable opportunity to produce evidence in support of his objections [1] But where

Order 26 Rule 12 — Note 1

1. (92) 1892 Bom P J 318 (318)
2. ('70) 1870 Pun Re No 40.

Note 2

1 ('71) 3 N W P H C R 217 (233)
('82) 1882 Pun Re 161, page 485
[*See* ('78) 3 Lom 161 (170)]
2. (01) 5 Cal W N 692 (707)
3. ('70) 1870 Pun Re No. 40

[**See however** ('32) AIR 1932 All 1-3 (130) 53 All 54 (There is nothing in O 26 to prevent a Court from accepting evidence on a debatable point, though Commissioner is appointed to inspect accounts)]

Note 3

1. ('29) AIR 1929 Lah 762 (763)
('34) AIR 1934 Pat 35 (38) (The Court must consider the objections and come to an independent conclusion)

the reference to a Commissioner has been made by *consent*, the parties are bound by it and cannot go behind the consent so given [2] **O. 26 R. 12 Notes 3-4**

Objections to the report must be taken in the trial Court and cannot be raised for the first time in appeal [3]

4. Powers and duties of the Appellate Court. — While the Commissioner's report which has been affirmed by the trial Court should have great weight given to it and should not be capriciously deviated from, it is not absolutely binding on the Appellate Court [1] The Appellate Court is entitled, therefore, whenever necessary, to scrutinize the report and make such further enquiries into the matter as it may deem *proper* [2]

COMMISSIONS TO MAKE PARTITIONS

R. 13. [S. 396.] Where a preliminary decree for partition has been passed, the Court may, in any case not provided for by section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree. **O. 26 R. 13**

Commission to make partition of immoveable property.

[1877, S 396.]

Synopsis

1 Legislative changes.
2 Scope of the Rule
3. "Such person as it thinks fit."
4 Appeal

1. Legislative changes. — The word 'person" has been substituted for the word "persons' which occurred in the old Section in order to negative the view that had been held under the old Code that the Court could not appoint a single Commissioner [1]

2. Scope of the Rule. — As has been seen in Note 9 to Rule 10, the Court has

('22) AIR 1922 Mad 219 (220) 45 Mad 79
('14) AIR 1914 Lah 339 (341) (Commissioner may be examined to substantiate objections)
Report of Commissioner for taking accounts—Objections to the report—Limitation—Practice in High Courts—Motion to vary report should be made within twenty days of the filing of the report
('89) 13 Bom 368 (369 370) (But if the Court allows further time then within further time so allowed)
('97) 24 Cal 437 (439) (Notice should be accompanied with grounds of objections)
('85) 9 Bom 250 (252) (Court has discretion to extend time for making such motion)
('75) 1 Bom 158 (161) (Objections to the report must be decided on the same evidence as was before the Commissioner)
2. ('74) 1 Ind App 346 (362) (PC)
('14) AIR 1914 Lah 339 (341)
3. ('74) 2 Ind App 34 (37) (PC).
('20) AIR 1920 Low Bur 31 (34)
(1863) 1 Mad H C R 418 (419)
('69) 11 Suth W R 3 (3)
('15) AIR 1915 Lah 144 (145) (Cannot be raised in second appeal)

Note 4

1. ('70) 6 Mad H C R 36 (37) (1 Mad H C R 1 and 1 Mad H C R 418 dissented from as being bad law)
2. ('01) 5 Cal W N 692 (701 706 707)
('27) AIR 1927 Lah 736 (734) (Decree based on incomplete report set aside)
('69) 6 Bom H C R A C 149 (151)
[But see ('98) 8 Mad L Jour 133 (134) (Proceeds according to Rule 292 of the Rules of Practice on the Original Side)]

Order 26 Rule 13 — Note 1

1 ('07) 29 All 235 (236)
('04) 6 Bom L R 556 (557)
('93) 1893 Pun Re No 124, page 481
[But see ('81) 7 Cal 318 (320)]

O. 26 R. 13
Notes 2-4

a discretion in the matter of issuing a commission. It is not, under this rule, bound to appoint a Commissioner in every case[1]

The essential difference between an arbitrator and a Commissioner appointed under this rule is that the latter merely submits his report for the approval of the Court, whereas the former has a final authority to settle all matters of difference between the parties Further, the former is selected by the parties and therefore his decision cannot be questioned except on the limited grounds specified in Schedule II, whereas the latter is selected by the Court and the parties are therefore at liberty to challenge his report[2]

An application for the appointment of a Commissioner is not governed by any rules of limitation[3]

Where an order dismissing the suit for default is passed after a preliminary decree for partition, the order though illegal cannot be ignored unless expressly set aside or revoked *Nor does an order under this rule appointing a Commissioner to make* a partition amount to an order setting aside the dismissal of the suit for default[4]

By Section 12 of the Bengal Estates Partition Act (V of 1897), a Civil Court passing a decree for an undivided share of an estate governed by this Act may cause the same to be executed as prescribed by this rule

3. "Such person as it thinks fit." — The choice of the Commissioner lies with the Court But a relation of one of the parties or their pleaders should not be appointed except with the consent of the other party[1]

4. Appeal. — An order issuing a commission under this rule is not appealable under O 43 R 1 Nor is the order one passed in execution within the meaning of S 47[1]

O. 26 R. 14

R. 14. [S. 396.] *(1)* The Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.

Procedure of Commissioner.

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign

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Note 2

1. ('09) 4 Ind Cas 1131 (1132) 31 Mad 540
2 ('14) AIR 1914 Oudh 183 (184)
('27) AIR 1927 Pat 135 (137)
('39) AIR 1939 Pat 526 (527) 18 Pat 193
3 ('05) 28 Mad 127 (129)
4. ('36) AIR 1936 Lah 875 (876)

Note 3

1. ('17) AIR 1917 All 148 (149)

Note 4

1. ('19) AIR 1919 Mad 42 (43)
('16) AIR 1916 Mad 809 (810) (Application for commission is only a step in aid in suit and is not barred by any limitation)
('07) 17 Mad L Jour 144 (144)
('98) 20 All 311 (313, 314).
('97) 24 Cal 725 (735, 738) (FB)

separate reports appointing the share of each party and distinguishing each share (if so directed by the said order) by metes and bounds.[5] Such report or reports shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall[4] confirm, vary or set aside[5] the same. O.26 R.14

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied; but where the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit.

[1877, S. 396 (2) and (3).]

Local Amendment

PATNA

Substitute the following for sub rules (2) and (3) :

"(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if necessary) by metes and bounds The Commissioner or Commissioners shall append to the report, or where there is more than one, to each report, a schedule showing the plots and areas allotted to each party and also, unless otherwise directed by the Court, a map showing in different colours, the plots or portions of plots allotted to each party In the event of a plot being sub divided, the area of each sub plot shall be given in the schedule and also measurements showing how the plot is to be divided Such report or reports with the schedule and the map, if any, shall be annexed to the commission and transmitted to the Court, and the Court, after hearing any objections which the parties may make to the report or reports shall confirm, vary or set aside the same

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied and, when drawing up the final decree shall incorporate in the decree the schedule, and the map, if any, mentioned in sub rule (2) above, as confirmed or varied by the Court The whole report or reports of the Commissioner or Commissioners shall not ordinarily be entered in the decree. When the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit"

Synopsis

Other Topics (miscellaneous)

1. Legislative changes. — In sub rule (1), the words "after such enquiry as may be necessary" have been substituted for "ascertain and inspect the property and shall".

Sub rule (3) is almost new

In sub rule (2), the words "or the Commissioners shall prepare and sign separate reports" have been newly added and the words "shall confirm, vary or set aside the same" have been substituted for the words "shall either quash the same". The object of the latter amendment was to negative the view taken in *Janki v Gouri* (1906) I L R 28 Allahabad 75, that the Court had no power to *vary* the report

2. Mode of effecting partition. — It is not contemplated by the rule that the Commissioner should propose a number of schemes and ask the Court to choose any one of them[1] only the shares as ascertained by the decree have to be worked out by him But the Court may, in the case of a joint Hindu family with the consent of all the coparceners order that any part of the property should remain joint[2] Where a partition cannot be made without destroying the intrinsic value of the property[3] or where it would be inconvenient to disturb the exclusive possession of one co sharer[4] the Court may also award a money compensation instead of dividing the properties

3. Partition of revenue-paying immovable property. — A partition of revenue paying land which has the effect of breaking up the joint liability of the sharers for revenue cannot be effected by the Civil Court[1] see Section 54 *ante* Therefore when a *revenue paying estate* has to be partitioned into several *revenue* paying estates such partition can be done only by the Collector because the revenue is affected[2] But where no *allotment of separate revenue* is asked for, the Civil Court is competent to allot the shares leaving the *whole estate liable for the whole revenue*[3] The reason is that the jurisdiction of the Civil Court is excluded only on questions affecting the right of the Government to assess and collect in its own way the public revenue[4]

4. Partition of joint family dwelling-house. — In the case of partition of non revenue paying immovable property such as a joint family dwelling house the Court can actually fix the particular area rooms or part of the house to be allotted to the respective sharers[1]

For cases under the Partition Act, IV of 1893, see the undermentioned cases[2]

Order 26 Rule 14 — Note 2

1 (04) 6 Bom L R 556 (557)

2 (78) 3 Cal 514 (516)

3 (84) 10 Cal 675 (676)

(81) 8 Cal L Rep 259 (260) (Compensation allowed to co-sharer enhancing value of portion)

4 (76) 25 Suth W R 335 (342)

(11) 11 Ind Cas 370 (371) (Cal)

Note 3

1 (82) 8 Cal 649 (651)

(82) 8 Cal 537 (545)

(74) 22 Suth W R 11 (11)

(74) 22 Suth W R 333 (333)

(76) 1876 Pun Re No 14 page 19

2 (89) 16 Cal 203 (20)

(78) 2 Cal L Rep 134 (136)

3 (97) 24 Cal 725 (734 735 745) (F B)

(81) 7 Cal 153 (155)

(88) 15 Cal 198 (201)

4 (88) 15 Cal 198 (200)

Note 4

1 (06) 28 All 75 (76)

2 (08) 32 Bom 103 (105) (Power to sell)

(01) 24 Mad 639 (641) (Power to sell under Section 2)

and for cases regarding valuation of suits, see the decisions cited below [3]

5. Allotment of shares. — The duty of the Commissioner is not to give possession but to allot the shares and prepare a report fixing the shares and distinguishing the same by metes and bounds if so ordered [1] The Court after considering the rights and objections of the different parties should make the final allotment [2] A casting of lots for an equitable distribution of shares is not opposed to the rule and can be resorted to by the Courts [3]

An order of the Court approving the allotment and division made by a Commissioner has been held to be binding on the parties, even though a fresh decree is not passed in accordance with the report [4]

6. Objections to Commissioner's report. — Objections to the report can be filed within the period fixed by the Court [1] When they are not so filed in the trial Court they cannot be raised for the first time in appeal [2] But the High Court has power to see whether the Commissioner has exceeded his jurisdiction or acted within the scope of his warrant of commission [3]

The provision in this rule requiring the Court to hear' the objections to the report of the Commissioner implies that evidence can be let in to support the objections [4]

7. Resistance to Commissioner. — As already seen in Note 4 to Rule 11, Commissioners are officers of the Court and a process of attachment can be issued by the Court to enforce the orders of the Commissioner But the Court is not justified in *dismissing the suit* when the Commissioner is resisted in executing his warrant of commission [1]

8. Issue of a new commission — Ordinarily a second commission ought not to be issued on the mere objection of a party [1] But where the report is unsatisfactory,[2] or the Commissioner has so misconceived his duties as to render his report useless a second commission may be issued in which case however, the old report should be

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(1900) 5 Cal W N 128 (130) (Power to sell under S 2 — Preliminary decree on report of the commissioner is no bar to proceedings under S 2)
(08) 30 All 324 (328) (F B) (Section 4 applies to Mahomedans)
(99) 23 Bom 77 (79) (Applicability of S 4)
(99) 21 All 409 (411) (Applicability of S 10)

3 (06) 3 Cal L Jour 257 (259) (For purposes of S 110 C P C value of the subject matter of the suit is the value of the whole estate which it is sought to partition)
(85) 8 Mad 235 (236) (Value of whole property determines jurisdiction)
(90) 12 All 506 (509) (Value of share determines jurisdiction)
(84) 8 Bom 31 (34) (Do)
(90) 13 Mad 25 (27) (Case of co owners -Specific share claimed determines jurisdiction)

Note 5

1 (98) 20 All 311 (313) ordered to be built by amin to separate shares)]

2. (08) 8 Cal L Jour 521 (523) (In this case it was held that the defendants had not sufficient reason for insisting on drawing of lots)

3 (15) AIR 1915 Mad 1171 (1172)

4 (13) 20 Ind Cas 908 (910) (Mad)

Note 6

1 (19) AIR 1919 All 403 (403)
(89) 13 Bom 368 (370) (Practice on the Original Side)

2 (20) AIR 1920 Low Bur 31 (34)
(81) 7 Cal 318 (321)

3 (29) AIR 1929 Mad 492 (492)

4

Note 7

1 (10) 5 Ind Cas 872 (873) 32 All 319

Note 8

1 (22) AIR 1922 Mad 219 (220) 45 Mad 79

2 (26) AIR 1926 Pat 159 (160)

O. 26 R. 14
Notes 8–11

superseded[3] A second Commissioner so appointed can rectify the mistakes of the first Commissioner[4]

9. Decree. — The proceedings contemplated by the rule are proceedings in the suit and not in execution[1] and the Court is bound to pass a *final* decree after perusing the report[2] The High Court of Madras[3] has held that the Court can pass a final decree *suo motu* without an application by the party, the reason being that the suit must be considered *pending* until a final decree is passed Though the *final decree* is appealable no appeal lies against an *order* of the Court confirming or varying the report[4]

10. Final decree to be engrossed on stamp paper. — A final decree for partition passed in accordance with the report of the Commissioner must be stamped as an instrument of partition within the meaning of Section 2, clause (15) of the Indian Stamp Act (II of 1899)[1]

11. Preliminary decree in a partition suit — Appeal. — Under Section 396 clause (1) of the old Code corresponding to Rule 13 of this Order, it was provided that the Court can issue a commission [illegible] and their several rights [illegible] an ascertainment amounted to a dec[illegible] and Madras[2] that it did amount to a decree while the Chief Court of the Punjab[3] held that it did not The conflict has now been set at rest by the Legislature by using the words *preliminary decree* in Rule 13 to avoid any possible doubt in the matter

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General provisions

O. 26 R. 15

Expenses of commission to be paid into Court

R. 15. [S 397.] Before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued

[1877, S 397; 1859, S. 182]

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3 (22) AIR 1922 Mad 219 (220) 45 Mad 79
4 (31) AIR 1931 Cal 170 (170)

Note 9

1 (86) 12 Cal 275 (277)
(06) 1906 Pun Re No 47, page 168
(95) 22 Cal 425 (432)
2 (93) 1893 All W N 99 (99)
(05) 1905 Pun Re No 23 page 99 (Decree — Effect—Is in favour of each share-holder)
3 (08) 18 Mad L Jour 23 (24)
(10) 8 Ind Cas 393 (393) (Mad)
4 (26) AIR 1926 Oudh 195 (196)

Note 10

1 (05) 29 Bom 366 (368)
(05) 32 Cal 483 (491)

Note 11

1. (86) 12 Cal 209 (212)
(86) 12 Cal 273 (275)
(92) 19 Cal 463 (467) (F B) [illegible] (In this case [illegible]
[illegible] (But see [illegible]

Local Amendment

MADRAS

Re-number the existing Rule 15 as Rule 15 (1) and *insert* the following as sub-rule (2)

"(2) Before executing and returning any commission issued by foreign Courts under the provisions of Section 78, the Court or the Commissioner required to execute the commission may levy such fee as the High Court may from time to time prescribe in this behalf in addition to the fees prescribed for the issue of summons to witnesses and for expenses of such witnesses under Rule 2 of Order 16"

Synopsis

1. Expenses of commission.
2. Reduction of Commissioner's bill, when justified

1. Expenses of commission. — The *rule provides that the Court may, if it* thinks fit, order the party requiring the commission to deposit the necessary expenses therefor [1] The rule is not exhaustive and does not prevent the Court from imposing any terms that it chooses as a condition precedent to the issuing of a commission [2] Nor does an omission on the part of the Court to require the deposit of the expenses prevent the Commissioner from recovering his remuneration from the party at whose instance he was engaged [3]

The object of requiring the expenses to be deposited beforehand is, that the Commissioner who is an officer of Court ought not to be driven to a separate suit or execution to get his fees [4] As to whether an order directing the deposit of fees to the Commissioner is capable of execution, the High Court of Madras[5] has held that it is not capable of execution The decisions of the High Courts of Calcutta[6] and Lahore[7] are conflicting An order directing one of the parties to pay a certain sum to the Commissioner cannot be made a part of the decree, the reason being that the Commissioner is not a party to the suit [8]

But failure to deposit the required fees can afford no ground for rejecting the report[9] or for dismissing the suit [10]

Order 26 Rule 15 — Note 1

by her)]

2. ('27) AIR 1927 Cal 907 (907)

3. ('82) 4 Mad 399 (401)
(1865) Bourke 24 (But the Commissioner has no lien)
('23) AIR 1923 Cal 436 (437, 438) (But a Commissioner ought not to take a mortgage from the party for his fees)

4. ('11) 9 Ind Cas 313 (314) (Cal)
('36) 63 Cal L Jour 563 (565)

5. *(1900) 10 Mad L Jour 241 (242)*
('96) 6 Mad L Jour 124 (124, 125).

6 ('25) AIR 1925 Cal 57 (58) 52 Cal 269 (Can be executed)
[*See* ('06) 10 Cal W N 234 (236) (Case under the old Code)
('13) 21 Ind Cas 191 (191) (Cal) (Cannot be executed)]

7. ('26) AIR 1926 Lah 62 (62) (Order cannot be executed)
('34) AIR 1934 Lah 46 (46) (Order can be executed—Following AIR 1925 Cal 57)

8. ('38) AIR 1938 Rang 254 (256)

9. ('90) 17 Cas 281 (284)

10. ('81) 3 Mad 259 (259).
[*See* ('90) 13 Mad 510 (511) (Suit dismissed for plaintiff's failure to deposit fees— No issues framed in the suit—No time prescribed for payment of fees — Plaintiff again suing defendant on the same cause of action — *Held*, suit was not barred by *res judicata*)]

O. 26 R. 15
Note 2

2. Reduction of Commissioner's bill, when justified. — The reduction or disallowance of a Commissioner's bill is a matter for the trial Court[1] The Court will not be justified in re opening or reducing the fees fixed in the presence of the parties and paid into Court[2] See also the undermentioned cases[3]

O. 26 R. 16

R. 16. [S. 399.] Any Commissioner appointed under this Order may, unless otherwise directed by the order of appointment, —

Powers of Commissioners.

(a) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him;

(b) call for and examine documents and other things relevant to the subject of inquiry;

(c) at any reasonable time enter upon or into any land or building mentioned in the order.

Synopsis

1. **Powers of Commissioner.**
2. **Review.** See Note 3 to Rule 11

***1. Powers of Commissioner.** — The provisions of O 26 R 16 are permissive in the sense that they vest a discretion in the Commissioner to examine or not to examine a witness[1] See Note 3 to Rule 10, *supra*

2. Review. — See Note 3 to Rule 11, *supra*.

O. 26 R. 17

R. 17. [S. 399.] *(1)* The provisions of this Code relating to the summoning, attendance and examination of witnesses and to the remuneration of, and penalties to be imposed upon, witnesses, shall

Attendance and examination of witnesses before Commissioner.

Note 2

1. (19) AIR 1919 Cal 839 (839)

(34) AIR 1934 Pat 316 (318) (It is not right to extend any indulgence to inefficient commissioners whether they are pleaders or professional surveyors — For worthless or nominal work by Commissioner no remuneration can be allowed)

negligence or improper motive — Fees held cannot be disallowed.)

direction by District Judge not to allow more than Rs 8 per day to Commissioners in ordinary cases — *Held* there was no implied contract to work on Rs 8)

Order 26 Rule 16 — Note 1

1. (35) AIR 1938 All 215 (216).

apply to persons required to give evidence or to produce documents under this order whether the commission in execution of which they are so required has been issued by a Court situate within or by a Court situate beyond the limits of British India, and for the purposes of this rule the Commissioner shall be deemed to be a Civil Court. **O. 26 R. 17 Notes 1–2**

(2) A Commissioner may apply to any Court (not being a High Court) within the local limits of whose jurisdiction a witness resides for the issue of any process which he may find it necessary to issue to or against such witness, and such Court may, in its discretion, issue such process as it considers reasonable and proper.

[1877, S. 399.]

Synopsis

1. Scope of the Rule. | 2. Sub-rule (2).

1. Scope of the Rule. — Under this rule the Commissioner is given the powers of Court in regard to the summoning and procuring the attendance of witnesses The reason is that the Commissioner is a delegate of the Court acting under its authority.[1] Although under O 26 R 16 it is in the discretion of the Commissioner to examine or not to examine a witness, yet, once the Commissioner has decided to examine a witness, the mandatory provisions of this rule come into play and those provisions in their turn attract the provisions of Order 18 of the Code and Section 138 of the Evidence Act. Hence, the parties must be afforded an opportunity of examining, cross examining and re examining the witnesses and it is not open to the Commissioner to examine the witnesses in the absence of the parties without giving them sufficient notice[2] of the time and place when he proposes to examine the witnesses.[2]

2. Sub-rule (2). — Sub-rule (2) is new. In the absence of a similar provision under the old Code it was held that if a witness residing outside jurisdiction refused to appear before the Commissioner pursuant to his notice, the only course left to the Commissioner was to return the warrant of commission [1] Such a contingency has now been obviated

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R. 18. [S. 400.] *(1)* Where a commission is issued under this Order, the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders. **O. 26 R. 18**

Parties to appear before Commissioner.

(2) Where all or any of the parties do not so appear, the Commissioner may proceed in their absence.

[1877, Ss. 394, 395, 400; 1859, S. 181.]

Order 26 Rule 17 — Note 1

1. ('23) AIR 1923 Oudh 119 (120).

2. ('38) AIR 1938 All 215 (216, 217).

Note 2

1. ('96) 23 Cal 404 (405).

O. 26 R. 18
Notes 1-2

Local Amendments

ALLAHABAD

In clause (1) *after* the words "agents or pleaders" *substitute* a comma for the full stop, and add the following words:

"and shall direct the party applying for the examination of the witness, or in its discretion any other party to the suit, to supply the Commissioner with a copy of the pleadings and issues"

OUDH

In sub-rule (1), *after* the words "agents or pleaders" *substitute* a comma for the full stop, and *add* the following words:

"and shall direct the party applying for the examination of the witness, or in its discretion any other party to the suit, to supply the Commissioner with a copy of the pleadings and issues"

RANGOON

The following shall be *substituted* for sub-rule (1):

"(1) When a commission is issued under this order, the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders, unless otherwise directed by the Court, within fifteen days."

Synopsis

1. Parties to appear. | **2. Form.** See Appendix H, Form No 7.

1. Parties to appear. — Under this rule it is obligatory on the part of the Court to order the parties to appear before the Commissioner either in person or by their recognized agents or pleaders Where a party fails to appear in pursuance of the order of Court, the Court can proceed under O. 17 R 2[1]

2. Form. — See Appendix H, Form No 7.

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*Commissions issued at the instance of foreign tribunals.

O. 26 R. 19

Cases in which High Court may issue commission to examine witness.

R. 19. [New.] *(1) If a High Court is satisfied —*

(a) that a foreign Court situated in a foreign country wishes to obtain the evidence of a witness in any proceeding before it,

(b) that the proceeding is of a civil nature, and

(c) that the witness is residing within the limits of the High Court's appellate jurisdiction,

it may, subject to the provisions of rule 20, issue a commission for the examination of such witness.

Order 26 Rule 18 — Note 1

1. (71) 16 Suth W R P C 23 (23) (PC).
(1862) 1862 Suth W R Sp No 1 (2)

(2) Evidence may be given of the matters specified in clauses (a), (b) and (c) of sub rule (1) — **O.26 R.19**

(a) by a certificate signed by the consular officer of the foreign country of the highest rank in India and transmitted to the High Court through the [b]*[Central Government], or*

(b) by a letter of request issued by the foreign Court and transmitted to the High Court through the [b]*[Central Government], or*

(c) by a letter of request issued by the foreign Court and produced before the High Court by a party to the proceeding

a Rules 19 to 22 and the heading were inserted by the Code of Civil Procedure (Amendment) Act 1932 (X of 1932) Section 3

b Substituted by the Government of India (Adaptation of Indian Laws) Order 1937 for Governor General in Council

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Application for commission

R. 20. [New] *The High Court may issue a commission under rule 19 —* **O.26 R.20**

(a) upon application by a party to the proceeding before the foreign Court, or

(b) upon an application by a law officer of the [a]*[Provincial Government] acting under instructions from the* [a]*[Provincial Government]*

a Substituted by the Government of India (Adaptation of Indian Laws) Order 1937, for Local Government

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To whom commission may be issued

R. 21. [New] *A commission under rule 19 may be issued to any Court within the local limits of whose jurisdiction the witness resides, or, where* [a][* * * *] *the witness resides within the local limits of* [b]*[the ordinary original civil jurisdiction of the High Court], to any person whom the Court thinks fit to execute the commission* **O.26 R.21**

a The words The High Court is established under the Indian High Courts Act 1861 or the Government of India Act 1915 and repealed by the Government of India (Adaptation of Indian Laws) Order 1937

b Substituted by ibid for its ordinary original civil jurisdiction

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O. 26 R. 22

Issue, execution and return of commissions, and transmission of evidence to foreign Court

R. 22. [New.] *The provisions of rules 6, 15, 16, 17 and 18 of this Order in so far as they are applicable shall apply to the issue, execution and return of such commissions, and when any such commission has been duly executed it shall be returned, together with the evidence taken under it, to the High Court, which shall forward it to the* [a]*[Central Government], along with the letter of request for transmission to the foreign Court.*

a Substituted by the Government of India (Adaptation of Indian Laws) Order 1937, for the Governor General in Council

Local Amendments

MADRAS

Insert the following as Order 26 A (new)

'ORDER XXVI A

O 26A R 1 (Madras)

Rule 1 The Court may in any suit issue a commission to such persons as it thinks fit to translate accounts and other documents which are not in the language of the Court

O 26A R. 2 (Madras)

Rule 2 The report of the Commissioner shall be evidence in the suit and shall form part of the record

O 26A R 3 (Madras)

Rule 3 Before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expense of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued

RANGOON

The following shall be added as Rules 19 to 30 (This is added before the amendments of Rules 19 to 22 by the Indian Legislature in 1932)

Fees to commissioners for local investigation, and commissioners of partition, or to take accounts or for examination of witnesses

O 26 R 19 (Rangoon)

Expenses of commissions

19 Civil Courts in issuing commissions will be guided by the provisions of Rule 15, and subject to the provisions of Rule 23, will exercise their own judgment in fixing a reasonable sum for the expenses of the commission

O 26 R 20 (Rangoon)

Judicial officers prohibited from accepting fee

20 Under Government of India Resolution in the Home Department (Judicial, No 10 1101, dated 21st July, 1875), Judicial Officers are prohibited from accepting any remuneration for executing commissions issued by Courts of other provinces

O 26 R. 21 (Rangoon)

21 It is to be understood that no part of the fee sent for the execution of a commission is to be accepted, either personally or on behalf of Government The execution of a commission is an official act which judicial officers are bound to perform when called upon and is not work undertaken for a private body

O 26 R 22 (Rangoon)

Refund of unexpended balance of expenses

22 In all cases the unexpended balance, which remains after all charges have been deducted should be returned to the Court issuing the commission

Fees to commissioners of partition or to take accounts or to examine witnesses

23 The following fees are to be allowed to commissioners of partition or to take accounts or for the examination of witnesses namely O 26 R 23 (Rangoon)

Commissioner s fees for every effective meeting shall not exceed three gold mohurs for the first two hours and one gold mohur for each succeeding hour

Fees to commissioners for administering an oath or solemn affirmation to a declarant of an affidavit

24 When under the orders of a Court in the Town of Rangoon or of a District Court an oath or solemn affirmation is administered to a declarant of an affidavit at his request elsewhere than at the Court a fee of Rs 16 shall be paid by the said declarant O 26 R 24 (Rangoon)

Provided that —

(a) the administration of the oath or of solemn affirmation elsewhere than in Court shall be authorised by the Court by order in writing

(b) if more than one affidavit is taken at the same time and place the fee shall be Rs 8 for each affidavit after the first

(c) in no case shall the fees for taking any number of affidavits at the same time and place exceed Rs 80

(d) in pauper suits and appeals when the affidavit of a pauper is taken no fee shall be charged

25 Affidavits taken under Rule 24 shall be taken out of Court hours The fees shall be retained by the Commissioner for administering the oath or solemn affirmation O 26 R 25 (Rangoon)

No fee for administration of oath under the order of a Court

26 No fee shall be charged for the administration of an oath under the order of any Court other than those specified in Rule 24 O 26 R 26 (Rangoon)

Commissions issued at the instance of Foreign Tribunals

27 (1) If a High Court is satisfied — O 26 R 27 (Rangoon)

(a) that a foreign Court situated in a foreign country wishes to obtain the evidence of a witness in any proceeding before it

(b) that the proceeding is of a civil nature and

(c) that the witness is residing within the limits of the High Court s appellate jurisdiction it may subject to the provisions of Rule 28 issue a commission for the examination of such witness

(2) Evidence may be given of the matters specified in clauses (a) (b) and (c) of sub rule (1) —

(a) by a certificate signed by the consular officer of the foreign country of the highest rank in India and transmitted to the High Court through the Governor General in Council or

(b) by a letter of request issued by the foreign Court and *transmitted to* the High Court through the Governor General in Council or

(c) by a letter of request issued by the foreign Court and produced before the High Court by a party to the proceeding

28 The High Court may issue a commission under Rule 27 — O 26 R 28 (Rangoon)

(a) upon an application by a party to the proceeding before the foreign Court or

O.26 R.28 (Rangoon) (b) upon an application by a law officer of the Local Government acting under instructions from the Local Government

O 26 R 29 (Rangoon) 29 A commission under Rule 27 may be issued to any Court within the local limits of whose jurisdiction the witness resides or, where the High Court is established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, and the witness resides within the local limits of its ordinary original civil jurisdiction, to any person whom the Court thinks fit to execute the commission

O 26 R 30 (Rangoon) 30 The Provisions of Rules 6, 15, 16, 17 and 18 of this order in so far as they are applicable shall apply to the issue, execution and return of such commissions and when any such commission has been duly executed it shall be returned, together with the evidence taken under it to the High Court, which shall forward it to the Governor General in Council along with the letter of request for transmission to the foreign Court

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ORDER XXVII.

SUITS BY OR AGAINST [a]*the Crown* OR PUBLIC OFFICERS IN THEIR OFFICIAL CAPACITY.

O.27 R.1

Suits by or against [a]Crown

R. 1. [New.] In any suit by or against [b]*the Crown*, the plaint or written statement shall be signed by such person as [a]*the Crown* may, by general or special order, appoint in this behalf, and shall be verified by any person whom [a]*the Crown* may so appoint and who is acquainted with the facts of the case.

[See Sections 79 and 80]

a Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "the Government"

b Substituted by ibid for "the Secretary of State for India in Council"

Synopsis

1 Suits by or against the Crown
2 Notice in suits against the Crown or public officer See Section 80

1. Suits by or against the Crown — In suits by or against the Crown the authority to be named as plaintiff or defendant is as provided for by Section 79

2. Notice in suits against the Crown or public officer. — See Section 80

O.27 R.2

Persons authorized to act for Crown

R. 2. [S 417] Persons being *ex officio* or otherwise authorized to act for [a]*the Crown* in respect of any judicial proceeding shall be deemed

to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of [a]*the Crown.* O. 27 R. 2 Notes 1-2

[1877, S. 417; 1859, S. 17, cl. (3). See O. 3 R. 2.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "the Government"

Synopsis

1. Scope of the Rule.
2. Collector, if can sue without power of attorney from Financial Commissioner.

1. Scope of the Rule. — As to recognized agents generally, see O 3 R 2 Collectors and Personal Assistants to Collectors have been authorized to act for the Government in judicial proceedings But a Personal Assistant is not agent of the Collector It is not permissible for the Personal Assistant to sign a vakalat which purports to be executed by the Collector [1]

2. Collector, if can sue without power of attorney from Financial Commissioner. — In the Punjab a Collector is competent to institute a suit on behalf of the Secretary of State for India in Council without obtaining a power of attorney from the Financial Commissioner [1] All Government Pleaders in the Punjab are also authorized to act for Government as their recognized agents.[2]

R. 3. [S. 418.] In suits by or [a]*against the Crown,* instead of inserting in the plaint the name and description and place of residence of the plaintiff or defendant, it shall be sufficient to insert [b]*the appropriate name as provided in section 79, or, if the suit is against the Secretary of State, the words "the Secretary of State."* O. 27 R. 3.

Plaints in suits by or against Crown.

[1877, S. 418; 1859, S 36.]

a Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "against the Secretary of State for India in Council"

b Substituted by *ibid* for the words "the Secretary of State for India in Council"

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[a]**R. 4.** [S. 419] *The Crown pleader in any Court shall be the agent of the Crown for the purpose of receiving processes against the Crown issued by such Court.* O. 27 R. 4.

Agent for Crown to receive process.

[1877, S. 419; 1859, Ss 52, 67.]

a Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for the original rule

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Order 27 Rule 2 — Note 1

1. ('28) AIR 1928 Mad 96 (96).

Note 2

1. (05) 1905 Pun Re No 84 page 258
2. ('28) AIR 1928 Lah 774 (775) 10 Lah 360

O. 27 R. 4 Note 1

1. Service of notice where no Crown pleader has been appointed. — See the undermentioned case [1]

O. 27 R. 5

R. 5. [S. 420.] The Court, in fixing the day for *the Crown* to answer to the plaint, shall allow a reasonable time for the necessary communication *with the Crown* through the proper channel, and for the issue of instructions to the *Crown pleader* to appear and answer on behalf of *the Crown* or the Government, and may extend the time at its discretion.

Fixing of day for appearance on behalf of Crown.

[1877, S. 420; 1859, S. 67. See O. 5 R. 6.]

a Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "the Secretary of State for India in Council."
b Substituted by *ibid* for "Government"
c Substituted by *ibid* for "with the Government"
d Substituted by *ibid* for "Government pleader"
e Substituted by *ibid* for "the said Secretary of State for India in Council"

Local Amendment

MADRAS

Substitute the following

"5. The Court in fixing the day for the Secretary of State for India in Council to answer the plaint shall allow not less than three months' time from the date of summons for the necessary communication with tl [illegible] channel and for the issue of instructions to the [illegible] answer on behalf of the said Secretary of State for [illegible] and may extend the time at its discretion."

Note This local amendment was made before the rule was amended by the Government of India (Adaptation of Indian Laws) Order, 1937.

O. 27 R. 6

R. 6. [S. 421.] The Court may also, in any case in which the *Crown pleader* is not accompanied by any person on the part of *the Crown*, who may be able to answer any material questions relating to the suit, direct the attendance of such a person.

Attendance of person able to answer questions relating to suit against Crown.

[1877, S. 421; 1859, S. 67. See O. 10 R. 4.]

a Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Government pleader"
b. Substituted by *ibid* for "the Secretary of State for India in Council"

Order 27 Rule 4 — Note 1

1. (39) AIR 1939 All 277 (278, 279) I L R (1939) All 392 (Agent for the Secretary of State in respect of cases concerning East India Railway —Absence of a Crown pleader—Service on Agent of East India Railway *held* sufficient)

R. 7. [S 423.] *(1)* Where the defendant is a public officer and, on receiving the summons, considers it proper to make a reference to [a]*the Crown* before answering the plaint, he may apply to the Court to grant such extension of the time fixed in the summons as may be necessary to enable him to make such reference and to receive orders thereon through the proper channel **O. 27 R. 7**

Extension of time to enable public officer to make reference to Crown

(2) Upon such application the Court shall extend the time for so long as appears to it to be necessary.

[1877, S 423; 1859, S 69 See S 2, sub section 17.]

a Substituted by the Government of India (Adaptation of Indian Laws) Order 1937 for the Government

1. Suit against public officer — A suit against a public officer should be brought in his personal and not in his official name [1]

R. 8. [Ss 426, 427] *(1)* Where [a]*the Crown* undertakes the defence of a suit against a public officer, [b]*the Crown pleader*, upon being furnished with authority to appear and answer the plaint, shall apply to the Court, and upon such application the Court shall cause a note of his authority to be entered in the register of civil suits **O 27 R. 8**

Procedure in suits against public officer

(2) Where no application under sub rule *(1)* is made by [b]*the Crown pleader* on or before the day fixed in the notice for the defendant to appear and answer, the case shall proceed as in a suit between private parties :

Provided that the defendant shall not be liable to arrest, nor his property to attachment, otherwise than in execution of a decree

[1877, S 427; 1859, S 71]

a Substituted by the Government of India (Adaptation of Indian Laws) Order 1937 for the Government

b Substituted by *ibid* for the Government pleader

1 Scope of the Rule — As to the maintainability of suits against public officers see Section 9 Note 58

Order 27 Rule 7 — Note 1

1 (27) AIR 1927 Bom 521 (523 525) 51 Bom 749

O. 27 I Note

O. 27 I

O. 27 R. 8A — No security to be required from Crown or a public officer in certain cases.

*R. 8A. [New.] *No such security as is ment[ioned in rules] 5 and 6 of Order XLI shall b[e required from] the Crown or, where the Crow[n has undertaken] the defence of the suit, fr[om any public] officer sued in respect of an act alleged to be done [by him in his] official capacity.*

[O. 41 R. 7 : 1882. S. 547 ; 1877. S. 547 : 1859. …

[illegible]

O. 27 R. 8B — Definitions of "Crown" and "Crown pleader."

*R. 8B. *In this Order ["Crown" and] "Crown pleader" mean respectiv[ely]—*

(a) in relation to any suit by or against t[he Secretary of] State or the Central Government, or a[gainst a public] officer in the service of that Governm[ent, the Central] Government and such pleader as t[hat Government] may appoint whether generally or s[pecially for the] purposes of this Order;

(b) in relation to any suit by or against [the Crown Re]presentative, or against a public offi[cer employed in] connection with the exercise of the f[unctions of the] Crown in its relations with Indian St[ates, the Crown] Representative and such pleader as h[e may appoint] whether generally or specially for the [purposes of this] Order; and

O. 27 R. 6

(c) in relation to any suit by or against [a Provincial] Government or against a public offi[cer in the service] of a Province, the Provincial Gov[ernment and the] Government pleader, or such other [pleader as the] Provincial Government may appoint [whether generally o]r specially, for the purposes of this O[rder.]

[illegible]

ALLAHABAD

Local Amendment

O. 27 R. 8 (Allahabad)

[illegible]

he shall in lieu of a *vakalatnama* file a memorandum on unstamped paper signed by him and stating on whose behalf he appears Such memorandum shall be as nearly as may be, in the terms of the following form **O 27 R. 9 (Allahabad)**

TITLE OF THE SUIT, ETC

I, *A B*, Government Pleader appear on behalf of the Secretary of State for India in Council (or the Government of the United Provinces or as the case may be) Respondent (or etc), in the suit

Or, on behalf of the Government [which under O 27 R 8 (1) of Act V of 1908 has undertaken the defence of the suit] respondent (or etc) in the suit

Note Th s local amendment was made before Rule 8 was amended by the Government of India (Adaptation of Indian Laws) Order 1937

ORDER XXVIII.

SUIT BY OR AGAINST MILITARY [a]*or Naval* MEN [b]*or Airmen*

Officers [c][soldiers sailors or airmen] who cannot obtain leave may authorize any person to sue or defend for them

R. 1. [S 465] *(1)* Where any officer, [c]*soldier, sailor or airman* actually [d]*serving under the Crown* in [e]*such* capacity is a party to a suit, and cannot obtain leave of absence for the purpose of prosecuting or defending the suit in person, he may authorize any person to sue or defend in his stead **O. 28 R. 1**

(2) The authority shall be in writing and shall be signed by the officer, [f]*soldier, sailor or airman* in the presence of *(a)* his commanding officer, or the next subordinate officer, if the party is himself the commanding officer, or *(b)* where the officer, [f]*soldier, sailor or airman* is serving in military, [g]*naval,* [h]*or air force* staff employment, the head or other superior officer of the office in which he is employed Such commanding or other officer shall countersign the authority, which shall be filed in Court

(3) When so filed the countersignature shall be sufficient proof that the authority was duly executed, and that the officer, [f]*soldier, sailor or airman* by whom it was granted could not obtain leave of absence for the purpose of prosecuting or defending the suit in person

Explanation — In this Order the expression "commanding officer" means the officer in actual command for the time being of

O 28 R.1 Note 1 any regiment, corps, [g]*ship*, detachment or depot to which the officer, [f]*soldier, sailor or airman* belongs

[1877, S 465, 1859, S 19]

a Inserted by the Amending Act XXXV of 1934 Section 2 and Schedule

b Inserted by the Repealing and Amending Act X of 1927 Section 2 and Schedule I

c The words soldier or airman were substituted by Section 2 and Schedule I *ibid* for or soldier and the word sailor was inserted by Act XXXV of 1934 Section 2 and Schedule

d Substituted by the Government of India (Adaptation of Indian Laws) Order 1937 for serving the Government

e Substituted by Act XXXV of 1934 Section 2 and Schedule for a military or air force

f The words soldier or airman were substituted by the Repealing and Amending Act X of 1927 for or soldier and or a soldier and the word sailor was inserted by the Amending Act XXXV of 1934

g Inserted by Act XXXV of 1934 Section 2 and Schedule

h Inserted by Act X of 1927 Section 2 and Schedule I

Local Amendment

RANGOON

For the heading the words Suits by or against the members of His Majesty s Military Naval or Air forces shall be *substituted*

In Rule 1 *for* the words officer soldier sailor or airman wherever they appear the words member of His Majesty s military naval or air forces shall be *substituted*

1 Amendments after 1908 — The following amendments have been introduced by the Repealing and Amending Act X of 1927

(1) The words or Airmen have been added after the words Military Men in the heading

(2) The words soldier or airman have been substituted for the words or soldier wherever they occur and the words or air force have been inserted after the word military

See also foot notes to the text of the rule

O 28 R 2

R. 2. [S 466] Any person authorized by an officer, [a]*soldier, sailor or airman* to prosecute or defend a suit in his stead may prosecute or defend it in person in the same manner as the officer, [a]*soldier, sailor or airman* could do if present, or he may appoint a pleader to prosecute or defend the suit on behalf of such officer, [a]*soldier, sailor or airman*

Person so authorized may act personally or appoint pleader

[1877, S 466, 1859, S 20]

a The words soldier or airman were substituted by the Repealing and Amending Act X of 1927 for or soldier and the word sailor was inserted by the Amending Act XXXV of 1934

Local Amendment

O. 28 R. 2 Note 1

RANGOON

For Rule 2, the following shall be *substituted*

"Any person authorized by a member of His Majesty's military, naval or air forces to prosecute or defend a suit in his stead may prosecute or defend it in person in the same manner as such member of His Majesty's forces could do if present, or he may appoint a pleader to prosecute or defend the suit on behalf of such member of His Majesty's forces."

1. Amendments after 1908. — See the foot-note to the text of the rule

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R. 3. [S. 467.] Processes served upon any person authorized by an officer, [a] *soldier, sailor or airman* under rule 1 or upon any pleader appointed as aforesaid by such person shall be as effectual as if they had been served on the party in person. O. 28 R. 3

Service on person so authorized or on his pleader, to be good service.

[1877, S. 467; 1859, S. 20. See O. 3 R. 5.]

a See the foot note to the text of Rule 2 above

Local Amendment

RANGOON

For Rule 3, the following shall be *substituted*

"Processes served upon any person authorized by a member of His Majesty's military, naval or air forces under Rule 1 or upon any pleader appointed as aforesaid by such person shall be as effectual as if they had been served on the party in person"

1. Service on soldiers. — *Vide* Notes under O 5 Rules 28 and 29.

For changes in the rule, see the foot note to the text of Rule 2 above

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ORDER XXIX.

SUITS BY OR AGAINST CORPORATIONS

R. 1. [S. 435.] In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case. O. 29 R. 1

Subscription and verification of pleading

[1877, S. 435; 1859, S. 26. See O. 6 R. 14.]

O.29 R.1
Notes 1-2

Synopsis

Other Topics (miscellaneous)

1. Legislative changes. — The words "or by a company authorized to sue or be sued in the name of an officer or of a trustee" which occurred in the old Section after the word "corporation" have now been omitted The reason for the omission is that most companies nowadays are registered, and companies which are *unregistered* but which are authorized by law to sue must be very few, if any indeed exist, and no special treatment is necessary in respect of these [1]

2. Suits by or against corporations. — This Order deals with the subscription and verification of pleadings in suits by or against corporations, it says nothing about the manner in which the suit itself is to be framed [1] There is nothing in this rule or Order to suggest that the cause title of the plaint should also contain the particulars showing the names and description or place of residence of the person who purports to verify or sign the pleadings [2]

A "corporation" is a fictitious or imaginary person invested by law with the attribute of perpetuity [3] For the purposes of this Order it may be stated to be a body authorized by law to act as one individual and constituted either by prescription, by the Letters Patent, or by an act of the Legislature [4] A corporation by prescription is one which has existed as a corporation "from a time whereof the memory of man runneth not to the contrary, and therefore, is looked upon in law to be well created" In other words, it is a corporation of such antiquity that the consent of the sovereign may be presumed [5] A *registered* company under the Companies Act is a corporation,[6] but not an unregistered one, unless it is authorized by law to act as an individual Unregistered companies so authorized are, as has been seen in Note 1, now practically non existent

A corporation must sue or be sued, not *in the names* of its agents or servants but in its *own corporate name*,[7] and, in the case of registered companies, in the form

Order 29 Rule 1 — Note 1

1 See Notes on Clauses

Note 2

1 (21) AIR 1921 Pat 465 (485)

2 (33) AIR 1933 Sind 102 (102) . 26 Sind L R 431

3 Goodeve s Law of Real Property, 5th Edn , page 39
Digby s Law of Real Property, 5th Edition page 218 foot-note I

4. (17) AIR 1917 Low Bur 36 (37)
[*See also* (90) 14 Bom 256 (259, 260)]

5 (95) 20 All 107 (109)

6. (86) 12 Cal 41 (44)
(85) 1885 Pun Re No. 43, page 81

7. (95) 17 All 292 (293)
(65) 10 Suth W R 366 (367)
(33) AIR 1933 Lah 203 (206) 14 Lah 330
(71) 15 Suth W R 534 (535)
('16) AIR 1916 Cal 818 (819) 43 Cal 441 (445)
(13) 19 Ind Cas 595 (596) (Lah) (Amendment not allowed as the error was persisted in even after objection)
[**See however** (23) AIR 1923 Pat 553 (560)]

given in Appendix A, First Schedule, Form No 2[9] and described as "the A B Company, Limited having its registered office at ' or as "*A B* a public officer of the C D Company[9] A description given as "*A B*, agent of C D Company' is not in conformity with the rule[10] Where in a suit against two companies, the description given was "the Indian General S N R Co, Ltd, and the Rivers S N Co, Ltd, by their joint agent *A B Rogers*" it was held that the suit was substantially against *A B Rogers* and not against the companies referred to[11] Where, however, relief is really sought against the company, and the error is *merely one of misdescription*, a suit, though nominally against the agent, may be treated as in substance one against the company[12] Similarly, where in a suit by a municipal body, the plaintiff was described as "*A B*, Chairman of the Municipal Board of . " but the intention was clear that it was the *Municipal Board* that was suing, it was held that the defect was merely one of form and could not be a ground in appeal for the reversal of the decree[13]

This rule merely authorizes the persons mentioned therein to sign and verify pleadings on behalf of a corporation The rule does not authorize such persons to *institute* suits on behalf of the corporation[14]

Where the manager of a company is authorized by the articles of association to file suits with the previous sanction of the executive board, a suit instituted by him without such sanction is unauthorized and the fact that the act of the manager is ratified after the period of limitation by a resolution of the board of directors is of no avail[15]

3. Suit by or against unregistered company. — A suit by or against an unregistered company or unincorporated body of persons must be brought in the names of, or against *all* the members of the company or body[1] Thus, an unregistered club or society cannot sue in the name of its secretary[2] A suit brought in the names of some only of the members of such a society will be dismissed[3] It was observed by the High Court of Calcutta in the undermentioned case[4] that where it appeared that the plaintiff did not know of what persons the company in question was composed, he might sue the company in the name under which it was carrying on the business, provided he had stated in the plaint that he was unable to give a better description of the defendant

8 ('21) AIR 1921 Pat 485 (485) (Amendment disallowed and suit dismissed)

(33) AIR 1933 Lah 93 (93)
(33) AIR 1933 Lah 456 (457) (State Bank of Native State which is not corporation cannot sue in British Indian Court through its secretary

L R 431)
12. (26) AIR 1926 Pat 40 (42) 5 Pat 128
13 (24) AIR 1924 Oudh 309 (310)
[*See also* (39) AIR 1939 Cal 178 (179) (Where the plaintiff *in a suit against a municipality*, sues the chairman only instead of the municipal commissioners as required by the local Municipal Act it is merely a technical flaw and no importance should be attached to it specially when the municipal commissioners duly appear and defend the suit in the Court)]
14. (35) AIR 1935 Lah 345 (346) 17 Lah 35
15. (36) AIR 1936 Lah 321 (322)

Note 3

1. (25) AIR 1925 All 337 (338) 47 All 342

O 29 R. 1
Notes 3-6

This view has however not been followed but has on the other hand been expressly dissented from by the Allahabad High Court[5]

Where the company consists of numerous persons the suit may under the provisions of O 1 R 8 be instituted by one or more of such persons on behalf of all with the permission of the Court

4 Companies authorized to sue and be sued in the name of an officer or secretary. — As has been seen in Note 2 the authority of a company or a body of persons to sue or be sued in the name of an officer or trustee thereof can only be created by *prescription* or by Letters Patent or by an Act of the Legislature The Indian Companies Act is one of such Acts of the Legislature[1] See also Act VII of 1890 under which a company such as *the Comptoir National Decompte de Paris* may be sued in the name of its chief manager[2]

Where a gift was made to the members of an unincorporated society by a deed and the society was subsequently registered the registered society can enforce the gift without a formal deed of transfer from the unincorporated society[3]

5 Foreign corporation — It is an established rule of Private International Law that a corporation duly created according to the law of one State may sue or be sued in its *corporate name* in the Courts of other States[1] and it is not necessary that it should be registered under the Indian Companies Act before it can claim the benefit of this rule in India[2] Thus a plaint filed in the Delhi Court on behalf of the Singer Manufacturing Company which is incorporated in the United States of America may be verified by an agent holding a general power of attorney from the company as a principal officer of the company within the *meaning of this rule*[3] The fact that the agent also acts for another is not material[4]

6 "Other principal officer of the corporation." — The official liquidator of a registered company in liquidation is competent *to sue on* behalf of the company[1] Where a branch of a bank was conducted by a manager holding a power of attorney under the seal of the company and such a manager had in his absence delegated in pursuance of such power all his authority to an accountant but such substituted power omitted words giving power to sue it was held by the Privy Council that such substitute was a principal officer of the corporation and could sign and verify a plaint by the company[2] The signing of the plaint by the principal officer of the corporation is pro...

5 (09) 31 All 346 (34)

Note 4

1 (86) 12 Cal 41 (44)
2 (10) 7 Ind Ca 952 (950) (Bom)
3 (0) 1907 Pun Re No 41 page 192

Note 5

1 (0) 30 Cal 103 (105)
2 (0) 30 Cal 103 (105)
3 (11) 10 Ind Cas 141 (14?) 1912 Pun Re No 8
4 (1911) 2 K B 516 (2 5 3) Saccharin Corporation Ltd v Chemische Fabrik Von Heyden Aktiengesellschaft

Note 6

1 ... 624 (P C)
... (33)

(37) AIR 193? Lah ?51 (?5) (Suit filed by ...

all things necessary for proper c... management of business of company — ... executing power of attorney empowering ... and verify plaints and to appear ... — Directors ... held could be construed as giving power to delegate — In any case ... was not material ...
(36) AIR 1936 Lah 419 (4 0) ILR (1936) ...
3 (A *de facto* secretary of a ...

invalid merely because he happens to be an *am mukhtear* of the corporation [3] **O. 29 R. 1 Notes 6–8**

Where the plaint is signed and verified by an officer other than those specified in the rule, the Court may, in its discretion, allow the plaint to be amended by filing a properly signed and verified copy of the plaint [4]

7. "Who is able to depose to the facts of the case." — It is not necessary that the principal officer of the corporation should verify the plaint from actual *personal* knowledge, he may verify upon his information and belief [1] According to the rules of the Calcutta High Court,[2] it is necessary that the fitness of the person verifying the pleading on behalf of the corporation should be proved by an affidavit at the time of presenting the pleading But, the Bombay High Court[3] has held that it is not necessary, in a suit by a corporation that the plaintiffs should state in the body of the plaint or by an affidavit that the person verifying was a principal officer of the plaintiffs able to depose to the facts of the case An insufficiency of verification is not a ground in appeal, for dismissing the proceedings had in the first Court in the absence of any prejudice caused to any person by such defect [4]

8. Subscription and verification of pleadings. — A plaint, on behalf of the corporation, may, under this rule, be signed and verified either —

(*a*) by the secretary, or

(*b*) by a director of the corporation, or

(*c*) by other principal officer of the corporation [1]

A Registrar of a Joint Stock Company is not a proper person to represent the company, he not being one of the persons specified [2] There is a conflict of opinions as to whether the provisions contained in O 6 R 14 apply to cases within this rule, so as to enable a plaint by a corporation to be signed and verified by a person duly authorized by it, where, by reason of absence or other good cause it could not be signed by the persons specified in this rule In *Delhi and London Bank Ltd* v *Oldham*,[3] their Lordships of the Privy Council observed as follows

> Their Lordships are of opinion that Section 51 of the Code (now O 6 R 14) which regulates proceedings taken by or on behalf of *ordinary* plaintiffs does not apply to such a case as the present, but that this case must be decided with reference only to Section 435, which expressly applies to corporations '

The High Court of Bombay[4] has held that the said decision of the Privy Council must be taken to apply to the particular facts of that case and that it is not an authority *for the proposition that O 6 R 14 does not apply to cases governed by this* rule, and they have consequently held that an agent holding a power of attorney is entitled to sign and verify the plaint on behalf of a corporation under the provisions

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a plaint in the absence of the secretary is a principal officer)]

3 ('14) AIR 1914 Cal 782 (782)

4. ('27) AIR 1927 Sind 263 (263) (Reversed on another point by AIR 1931 Sind 178)

Note 7

1 ('05) 9 Cal W N 603 (603, 610)

2 ('27) AIR 1927 Cal 780 (780, 781) (22 Cal 68 Dist)

3. ('36) AIR 1936 Bom 418 (421) I L R (1937) Bom 65

4 (1900) 5 Cal W N 91 (95)

Note 8

1 ('86) 12 Cal 41 (44)

('33) AIR 1943 Sind 102 (102) 26 Sind L R 431

('66) 6 Suth W R Civ Ref 21 (25) (Secretary of a Government aided school can maintain an

O. 29 R. 1 Note 8

of Order 6 Rule 14 The High Court of Lahore[5] and the Judicial Commissioner's Court of Sind[6] are also of the same opinion

To enable a principal officer of a corporation to verify a plaint or a written statement, it is not necessary that permission of the Court should be obtained for that purpose, but, according to the Calcutta High Court,[7] it should be shown by a statement in the plaint or in the written statement or by an affidavit, that the person purporting to verify is a principal officer of the corporation and is able to depose to the facts of the case See also Note 7

Where the defence raises the question of the competency of the director to sign and verify the plaint, the defendants are entitled so to cross examine him as to expose all the facts bearing on that question [8]

Local Amendment

MADRAS

Insert the following as Rule 1A:

O. 29 R. 1A (Madras)

"1A In suits against a local authority the Court in fixing the day for the defendant to appear and answer shall allow not less than two months' time between the date of summons and the date for appearance"

O. 29 R. 2

R. 2. [S. 436.] Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served —

Service on corporation.

(*a*) on the secretary, or on any director, or other principal officer of the corporation, or

(*b*) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office then at the place where the corporation carries on business.

[1877, S. 436; 1859, S. 63. See O. 5.]

1. Service on corporation. — The mode of service provided by this rule can be availed of only in cases where there is no mode of service provided by any other

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(39) AIR 1939 Bom 347 (349) I L R (1939) Bom 295 (O 29 R 1, C P Code, is only a permissive rule and does not exclude the operation of O 6 Rr 14 and 15 of the Code A plaint signed by the constituted agent of a party, who holds a power of attorney is properly signed)

[*See also* (36) AIR 1936 Bom 418 (420) I L R (1937) Bom 65 (O 29 R 1 does not exclude the operation of the provisions of O 6 Rr 14 and 15—De facto secretary of a firm who verifies a plaint in the absence of secretary is a principal officer)]

5 (25) AIR 1925 Lah 333 (339)
(32) 135 Ind Cas 41 (41) (Lah)

6. (31) AIR 1931 Sind 178 (179) 26 Sind L R 58 (Reversing A I R 1927 Sind 263)

7 [illegible]

8. (31) AIR 1931 Rang 54 (55)

statute[1] In the case of foreign companies the place where the corporation carries on business means the *principal place of business* in British India[2] A Railway Company must be deemed to dwell at its principal office[3] Service at the registered office of a company is essential[4] though the Secretary may accept service elsewhere than at the registered office[5] But a service on the solicitor of the company is not sufficient unless the company accepts service and enters appearance[6] O.29 R.2

The mode of service prescribed by the rule can be availed of only after the suit has been properly framed and the person on whom the service is effected must be a person entitled to receive the notice in respect of the company or the companies sued[7] The Judicial Commissioner's Court of Sind has held in the undermentioned case[8] that where a corporation is sued as a defendant the plaint should be accompanied by an application under this rule duly stamped, stating in what manner and on whom the plaintiff wishes the summons to be served

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R. 3. [S. 436] The Court may, at any stage of the suit, require the personal appearance of the secretary or of any director, or other principal officer of the corporation who may be able to answer material questions relating to the suit O.29 R.3

Power to require personal attendance of officer of corporation

[1877, S 436, 1859, S 63]

ORDER XXX.

SUITS BY OR AGAINST FIRMS AND PERSONS CARRYING ON BUSINESS IN NAMES OTHER THAN THEIR OWN

R. 1. [New.] Any two or more persons claiming or being liable as partners and carrying on business in British India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of O.30 R.1

Suing of partners in name of firm

Order 29 Rule 2 — Note 1

1 (28) AIR 1928 Sind 111 (113 114) (Foreign Company)
(10) 7 Ind Cas 982 (985) (Bom) (Company registered under the Indian Companies Act)
2 (28) AIR 1928 Sind 111 (113)
3 (1862) 1 Hyde 217 (217)
4 (1902) 1 K B 91 (93) Fearks Gunston and Tee v Richardson
(1909) 53 S J 716 Vignes v Stephens Smith & Co Ltd
5 (1878) 8 Ch D 183 (189 190) In Ex parte Railway Steal and Plant and Co Re Taylor
6 (1890) 63 L T 96 Re Denver United Breweries
7 (16) AIR 1916 Cal 818 (819) 43 Cal 441
8 (33) AIR 1933 Sind 102(103) 26 Sind L R 431

O 30 R. 1
Note 1

the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct

(2) Where persons sue or are sued as partners in the name of their firm under sub-rule (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified or certified by any one of such persons

[R S C, O. 48A, R 1]

Local Amendments

LAHORE

Add the following Explanation

Explanation —This rule applies to a joint Hindu family trading partnership

N-W F P

Add the following Explanation

Explanation —The rule applies to a joint Hindu family trading partnership '

SIND

Add the following as an Explanation

'*Explanation* —This rule applies to a joint Hindu family trading partnership

Synopsis

1 Scope of the Rule
2 "Any two or more persons"
3 "Firm," meaning of
4 Minor
5 Suit against manager and owner of the firm *See O 30 R 10*
6 Carrying on business in British India "
7. ' May sue or be sued in the name of the firm "
8 Firm as 'agriculturist "
9 Suit by firm on promissory note
10 "At the time of the accruing of the cause of action "
11 Suit against firm — *Reference* to arbitration
11a Suit in name of firm — Compromise
12 Statement of names and addresses
13 Subscription and verification
14 Death of partner before suit
15 Suit against individual partners

Other Topics (miscellaneous)

Foreign firm See Note 6 Partners and partnership See Notes 1 and 2

1. Scope of the Rule —It is a general principle of law that a plaintiff who wishes to obtain a decree against several persons must make them all parties to the suit Where A makes a promise to *B C* and *D* the right to enforce the promise rests with them all under the provisions of the Contract Act Section 45, so that all of them are necessary parties to a suit to enforce such promise [1] It was accordingly held under the old Code, which did not contain any provisions corresponding to this *Order*, that in suits by or against firms, all the members composing the firm were necessary parties [2]

Order 30 Rule 1 — Note 1

1 (?) AIR 1928 Bom 191 (193)
2 (6) 25 Suth W R 115 (119)
(05) 7 Cal L Jour 256 (264)
(07) 4 Low Bur R 53 (4)
(65) 9 Suth W R 190 (192)
(186) 1 Lom H C R 85 (86)
(C") 8 Suth W R 45 (46)

O. 30 R. 1
Note 1

This Order has been newly introduced into the present Code and provides, as it were, an exception to the provisions of Section 45, Contract Act, in that it allows two or more partners alone to sue, provided the suit is brought *in the name of the firm*[3] A firm as such, has no existence in law, it is a mere abbreviated name for the partners of which it consists, and not a *legal entity* as a corporation,[4] and when a suit is brought against a firm, it is precisely as though it were brought in the name of *all* the partners[5] The effect of using the name of the firm is simply to bring all the partners before the Court and the procedure indicated in this rule is adopted only as a convenient method for denoting the persons who constitute the firm at the time of the accrual of the cause of action[6] A decree against a firm in the name of the firm has the same effect as a decree against all the partners[7] This is made clear by the various rules of this Order Thus, Rule 2 provides that in a suit brought in the name of the firm, the plaintiff shall, on a written demand of the defendants, declare, in writing, the names and residences of the partners and that, on such a declaration being made, the suit will proceed *as if all the partners had been named* as plaintiffs in the plaint. Rule 6 provides that where persons are sued as partners in the name of their firm, they *shall appear individually* in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm. But the Order merely provides a new procedure and does not affect the plaintiff's right of bringing a suit against a firm by impleading all or any of the members as defendants thereto in conjunction with the firm[8] Where a suit is to be brought against *A* and *B* as partners of the firm *A*, *B* & Co , the proper form is not to sue them as "*A*, *B* & Co , by partners *A* and *B*" but to sue as follows —

"1 *A B* & Co , a firm
2 *A*, a partner in the firm
3 *B*, a partner in the firm "[9]

Where the plaint describes the plaintiff as the "firm X through *B*, the proprietor of the said firm, ' and the plaint is signed by *B*, the plaintiff cannot be deemed to be

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('99) 21 All 346 (347)
[[illegible] ('0?) 6 Bom 700 (702) (Suit upon a [illegible]

3. ('27) AIR 1927 Lah 115 (116) 8 Lah 1
('17) AIR 1917 Pat 246 (246)
[*See* ('19) AIR 1919 Mad 957 (959) 41 Mad 923]

[illegible] Bank [illegible]

6. ('27) AIR 1927 Lah 115 (116) 8 Lah 1.
('26) AIR 1926 Sind 75 (76)
[*See also* ('38) AIR 1938 All 69 (71) I L R (1938) All 100 (The policy underlying O 30 is no more than to afford facilities in the joinder of parties who may be numerous)

7. ('26) AIR 1926 Sind 75 (76)
[*See also* ('32) AIR 1932 Bom 375 (378) (Same rule holds good in the case of an award))

8. ('30) AIR 1930 Pat 239 (240) 9 Pat 717.

9. ('25) AIR 1925 Bom 494 (495)
('31) AIR 1931 Sind 121 (122) 25 Sind LR 104
[*See* ('24) AIR 1924 Bom 155 (156).
('35) AIR 1935 Rang 209 (209) (The correct way of bringing a suit under O 30 R 1 is to bring it in the name of the firm as plaintiff, and no other name should be mentioned as plaintiff at the head of the plaint, but in the signature and verification of the plaint, the [illegible]

[illegible] partner in a firm, suing in name of firm — Proper form of suit would be to name only the

O 30 R 1
Notes 1-3

suing in the *firm s* name but in his own name and the mere fact of the firm s name being mentioned in no way affects the matter [10]

The provisions of this Order apply only to a firm or contractual partnership and do not apply to a joint Hindu family business Therefore an undivided Hindu family carrying on business is not entitled to sue as a firm under this Order [11] Further the provisions of this Order assume that the firm is legally constituted and do not have any bearing on the question of the maintainability of a suit against an illegal association [12]

This Order applies only to *suits* by or against partners and persons carrying on business in *names other than their own* The *execution* of decrees against firms and the attachment of partnership property are dealt with in O 21 Rules 49 and 50

Where a decree is obtained in the name of a firm as to whether a payment of the decree amount to one of the partners is a valid discharge see Note 8 to Order 21 Rule 15 *ante*

2. "Any two or more persons" — This rule applies only where there are *two or more persons* carrying on business in the name of a firm One *single* person carrying on business in the name of a firm cannot sue in the name of the firm [1] Nor can one of several partners carrying on business in the name of a firm *sue in his own name* on a cause of action which has arisen in favour of the firm [2] But he can institute a suit in the name of the *firm* in such cases and this rule does not bar him from doing so [3]

3 "Firm," meaning of — Under Section 4 of the Indian Partnership Act IX of 1932 (Section 239 of the Contract Act 1872) persons who have entered into partnership with one another are called individually partners and collectively a firm In the earlier part of the same Section it is enacted that partnership is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all A firm is thus a short, collective name for the individual members who constitute the partners[1] and as has been seen in Note 1 above is not a legal entity or an artificial person as a corporation It follows that a

firm in the cause title as the plaintiff without saying through M but the addition of those words does not matter)]

10 ('36) AIR 1936 Pat 140 (141) (What is contemplated by O 30 R 1 is that two or more persons under a firm name may sue without mentioning the names of the individuals)

11 ('34) AIR 1934 Cal 810 (812) 61 Cal 975
('38) AIR 1938 Lah 563 (564) (Such a firm must sue and be sued in the name of its members)
('36) AIR 1936 Nag 292 (292) I L R (1937) Nag 423
('38) AIR 1938 Pat 270 (270)
[*See also* ('33) AIR 1933 Bom 304 (305)
('35) AIR 1935 All 280 (281)]

12 ('34) AIR 1934 Lah 882 (883) (Suit against such an illegal association is not maintainable as its existence cannot be recognized by law)

Note 2

1 ('14) AIR 1914 All 474 (474)
('34) AIR 1934 Lah 157 (15) (The defect in form can be removed by amendment and suit should not be thrown out on the technical ground)
('36) AIR 1936 Pat 140 (141)
('36) 38 Bom L R 529 (530) (He can however be sued in a firm name)
('35) AIR 1935 Rang 240 (243) (But where a sole proprietor brings a suit in a firm name the plaint can be amended even at the appellate stage in proper cases.)

2 ('25) AIR 1925 Sind 181 (182) 17 Sind L R 3 [illegible]
[illegible] (438) (Mad)

3 [illegible]

the suit till the ind [illegible]
Note 3

[illegible]

firm cannot, as such, enter into a contract and be a member of a partnership[2] nor can it be a party to a reference under the Arbitration Act[3] It cannot appear in any suit *as a firm*, if, however, a partner is made a co defendant along with the firm he may put in a separate defence for himself and one on behalf of the firm[4]

A, *B* and *C* carry on business as a firm X They enter into a partnership with *D* Then *A* sues *D* in the name of the firm X for a dissolution of the partnership with *D* and for accounts Such a suit is maintainable Though the firm X as such cannot enter into a partnership with another, the individual partners therein, *A*, *B* and *C* can do so and the suit as brought must be deemed to be one on behalf of all three of them[5]

Before the passing of the Partnership Act of 1932, the insolvency of one of the partners in a firm did not cause a dissolution of the firm and hence, a suit could be instituted in the name of the firm even after the insolvency of one of the partners[6]

4. Minor. — Section 30 of the Indian Partnership Act, IX of 1932 (Section 247 of the Contract Act, 1872) provides that a person, who is under the age of majority according to the law to which he is subject, may be admitted to the benefits of partnership, but cannot be made personally liable for any obligation of the firm, but the share of such a minor in the property of the firm is liable for the obligations of the firm The person under the age of majority cannot, under the Indian law, become a partner by contract, and cannot be one of that group of persons called a "firm," inasmuch as a contract by a minor is void[1] In this view, the share, of which S 247 speaks, is no more than a right to participate in the property of the firm after its obligations are satisfied[2] If a suit is brought under Order 30 against a firm where a minor has been admitted to some kind of benefit, the minor cannot be regarded as a party to the suit[3] Where a suit is brought against a firm, the mere fact that there is a minor member of the firm, does not bring the suit within the purview of Order 32 and no sanction is necessary under the provisions thereof where the matter in dispute in such suit is referred to arbitration[4] According to the law of England a contract by a minor is only *voidable* and not void He may be a partner though he cannot be made *personally* liable for the debts of the firm. A judgment against the firm may be executed against the partnership property including the share of the minor[5]

5. Suit against manager and owner of the firm. — See O 30 R. 10, *infra*.

6. "Carrying on business in British India." — The rule clearly indicates that an action can only be brought by or against a firm in the firm name in which the

3. ('27) AIR 1927 Bom 428 (430).
4. (1882) 51 L J Ch 853 (854), Taylor v. Collier
5. ('38) AIR 1938 All 69 (73) I L R (1938) All 100
6. ('37) AIR 1937 Nag 314 (316) I L R (1937) Nag 28 (In this case it was observed that even if the firm is dissolved, it continues to exist for all purposes necessary for its winding up, including the recovery of moneys due to it, by suit or otherwise.)

Note 4

1. ('36) AIR 1936 Mad 707 (708, 709), I L R (1937) Mad 28 (When all the owners of a business are minors, there is no partnership as contemplated by the Partnership Act and a suit against them in the firm name cannot be brought)
2. ('22) AIR 1922 P C 237 (239, 240) 49 Cal 560, 49 Ind App 108 (PC)
3. ('36) AIR 1936 Mad 707 (708, 709) I L R (1937) Mad 28
4. ('23) AIR 1923 Lah 103 (104).
('23) AIR 1923 Lah 212 (213) (Suit by one firm against another — Reference to arbitration by representatives)
5. (1894) 1894 A C 607 (611), Lovell v. Beauchamp.
(1893) 1 Q B 534 (535, 536), Harris v. Beauchamp Bros.
[*See also* ('36) AIR 1936 Oudh 245 (246)]

O. 30 R. 1
Notes 1-3

suing in the *firm's* name but in his own name and the mere fact of the firm's name being mentioned in no way affects the matter[10]

The provisions of this Order apply only to a firm or contractual partnership and do not apply to a joint Hindu family business. Therefore an undivided Hindu family carrying on business is not entitled to sue as a firm under this Order[11] Further, the provisions of this Order assume that the "firm" is legally constituted and do not have any bearing on the question of the maintainability of a suit against an illegal association[12]

This Order applies only to *suits* by or against partners and persons carrying on business in names other than their own. The *execution* of decrees against firms and the attachment of partnership property are dealt with in O. 21 Rules 49 and 50.

Where a decree is obtained in the name of a firm, as to whether a payment of the decree amount to one of the partners is a valid discharge, see Note 8 to Order 21, Rule 15, *ante*

2. "Any two or more persons." — This rule applies only where there are *two or more persons* carrying on business in the name of a firm. One *single* person carrying on business in the name of a firm cannot sue in the name of the firm[1] Nor can one of several partners carrying on business in the name of a firm, *sue in his own name* on a cause of action which has arisen in favour of the firm[2] But he can *institute* a suit in the name of the *firm* in such cases, and this rule does not bar *him* from doing so[3]

3. "Firm," meaning of. — Under Section 4 of the Indian Partnership Act, IX of 1932, (Section 239 of the Contract Act, 1872), "persons who have entered into partnership with one another are called individually 'partners' and collectively a 'firm'." In the earlier part of the same Section it is enacted that "partnership' is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. A "firm" is thus a short, collective name for the individual members who constitute the partners[1] and, as has been seen in Note 1 above, is not a legal entity or an artificial person as a corporation. It follows that a

firm in the cause title as the plaintiff without saying "through M" but the addition of those words does not matter)]

10. ('36) AIR 1936 Pat 140 (141) (What is contemplated by O. 30 R. 1 is that two or more persons under a firm name may sue without mentioning the names of the individuals)

11. ('34) AIR 1934 Cal 810 (812) 61 Cal 975
('38) AIR 1938 Lah 563 (564) (Such a firm must sue and be sued in the name of its members)
('36) AIR 1936 Nag 292 (292) I L R (1937) Nag 423
('38) AIR 1938 Pat 270 (270)
[*See also* ('33) AIR 1933 Bom 304 (305)
('35) AIR 1935 All 280 (281)]

12. ('34) AIR 1934 Lah 882 (883) (Suit against such an illegal association is not maintainable as its existence cannot be recognized by law)

Note 2

1. ('14) AIR 1914 All 474 (474)
('34) AIR 1934 Lah 157 (157) (The defect in form can be removed by amendment and suit should not be thrown out on the technical ground) [illegible]

proprietor brings a suit in a firm name, [illegible] plaint can be amended, even at the appellate stage in proper cases)

2. ('25) AIR 1925 Sind 181 (182) 17 Sind L R 324
('10) 6 Ind Cas 438 (478) (Mad).

3 [illegible]

O. 30 R. 1
Notes 7-11

disclosure of the names of those partners under Rule 2[2] An addition of one of the partners after the period of limitation, or the correction of the name of a wrong representative of the firm who has been made a party to the suit will not amount to *an addition or substitution of a new party to the suit within the meaning of* Section 22 of the Limitation Act[3]

The cause of action in respect of a contract with a firm vests in all the partners jointly, and if, after the contract one of the partners retires and a stranger comes in, the new partnership cannot enforce the contract entered into by the old Nor can it, by substituting the names of the old partners, alter the period of limitation for instituting the *suit or avoid the bar of limitation*[4] *Where a firm continues to be* known by its old name even after the original partners are dead though occasionally the name of the actual head of the firm is also added to the old name, the omission of the latter s name in a suit by the firm does not amount to any misdescription[5] It has been held in the undermentioned case[6] that in a suit for libel made against a firm all the partners should join as plaintiffs

8. Firm as "agriculturist." — A firm can be an "agriculturist' within the meaning of Section 2, Dekkhan Agriculturists' Relief Act (XVII of 1879), only when, by itself or by its servants, or by its tenants it earns its livelihood wholly or principally by agriculture carried on within the limits of a district to which the Act extends The mere fact that an individual partner or even all the partners of the firm earn their livelihood from an agricultural income does not make the firm an "agriculturist" A plaintiff suing a firm which, by itself, does not earn its livelihood by agriculture must be sued only at the place where it carries on business and not where the individual partners reside[1]

9. Suit by firm on promissory note. — Where a promissory note is executed to *A*, a partner of a firm, for a debt due to the firm, *A* is personally entitled to sue on the note although the benefit of the decree would result to the partnership firm[1] The firm is also entitled to sue on the note, though it is advisable, before suit, to get the instrument endorsed in its name[2] Where *A* sues individually to recover a debt due to the firm consisting of partners *A* and *B*, the correct procedure, if *B* will not join *A* as co plaintiff, is to make him a defendant[3]

10. "At the time of the accruing of the cause of action." — A suit may be brought under this rule in the name of a firm which has been dissolved before the date of the suit, provided the cause of action has arisen before the date of the dissolution[1]

11. Suit against firm — Reference to arbitration. — Where a reference is made to arbitration in a suit in which a firm is a party, all the members of the firm who are sought to be bound, must join in making the reference, sub rule (2) of this

2 ('16) AIR 1916 Mad 649 (649)
3. ('16) AIR 1916 Mad 649 (649)
('28) AIR 1928 Nag 319 (321)
[See also ('35) AIR 1935 Sind 225 (226, 227).

Note 8
1. ('29) AIR 1929 Bom 378 (379) 53 Bom 787
('31) AIR 1931 Sind 121 (122) 25 Sind L R 104

Note 9
1 ('29) AIR 1929 Bom 177 (177) 53 Bom 110
2. ('28) AIR 1928 Cal 148 (150, 151) 55 Cal 551.
3 ('25) AIR 1925 Lah 504 (505)

O.30 R.1 Notes 11-15 rule does not empower one partner alone to refer the case to arbitration so as to bind the other partners who have not agreed to, or joined in, the application for reference[1] A proceeding before an arbitrator under the Arbitration Act is not a suit and, therefore, the provisions of Order 30 do not apply thereto[2]

11a. Suit in name of firm — Compromise. — Although a suit is instituted in the name of a firm, all the partners are in reality plaintiffs and it cannot be compromised by one of the partners alone[1]

12. Statement of names and addresses. — *Both Rules 1 and 2 provide for* the disclosure of the names of partners Under Rule 1 *any party* may apply to the Court for a statement of the names and addresses of the partners to be furnished as directed by the Court Under Rule 2, *a defendant* may, on demand in writing, without recourse to Court, ask the plaintiff or his pleader to declare in writing the names and places of residence of the partners Where a statement under Rule 1, or a declaration under Rule 2 is made, the Court cannot direct a cross examination on such statement or declaration nor can it direct the trial of an issue as to who were the partners of the firm at the time of the accruing of the cause of action But the statement or declaration, as the case may be, will be treated as embodied in the plaint and *will be* a necessary part of the cause of action[1]

13. Subscription and verification. — It is quite sufficient, under the provisions of sub rule (2) that, in suits by or against a firm, the pleading on behalf of the firm is signed and verified by *one* of the partners *composing the firm it* is not necessary that it should be signed by *two or more* persons, though under sub rule (1) no suit can be brought in the name of a firm unless it consists of two or more partners[1]

14. Death of partner before suit. — A suit may be brought against a firm in the name of the firm, even though one of the partners is dead before the *institution* of the suit,[1] inasmuch as the suit must be deemed to be against the surviving partners The judgment so obtained against the firm, though enforceable against the partnership property, cannot be enforced against the *private estate* of the deceased partner, *unless* his legal representatives are actually made parties[2]

15. Suit against individual partners. — This rule does not affect, *in any* way, the operation of Section 43 of the Contract Act In a suit upon a contract made by a partner on behalf of the partnership, the promisee can compel all or any *one of* the partners to perform the whole of the promise[1] As has been *seen* in Note 1, an individual partner may be sued personally along with the firm[2]

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tinues to exist for all purposes necessary for winding up of the firm)]

Note 11

1 (26) AIR 1926 All 233 (240) 48 All 239
(32) AIR 1932 Bom 516 (519)
2. (29) AIR 1929 Lah 228 (229, 230).

Note 11a

1 (33) AIR 1933 Lah 618 (620)

Note 12

1 (1905) 1 K B 46 (50, 51), Abrahams and Co v. Dunlop Pneumatic Tyre Co

Note 13

1. ('14) AIR 1914 All 474 (474)
(23) AIR 1923 Nag 137 (137)
(11) 9 Ind Cas 450 (450) (Low Bur)
(74) 12 Beng L R 35 (36)
('70) 5 Beng L R 89 (90)
(32) AIR 1932 Nag 137 (138) 28 Nag L R 116
(35) AIR 1935 Rang 209 (210) (Correct way of bringing the suit is to mention only the firm at the head of the plaint but subscription and verification to be by a partner in the *firm describing himself as such*)

Note 14

1. ('28) 112 Ind Cas 715 (717) (All)
2. ('24) AIR 1924 Bom 109 (111)

Note 15

1. (27) AIR 1927 Lah 819 (821) *9* Lah 217.
2 (1882) 30 W R (Eng) 701, Taylor v Collier & Co.

R. 2. [New.] *(1)* Where a suit is instituted by partners in the name of their firm, the plaintiffs or their pleader shall, on demand in writing by or on behalf of any defendant, forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted. **O. 30 R. 2**

Disclosure of partners' names

(2) Where the plaintiffs or their pleader fail to comply with any demand made under sub rule *(1)*, all proceedings in the suit may, upon an application for that purpose, be stayed upon such terms as the Court may direct

(3) Where the names of the partners are declared in the manner referred to in sub-rule *(1)*, the suit shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as plaintiffs in the plaint.

Provided that all the proceedings shall nevertheless continue in the name of the firm

[R S C, O 48A, R 2]

Synopsis

1 Scope of the Rule	3 Proceedings to continue in the name of firm See Rule 6 Note 2
2 Disclosure of partners' names	

1. Scope of the Rule — This rule applies only to suits instituted *by* and *not* against partners in the name of the firm in other words it applies only to the case of plaintiffs suing in the name of the firm [1] Sub rule (2) of this rule does not control the provisions of O 21 R 50 and does not apply to anything that follows after the suit has reached the stage of a decree [2] nor does it in any way contradict the provisions of O 30, Rule 4 and it is therefore not necessary to join the legal representatives of a deceased partner as parties to the suit [3]

2. Disclosure of partners' names — An incomplete disclosure or a wrong declaration of the names of the partners is not a fatal defect to the suit the proper procedure in such a case is not to dismiss the suit but to allow a further declaration making a full disclosure [1] The effect of such a fresh declaration is equivalent to that of the addition of a party and therefore it should be made before the expiry of the period of limitation [2] A suit for dissolution of a partnership existing between an individual on the one hand and a different partnership on the other may be instituted against such

Order 30 Rule 2 — Note 1

1 (27) AIR 1927 Bom 417 (448) 51 Bom 794
2 (27) AIR 1927 Bom 417 (448) 51 Bom 794
3 (29) AIR 1929 Cal 11 (14)
(21) AIR 1921 Cal 723 (725)
41 Cal 581

Note 2

1. (30) AIR 1930 Bom 1 0 (150) 51 Bom 285
(34) AIR 1934 Cal 253 (255) 60 Cal 1217
(14) AIR 1914 Cal 53 (54) 21 Ind Cas 836 (838)
2 (34) AIR 1934 Cal 253 (255) 60 Cal 1217
[See however (37) AIR 1937 Rang 137 (138) (Person suing as managing partner of firm — cannot be dismissed as bad for non joinder — AIR 1934 Cal 253, Distinguished)]

O. 30 R. 2
Notes 2-3

partnership without disclosing in the plaint the names of the individual partners thereof [3]

3 Proceedings to continue in the name of firm —See Rule 6, Note 2 *infra*

O. 30 R. 3

R. 3. [New.] Where persons are sued as partners in the name of their firm, the summons shall be served either —

Service

(a) upon any one or more of the partners, or

(b) at the principal place at which the partnership business is carried on within British India upon any person having, at the time of service, the control or management of the partnership business there,

as the Court may direct; and such service shall be deemed good service upon the firm so sued, whether all or any of the partners are within or without British India ·

Provided that, in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the summons shall be served upon every person within British India whom it is sought to make liable

[R S C, O 48A R. 3]

Synopsis

1 Scope of the Rule
2 Dissolution of partnership before suit
3 Service by registered post
4 " Person having partnership business "
5 Successive services
6 " Principal place at which the partnership business is carried on ,
7 " As the Court may direct '
8 Mortgage suit
9 Ex parte decree against firm
10 Notice as to capacity in which partner is sued See Rule 5

Other Topics (miscellaneous)

Deemed good service See Note 1
First service on manager—Subsequent service on partners—Time for appearance to be counted from what date stated See Note 5
Proviso—Dissolved firm See Note 2
Whether all or any of the partners are within or without British India See Note 1

1 Scope o
of their firm and
application to suits against partners not brought in the name of their firm

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3 (29) AIR 1929 Sind 7 (9)
[*See also* (36) AIR 1936 Lah 78 (79) (Suit by firm partners in which have become partners in another firm for dissolution of latter partnership—Names of partners in plaintiffs partnership disclosed under R 2 — The suit can proceed as if the partners had been originally joined as plaintiffs in the suit)]

Order 30 Rule 3 — Note 1

1 (25) AIR 1925 Cal 1136 (1137)
(39) AIR 1939 Pesh 9 (11) (Notice under O 21 R 66 must be served on the judgment debtors in such cases)

the firm is an existing one or has not been dissolved to the knowledge of the plaintiff before the date of suit, there are two modes of service prescribed by this rule : **O. 30 R. 3 Notes 1-2**

(a) upon any one or more of the partners, or

(b) upon the manager of the business at the principal place thereof within British India

A service effected in one of the above modes is a good service *against the firm*, and a decree can be passed against it,[2] it is immaterial that all the partners are not individually served,[3] or that all or any of them resides outside British India.[4] If the summons be not served in either of the two modes mentioned above, the service is irregular and no decree can be passed against the firm[5] But though the firm is properly served by adopting the above modes of service, it is not sufficient to make a member who has not been *actually* served, a person "who has been individually served as a partner" within the meaning of O 21 R 50[6] That rule provides that a decree obtained against a firm may be executed —

(a) against the *partnership assets*,

(b) against any person *personally* who has been individually served with summons and has failed to appear ,

(c) against any person *personally* who has appeared in his own name under Rules 6 and 7 of Order 30, or who has admitted in the pleadings that he is, or who has been adjudged to be, a partner ,

(d) *with the leave of the Court*, against any person *personally* as being a partner of the firm, even though he has not appeared or been individually served in the prescribed manner

As to the mode of service to be adopted in cases where the firm has been dissolved before the institution of the suit and the effect of not complying with the rule of service so prescribed, see Note 2 below

See also the undermentioned cases[7]

2. Dissolution of partnership before suit. — The proviso to this rule deals with the method of service to be adopted where the firm has been dissolved before the date of the suit If the plaintiff, at the time of instituting the suit, is not aware of the dissolution, the proviso has no application and a service effected in one of the modes mentioned in clause (a) or clause (b) of the rule is good service against the firm, and a decree passed against it can be executed against the partners in the manner prescribed by O 21 R 50 If, however, the plaintiff is aware of the fact of dissolution before the date of the suit, he must, if he seeks to make any person liable as a partner, serve it on such person *individually* If instead of doing so the service is effected as prescribed by clause (a) or clause (b) only, there will no doubt be a decree *against the firm*, but it cannot be executed, even with the leave of the Court, personally against the partner not

2. ('15) AIR 1915 Cal 238 (240)
('32) AIR 1932 Sind 199 (200) 26 Sind L R

3. ('25) AIR 1925 Bom 331 (332).
('26) AIR 1926 Sind 75 (76)
('71) 7 Beng L R App 58 (58) (Service on one partner for his co partner is good service)

4. ('15) AIR 1915 Cal 238 (240)
('24) AIR 1924 Bom 366 (367)

5. (1894) 1 Q B 784 (788, 790), Worcester City and County Banking Co v Firbank Pauling & Co

6. (1886) 17 Q B D 755 (758), In Re Ide
('27) AIR 1917 Bom 581 (592) 51 Bom 986

7

this rule duly stamped stating where, in what

R. 3 does not apply to such a case.)

O. 30 R. 3 Note 2

individually served, under sub-rule (2) of O 21 R 50[1] To this extent the proviso to this rule overrides O 21 R 50, which allows a decree against a firm to be executed against a partner personally with the leave of the Court, even though he has not been served individually[2]

Where a partner *dies* before the institution of the suit, the partnership gets dissolved under the provisions of Section 42 of the Partnership Act, IX of 1932 (Section 253 of the Contract Act) If the plaintiff is aware of the death at the date of the suit he must, if he wishes to make the *private estate* of the deceased partner liable, implead the legal representatives as parties and obtain a decree against them[3] But the proviso to this rule does not imply that if the plaintiff was not *aware* of the dissolution by the death of the partner, the latter's legal representatives can be treated as partners themselves and proceeded against under sub rule (2) of O 21 R 50 in respect of the private estate of the deceased partner It has accordingly been held by a Full Bench of the High Court of Madras[4] that the fact that the plaintiff had no knowledge of the death of the partner before the suit does not affect the question of the liability of the legal representatives in respect of the private estate of the deceased partner and that the scope of O 21 R 50 sub rule (2) cannot be enlarged by a reference to the rule of service prescribed by the proviso A different view has been taken by the High Court of Bombay According to that High Court the legal representatives can be proceeded against under sub rule (2) of O 21 R 50, in respect of *the private* estate of the deceased partner[5] The Sind Judicial Commissioner s Court has also held a similar view[6] It is submitted that the Bombay view is not correct Sub rule (2) of O 21 R 50 applies only to execution against a person *as being a partner* of the firm and the legal representatives are, in no sense, the partners of the firm[7]

In *Ellis* v *Wadeson*[8] Romer, L J, observed as follows

> Suppose a partner dies before action is brought and an action is brought against *the firm* in the firm s name The dead man is not a party to the action so far as his private estate *is concerned*, for a dead man cannot be sued though the legal personal representatives of a dead man can be sued in a proper case If the legal representatives of the deceased partner *are not* added expressly as defendants and the action is brought against the firm in the firm s name then judgment can only be obtained as against the surviving partners and be enforced against them and against the partnership assets . I have so far dealt with the case of the death of a partner before action Now what happens if a partner dies between service of *writ* and the trial of the action and judgment? *In that case equally the dead man s estate is not bound* Judgment can only be obtained against the surviving partners and enforced against them and against the partnership assets "

Where a suit is instituted against a firm which has been dissolved *before* the date of the suit, the date of the institution for the purpose of *limitation* is the date of the suit and not the date of the *service* of summons individually *upon* a partner, subsequent to the institution of the suit[9]

Note 2

1 (25) AIR 1925 Bom 331 (332)
(1894) 1 Q B 792 (795) Wigram v Cox & Co
(1883) 10 Q B D 436 (449 450) Davis v Morris
(38) 42 Cal W N 820 (821)
(36) AIR 1936 Sind 34 (39) (Property of dissolved firm can be proceeded against)
[See also (36) AIR 1936 Sind 206 (207) 30 Sind L R 206]

4

5 [*See also* (27) AIR 1927 Bom 581 [illegible] [illegible] Blackwell J)]

6

13

(30

7

(27) AIR 1927 Bom 581 (584) [illegible]

9)

The mere fact that in cases covered by the proviso, service of summons individually on all the partners in the dissolved partnership is required does not mean that in such cases there cannot be a decree both against the firm as well as against the individual partners who have been served [10]

3. Service by registered post. — As has been seen in Note 1, a summons can be served in suits against a firm only in the modes specified in clauses (a) and (b) of the rule Therefore, where service by registered post has been ordered, the registered letter should be addressed to a *partner* or to the *manager* of the business and not to the *firm name* at the place where the business is carried on [1]

4. "Person having . . . . partnership business." — The person "having at the time of service, the control and management of the partnership business' must be a *servant* of the firm, a receiver or a manager appointed *by the Court* is not such a person as is referred to in clause (b) of the rule [1]

5. Successive services.—Where more than one service is effected, the time for appearance by the firm runs from the last service In a case where service was effected on the person in control of the business and five days later, upon a partner, and judgment in default of appearance was signed on the first service before the eight days had elapsed from service on the partner, the judgment was set aside [1]

6. "Principal place at which the partnership business is carried on."—Where a suit is filed against a firm, service on an agent at the principal place of business of the firm within jurisdiction is good service on the firm, whether any members of the firm are within jurisdiction or not [1] But where the mandate to the bailiff is to serve the summons *at the place of the business* of the firm on the manager or managing partner, without specifying the name of the person to be served, it is not within the competence of the bailiff to effect service by the affixture of summons at the *residence* of the managing partner [2] Where the manager at the place of business refuses to accept service, a copy of the summons may be affixed on the premises [3]

7. "As the Court may direct." — These words do not occur in the corresponding English rule According to the latter, the plaintiff has an *option* to serve the summons upon a partner or upon the manager Under the present rule, the plaintiff has no such option but should obtain the directions of the Court as to the method of service to be followed If the method prescribed in each particular case is followed and service is so effected, then *prima facie* there has been good service on the firm [1]

8 Mortgage suit.—A mortgage suit by or against a firm is on the same footing as other suits relating to the properties of the firm and service of summons or notice on the manager of the firm is service on all the partners of the firm [1]

9. Ex parte decree against firm. — An *ex parte* decree passed against a firm

10. ('36) AIR 1936 Sind 206 (208) 30 Sind L R 296

Note 3

1. ('22) AIR 1922 Cal 300 (300 301) 49 Cal 394 (Service of summons in suit against a dissolved firm is by serving on the partner charged as liable as principal)

Note 4

1. (1897) 1 Q B 14 (15 16) In re Flowers & Co

Note 5

1. (1890) 25 Q B D 543 (544) Alden v Beckley

Note 6

1. ('14) AIR 1914 Mad 556 (562) 18 Ind Cas 159 (191) 37 Mad 163

2 ('26) AIR 1926 Sind 205(209)

3. ('09) 1 Ind Cas 118 (120) (Cal)

1 [illegible] Cal [illegible] th- out Court s directions, is not a defect or irregularity which affects the jurisdiction of the Court)]

Note 8

1. ('11) 12 Ind Cas 620 (650) (All).

O. 30 R. 3
Notes 9-10

after due service under this rule cannot be set aside on the allegation of a partner that *he* was not duly served "It can never be said that a decree against the firm is *ex parte* against one of the partners because he has not appeared "[1]

10. Notice as to capacity in which partner is sued. — See Rule 5 *infra*.

O. 30 R. 4

R. 4. [New.] *(1)* Notwithstanding anything contained in section 45 of the Indian Contract Act, 1872, where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

Right of suit on death of partner.

(2) Nothing in sub-rule *(1)* shall limit or otherwise affect any right which the legal representative of the deceased may have —

(a) to apply to be made a party to the suit, or

(b) to enforce any claim against the survivor or survivors.

1. Joinder of legal representatives. — Under Section 45 of the Contract Act, where a person has made a promise to two or more persons, then, unless a contrary intention appears from the [illegible] him and them, with them [illegible] with the representative of such deceased person, jointly with the [illegible] and after the death of the last survivor, with the representatives of all jointly Where therefore a contract is made in favour of *A* and *B*, *A* alone cannot enforce the contract without impleading the legal representatives of *B*, in case *B* dies before suit In applying this rule to cases of suits by or against *partners* in respect of partnership debts, there was, however, a conflict of opinions among the High Courts All the High Courts except the Calcutta High Court held that in the case of such suits the legal representatives of a deceased partner need not be impleaded as parties [1] The High Court of Calcutta[2] held that the general rule applied to this class of suits also and that the legal representatives were necessary parties This conflict has now been set at rest by the enactment of O 30 R 4, modifying the operation of Section 45 of the Contract Act so far as the frame of suits relating to partnership is concerned, and making it clear that the Calcutta view ought not to prevail [3] But the rule will enable a decree to be obtained only against the *partnership assets*, and cannot be carried further so as to alter the substantive law laid down in Section 45 and fix liability on the *private estate*

Note 9

1. ('24) AIR 1924 Bom 366 (367).

Order 30 Rule 4 — Note 1

[illegible]

[*See* ('97) 21 Bom 412 (421, 422)]

2. ('91) 18 Cal 86 (90)
[*See also* ('09) 1 Ind Cas 254 (256) (Cal)]

3. ('27) AIR 1927 Bom 581 (585, 586, 591) 51 Bom 986
('14) AIR 1914 Low Bur 58 (60, 61) 8 Low Bur

representatives of deceased [illegible]

of the deceased partner If the plaintiff wishes to fix such liability, he is bound to make the legal representatives of the deceased partner also parties[4] **O. 30 R. 4 Note 1**

There is a conflict of opinions as to whether this rule applies where the suit is not brought *in the name of the firm*, but by one or more partners in respect of the partnership It was held by the Calcutta High Court in the undermentioned case[5] that *the suit need not be brought in the name of the firm, and that this rule was enacted to* simply uphold the view of the High Courts under the old Code that, in suits on behalf of a partnership the legal representatives of a deceased partner were not necessary parties The High Court of Rangoon[6] has held that where the suit could not be brought in the firm name by reason of the firm having no name at all, this rule does not become inapplicable The High Courts of Allahabad,[7] Lahore[8] and Patna[9] and the Judicial Commissioner s Court of Sind,[10] and the Calcutta High Court itself in a later case,[11] have held that the rule applies only when the suit is brought in the name of the firm

Sub rule (2) *of this rule is intended to safeguard the rights of the legal* representatives in case, for instance there should be any collusion between debtors to the estate and the surviving partners Similarly, sub rule (2) (b) may enable them to claim contribution from the surviving partners under Section 43 of the Contract Act, in the event of there being a partnership liability[12]

It follows from what has been stated in the above paragraphs that where a partner dies during the pendency of the suit the suit does not abate but can be proceeded with by or against the firm[13] This principle will not, however, apply unless two or more persons constituted a firm where the sole proprietor dies, the suit will abate unless the legal representatives are brought on the record within the limitation period[14]

A person who sues some of the partners in their individual capacity, cannot be permitted to prove his case against them as partners of the firm[15]

The rule does not apply to a joint Hindu family firm[16]

R. 5. [New] Where a summons is issued to a firm and is served in the manner provided by rule 3, every person upon whom it is served shall be informed by notice in writing given at the time of such service, whether he is served as a partner or as a person having the control or management of the partnership business, or in both characters, and, in default of such notice, the person served shall be deemed to be served as a partner. **O. 30 R. 5**

Notice in what capacity served

[R S C, O 48A, R 4]

4 (27) AIR 1927 Bom 581 (587) 51 Bom 966
(31) AIR 1931 All 65 (69) 52 All 964
5. (13) 21 Ind Cas 509 (510) (Cal)
6 (29) AIR 1929 Rang 310 (311) 7 Rang 558
7. (32) 135 Ind Cas 245 (246) (All)
8 (27) AIR 1927 Lah 115 (117) 8 Lah 1
(33) AIR 1933 Lah 356 (359) 14 Lah 543 (O 30 R 1 is merely permissive If it is followed, O 30 R 4 applies but not otherwise)
9 (35) AIR 1935 Pat 121 (122) (Suit could not have been brought in this case in the name of firm by reason of its having ceased to exist on

15 (15) AIR 1915 Lah 167 (165) 1915 Pun Re No 76
16 (36) AIR 1936 Nag 292 (293) ILR (1937) Nag 423

O.30 R.5
Notes 1-5

Synopsis

1. Notice, in what capacity served.
2. Service on manager. See Rule 3
3. Person served both as manager and partner.
4. Appearance under protest. See Rule 8
5. Form of notice.

1. Notice, in what capacity served. — "The object of the notice as to the capacity of the person served is obvious, namely, the Legislature intended to remove the possibility of dispute as to the character in which a particular person has been served If there is a notice in writing, the person served is apprised of the character in which he is sought to be made liable It is worthy of note that the language used is, not that the person served shall be *presumed* to be served as a partner, but that the person shall be *deemed* to be served as a partner . . . In the absence of a notice consequently, the person must be deemed to have been served as a partner, and if in reality not a partner he should proceed in accordance with R 8 [1] The failure to give notice under this rule will expose the plaintiff to the risk of being liable for costs in case the defendant appears under protest under Rule 8 [2]

2. Service on manager. — See Rule 3 *ante*

3. Person served both as manager and partner. — Where there is doubt whether the person served is a partner or not, notice may be given that he is served both as a partner in the firm and as the person having the control or management of the partnership business there This double form of notice has this advantage, namely, that if the person appears denying that he is a partner, judgment can still be signed in default of a proper appearance upon the service on him as the manager or controller. The assets of the firm will be liable in execution.

As the Order applies only to suits, notices served on the judgment debtor during the course of arbitration proceedings as a managing partner of the firm will not enable the decree holder to take execution at once against him without leave of the Court under Order 21 Rule 50, sub rule (2) [1]

4. Appearance under protest. — See Rule 8, *infra*

5. Form of Notice. — See Form Nos 23C and 23D of Appendix B to the English Rules of the Supreme Court

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O.30 R.6

R. 6. [New.] Where persons are sued as partners in the name of their firm, they shall appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm.

Appearance of partners.

[R. S. C., O. 48A, R. 5.]

Synopsis

1. Appearance of partners.
2. "All subsequent proceedings shall continue in the name of the firm."
3. Defence in suits against firms.
4. Decree in suits against firms.
5. Revision.

1. Appearance of partners. — As has been seen in Note 1 to Rule 1 *ante*, a firm, as such, has no existence in law. It cannot, consequently, appear as such in a suit

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Order 30 Rule 5 — Note 1
1. ('15) AIR 1915 Cal 233 (240)
('28) AIR 1928 Lah 528 (529)
2. ('26) AIR 1926 Sind 51 (53)
Note 3
1. ('29) AIR 1929 Lah 228 (229, 230)

against partners in the name of the firm It is, therefore, enacted by this rule that the partners should appear *individually* in their own names, though all the subsequent proceedings should continue in the name of the firm The word "individually" does not mean "in person" and, therefore, no partner can be compelled to appear *in person* [1] He can appear by an agent or a solicitor or a pleader and such appearance will be an *individual* appearance within the meaning of the rule [2] Under this rule the appearance of one partner is appearance of the firm, that is, of all the partners of the firm [3] The fact that the firm has been represented by the appearance of one partner does not disentitle another partner from putting in his appearance, the reason is that if such partner considers that his rights will not be adequately represented by the other partner who has appeared or who has been impleaded, or that his interests are adverse to those of such partner, it is just and fair that he should be allowed to appear individually and resist the claim [4]

Where a partner does not appear in the suit and has not also been served individually with a summons in the suit, the decree obtained against the firm cannot be executed against him *personally* except with the leave of the Court under O 21 R 50, sub rule (2) If he does appear under the provisions of this rule, execution can at once issue against him personally under O 21 R 50 sub rule (1)

The only persons who can appear under this rule are persons who allege that they are partners of the firm sued against and persons who are sued as partners but who deny that they are such (see Rule 8) A person merely served as manager cannot appear under this rule (see Rule 7)

2. "All subsequent proceedings shall continue in the name of the firm." — Where persons are sued as partners in *the name of their firm, they should* under this rule appear individually in their own names, but all subsequent proceedings are nevertheless to continue in the name of the firm [1]

3. Defence in suits against firms. — Each *partner appearing individually* can put in a separate written statement but each written statement is the written statement of the *firm* It is only when a person is sued personally along with the firm that he *may put in a personal defence* [1] Where a person was served as a partner *and not* individually and he put in a written statement in his *own name*, but there was nothing individual in the defence, it was held that there was only a technical flaw which could be corrected by the Court [2]

Where several partners individually appear and put in separate written statements and such written statements are inconsistent with one another, the plaintiff is bound to meet all the defences and is bound to show that none of the defences prevents a decree being passed against the firm [3]

Order 30 Rule 6 — Note 1

1. ('19) AIR 1919 Lah 296 (297) 1918 Pun Re [illegible]

[illegible] warrant of attorney is given by one partner to enter appearance on his behalf, the warrant of attorney is and is intended to be on behalf of the firm)

4. ('30) AIR 1930 All 701 (702) 52 All 951
('33) AIR 1933 All 523 (525) 55 All 719 (Where written statement on behalf of firm is signed by one partner, another partner entering appearance can take part in the conduct of the case by examining or cross examining witnesses, etc)

Note 2

1. ('25) AIR 1925 Bom 494 (496)
('33) AIR 1933 All 523 (524) 55 All 719
('21) AIR 1921 Cal 722 (725) (Even though the names of the partners are disclosed as required by R 2 the proceedings continue in the name of the firm)

Note 3

1. ('25) AIR 1925 Bom 494 (4[illegible])
2. ('29) AIR 19[illegible]9 Sind 194 (1[illegible]
3. (1899) 1 Q B 714 (717), L[illegible]

O. 30 R. 6
Notes 4-5

4. Decree in suits against firms. — The firm being sued in the *firm name*, judgment can be passed against it only in *that name* and not against the individual partners, though it may be *enforced* against them personally under O 21 R 50 The judgment must follow the writ, i e, the decree must be against the firm in the firm name and if one of the partners fails to appear no decree can be passed against him separately for default of appearance [1] But the judgment has the effect of a judgment against all the partners as partners[2] and therefore, the assets of the firm are primarily liable to satisfy the decree Whether a particular partner is also personally liable to satisfy the decree can only be decided in execution under O 21 R 50 [3] A judgment entered against a firm may be a ground for a valid cause of action against an individual partner and an action may be brought upon it against him [4]

5. Revision. — Where a Court refuses to allow a partner, who has entered appearance but has not filed a separate statement, to take part in the conduct of the case against the firm, it acts illegally in the exercise of its jurisdiction and the order is open to revision [1]

O. 30 R. 7

R. 7. [New.] Where a summons is served in the manner provided by rule 3 upon a person having the control or management of the partnership business, no appearance by him shall be necessary unless he is a partner of the firm sued.

No appearance except by partners

[R. S. C., O. 48A, R. 6.]

1. Scope of the Rule. — A person served as manager is under no obligation to appear in Court unless he is a partner [1] This rule is to be read subject to Rule 5 above It contemplates only a case where a person is served as a manager and not a case where the person served is deemed to be served as a partner [2]

The object of the rule is to avoid unnecessary delay caused by the appearance of persons who are neither partners nor their agents

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O. 30 R. 8

R. 8. [New.] Any person served with summons as a partner under rule 3 may appear under protest, denying that he is a partner, but such appearance shall not preclude the plaintiff from otherwise serving a summons on the firm and obtaining a decree against the firm in default of appearance where no partner has appeared.

Appearance under protest.

[R. S. C., O. 48A, R. 7.]

Note 4

1. (1882) 8 Q B D 474 (477, 478), Jackson v. Litchfield
2. (1899) 1 Q B D 566 (570), In Re Frances Handford & Co
3. (24) AIR 1924 Bom 266 (267).
4. (1882) 9 Q B D 355 (356), Clark & Sons v. Cullen

Note 5

1. (33) AIR 1933 All 523 (525) 55 All 719 (The order is a case decided within the meaning of S 115, C P. C)

Order 30 Rule 7 — Note 1

1. ('26) AIR 1926 Sind 51 (52).
2. ('15) AIR 1915 Cal 238 (242).

Synopsis

1. Scope of the Rule. — This rule enables a person who is served with summons as a partner under Rule 3 to appear under protest and deny that he is a partner The effect of such an appearance has nothing to do with the merits of the suit but it nullifies the service altogether as regards the firm [1] But the plaintiff is not precluded thereby from otherwise serving the summons on the firm He may disregard the appearance of the person denying that he is a partner and may again effect a service upon a partner or partners or upon the manager of the business as required by Rule 3, or he can contend that the person served *was a* partner at the time the cause of action accrued, and apply on that basis either to have the appearance entered struck out, or to have the denial of partnership struck out of the appearance [2] According to the High Court of Bombay[3] the person protesting that he is not a partner has a right to have the issue as to whether he was a partner of the defendant firm, tried in the suit itself and not be left hanging over him until execution proceedings are taken out against him under O 21 R 50 On the other hand in the undermentioned case of the Calcutta High Court,[4] Mr Justice Buckland was of the opinion that an inquiry of the kind prior to judgment is not within the contemplation of the rule, inasmuch as there is an express provision in O 21 R 50 for the decision of the question before according leave to proceed in execution The Judicial Commissioner's Court of Sind has, also, taken the same view [5] See also the case cited below [6]

2. Party appearing under protest not entitled to file written statement on his own behalf. — A party who has been served as a partner under Rule 3, and entered appearance under protest, is not entitled to file a written statement on his own behalf denying that he is a partner [1]

3. Party appearing under protest, if can question liability of firm. — A defendant entering appearance under protest is not precluded from taking alternative defences, namely, that he is not a partner and that, assuming that he is a partner, the firm is not liable [1] It was held in England in the undermentioned case[2] that under the corresponding rule (O 48A R 7) of the Rules of the Supreme Court, such a defence was not open to the defendant That rule, however, has been substituted by a new

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to appearance of a person who wishes to enter appearance under protest in a summary suit under O 37)
(32) AIR 1932 Bom 269 (269) (But if plaintiff does not apply to strike off appearance under protest, it is open to Court to make provision for the costs of protesting party in the suit)
3. (21) AIR 1921 Bom 48 (49)
[See however (32) AIR 1932 Bom 269 (269, 270)]
4. (27) AIR 1927 Cal 758 (759 760) 54 Cal 1057
5. (32) AIR 1932 Sind 199 (200, 201) 26 Sind L R 228

names should be struck out—Court not deciding issue — There is no irregular exercise of jurisdiction)

Note 2

1. (27) AIR 1927 Cal 758 (760) 54 Cal 1057.

Note 3

1. (26) AIR 1926 Sind 154 (154, 156).
[But see (32) AIR 1932 Sind 199 (201) . 26 Sind L R 228)]
2. (1925) 2 K B 127 (134), Weir and Co. v. McVicar & Co

O 30 R 8 Notes 3-4

rule in 1929 under which such a defence is now permitted in England That English case therefore has now been rendered obsolete in England

4 **Defence of party entering appearance under protest in proceeding under O 21 R 50** — *A* files a suit against a firm and serves *B* with a summons as a partner of the defendant firm *B* appears under protest stating that he is not a partner and a decree is passed in his absence against the firm *A* then seeks to *execute* the decree personally against *B* under the provisions of O 21 R 50 sub rule (?) *B* can in such proceedings defend himself on the ground that he is not a partner of the firm He can also take any other defence that is open to him unless to allow him to do so would be to negative any rule of procedure[1]

O 30 R 9

Suits between co partners

R. 9. [New] This Order shall apply to suits between a firm and one or more of the partners therein and to suits between firms having one or more partners in common, but no execution shall be issued in such suits except by leave of the Court, and, on an application for leave to issue such execution, all such accounts and inquiries may be directed to be taken and made and directions given as may be just

[R S C, O 48A, R 10]

1 **Scope of the Rule** — The general rule of procedure is that a person cannot be both a plaintiff and a defendant[1] This rule provides an exception to that rule[2] and makes this Order applicable to suits between firms and one or more of the partners therein and to suits between firms having one or more partners in common[3] A suit may also lie by one firm against another when *all* the members of *one* firm are members of the other[4] The rule does not alter the *substantive law* as it existed before[5] and does not lay down when and under what circumstances suits can be laid as between partners[6] It only lays down the possibility of such suits and the *procedure* to be followed therein[7] No suit will lie as between partners or between firms having common partners for recovery of moneys due on accounts *without asking for accounts*[8] But an action for the balance of a *settled account* will not be barred merely because there are other unsettled accounts between the parties[9]

One of the directors of a company who has been excluded from *acting* as a director by the other directors can maintain an action in his own name on the ground of individual injury to himself[10]

Note 4

1 (30) AIR 1930 Cal 53 (54) 56 Cal 704 (Alternative personal defence under the U P Court of Wards Act allowed as such defence would not be a challenge of the decree itself)

(32) AIR 1932 Bom 334 (335) (Plea of not being a partner and in the alternative that partnership had no authority to borrow — Alternative decree—

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4 (29) AIR 1929 Sind 192 (194)

5 (1923) 2 Ch 421 (435) Meyer & Co v Faber

9

—AIR 1916 Cal 788 Followed)

10 (28) AIR 1928 Mad 1215 (1219)

R. 10. [New] Any person carrying on business in a name or style other than his own name may be sued in such name or style as if it were a firm name; and, so far as the nature of the case will permit, all rules under this Order shall apply **O. 30 R. 10.**

Suit against person carrying on business in name other than his own

[R. S C, O. 48A, R. 11]

Synopsis

1. Scope of the Rule — In order to maintain a suit against a firm in the name of the firm there must be *two or more persons* who are alleged or who claim, to be partners therein [1] A *single* person cannot constitute a firm though he is carrying on business in a name or style other than his own This is made clear by the use of the words as if it were a firm and so far as the nature of the case will permit in this rule [2] Such a person cannot therefore *sue* in the name of a firm but must sue in his own name [3] Where however he files a suit in the name of the firm but is willing to amend the plaint by inserting the words (plaintiff) carrying on business under the name and style of (firm) the amendment should be allowed on terms that he should pay all the costs incurred up to the date of the amendment [4] Where the title of the plaint mentioned the plaintiff as *A* owner of the shop *C* there is no misdescription inasmuch as the plaintiff is *A* and not the shop *C* [5]

But though a single person trading in a firm name cannot *sue* in the name of a firm he *can be sued* in that name under the provisions of this rule [6] But the business must be carried on in British India and must be an *existing* one at the time when the suit is instituted [7] If the sole proprietor dies no suit can be brought against him in the name of the firm for such a suit will be only a suit against a dead person and therefore a nullity [8] The proper form of the suit will be against the legal representatives of the deceased proprietor [9] Similarly if he dies pending the suit it will abate unless his legal representatives are brought on the record within the prescribed period of limitation (90 days from the date of his death) [10]

This rule only applies to the case of a *single* individual carrying on business in a name or style other than his own Where the sole proprietor of a business dies and the business is then carried on by the guardian of his minor sons on their behalf, this rule does not apply [11]

Order 30 Rule 10 — Note 1

1 See Notes to Rule 1 *ante*
(30) AIR 1930 Bom 216 (216)
2 (24) AIR Bom 109 (111)
3 (30) AIR 1930 Bom 216 (216)
(36) AIR 1936 Lat 194 (196)
(39) AIR 1939 Sind 172 (173) ILR (1939) Kar 275
[*See* (34) AIR 1934 Lah 147 (147) (Person

(36) AIR 1936 Lat 194 (196)
[*See also* (34) AIR 1934 Mad 386 (387) 57 Mad

Mad 28

A. I. R. 1938 Lahore 345 at 346.

'The learned counsel for the present respondents also quoted A. I. R. 1932 All. 446, A. I. R. 1933 All. 264 (a judgment by a Full Bench, one member of which was the present Hon'ble Chief Justice of the Lahore High Court) and the remarks in the Commentary of Mr. Chitaley's Criminal Procedure Code, (1st Edn.) Vol. 1, p. 676."

A. I. R. 1938 Lahore 220 at 222.

"(The amended Rule will be found printed at pp. 252-3 of Chitaley's Code of Civil Procedure, Edn. 2.)"

A. I. R. 1938 Calcutta 730 at 733 = I. L. R. (1939) 1 Cal. 112 at 120.

"The expression 'other cause of a like nature' has been the subject of various decisions, most of which will be found mentioned in Chitaley's Limitation Act (1st Edn., 1938), pp. 567 to 572."

A. I. R. 1938 Calcutta 287 at 289 & 290 = I. L. R. (1938) 1 Cal. 53 at 58 and 60.

"In the Note to Messrs. Chitaley and Annaji Rao's Code of Civil Procedure, (2nd Edn.) at p. 1383, I find the following comment: 'The first . . . . parties'.

'The learned authors of Chitaley and Annaji Rao's Code of Civil Procedure in the paragraph to which I have already referred, appear to me to sum up in a few words the substance of the decisions'."

A. I. R. 1937 Rangoon 391 at 392.

'The learned authors of the Code of Criminal Procedure by Chitaley and Annajirao, Edn. 1, Vol. 1, at p. 200 say: 'Thus an . . . . Proviso.'

'I agree with this view.'"

A. I. R. 1937 Peshawar 81 at 81.

"Learned counsel has been unable to show me any decided case in which action of that nature amounts to a public nuisance, and the Commentary in Chitaley's Civil Procedure Code (2nd Edn.) certainly indicates the contrary."

A. I. R. 1937 Peshawar 41 at 41.

"On p. 1480 of Mr. Chitaley's commentary on the Civil Procedure Code (Edn. 1) it is noted that 'where a plaint is presented on the re-opening date after court holidays and the period of limitation has expired during the holidays, the fact that the ground of exemption under S. 4, Limitation Act, was not specifically mentioned in the plaint will not entail the dismissal of the suit inasmuch as the Court is bound to take judicial notice of

. . .

stated appears to me to be correct.'

A. I. R. 1937 Peshawar 13 at 15.

"In this connexion we may quote the following Note No. 4 from Mr. Chitaley's Commentary (2nd Edn. p. 1855) under R. 53 which is as follows: 'Other decrees — A decree . . . . this rule'."

A. I. R. 1937 Oudh 481 at 483 = I. L. R. 13 Luck. 560 at 565 & 566.

"Messrs. Chitaley and Annaji Rao in their Commentary on the Code (2nd Edn. p. 2347) express the opinion that the present cl. (d) of R. 5 of O. 33 gives effect to the view taken in the Full Bench decision of the Allahabad High Court reported in 7 All. 661, and other cases."

A. I. R. 1937 Nagpur 268 at 269 = I. L. R. 1937 Nag. 519 at 520.

"It appears that the weight of authority is in favour of the view that the Appellate Court has such powers. The dissentients from that view are limited to the High Courts of Allahabad and Rangoon and the Chief Court of Oudh. See also Chitaley and Rao's Code of Civil Procedure, (2nd Edn.) Vol. I, page 712."

A. I. R. 1937 Nagpur 216 at 217 = I. L. R. 1938 Nag. 280 at 282.

"In Chitaley and Rao's Civil Procedure Code, Edn. 2, p. 2094 under O. 22, R. 1, it is remarked:

'If, in the first Court, the . . . . either party.'

'I agree with these remarks which would apply to a dismissal of the suit in appeal. It is further remarked on the authority of 34 Mad. *loc. cit.* that the appeal cannot be continued even in respect of costs or other relief which are merely incidental to the main reliefs. I accordingly uphold the contention of the respondent'."

A. I. R. 1937 Nagpur 50 at 53 = I. L. R. 1937 Nag. 277 at 284.

"This question has been well discussed in Note 10 under S. 162, p 804, of Chitaley and Annaji Rao's recent Commentary on the Criminal Procedure Code (1st Edn). The learned author's favour the view of the Madras and Calcutta High Courts which is in accordance with the opinion expressed above."

A. I. R. 1937 Lahore 41 at 49 = I. L. R. 1937 Lah. 11 at 33.

"I find it stated in Chitaley and Annaji Rao's Code of Civil Procedure (2nd Edn p 612) that this section (i e , S 80) like S 79 enacts only a rule of procedure. With this view I agree"

A. I. R. 1937 Calcutta 222 at 224.

"On this point there is a considerable

A. I. R. 1937 Allahabad 82 at 87.

"The balance of authority seems to be that an Appellate Court has no power under it to interfere to the prejudice of a person who was a party to a suit, but who was not impleaded in the appeal *vide* "Code of Civil Procedure,' Chitaley and Annaji Rao, Vol 3, pp. 3003 3004 (1st Edn). I am, therefore, of opinion that defendants 2 7 ought not to have been impleaded"

A. I. R. 1936 Peshawar 209 at 210.

"We have been referred to Note (7) under S 48 in Chitaley's Commentary on the Civil Procedure Code (1st Edn) where the distinction between a fresh application and an application in continuation of a previous application is illustrated"

A. I. R. 1936 Peshawar 37 at 37.

"Counsel for the appellants quotes from Chitaley's Commentary (Civil P C, 2nd Edn , p 3005) to the effect that where the question of costs has been referred to the arbitrator, or where the whole matter in dispute has been referred to the arbitrator, the arbitrator has authority to award costs in the award"

A. I. R. 1936 Nagpur 228 at 230 = I. L. R. 1937 Nag 230 at 234.

"The point is well summed up at pages 2469 and 2470 of Chitaley and Rao's Code of Criminal Procedure, (1st Edn) Vol. 3, and the learned authors rightly point out that the view of the High Courts, excepting Rangoon, is consistent with the principles underlying sub section 3 of the section"

te...

Code, Vol 3, p 2318, 2nd Edn"

A. I. R. 1934 Peshawar 94 at 95.

"He (D J) *quotes from Chitaley* (1st Edn , p 1240) as follows 'All co promisees . . . . as parties.'

"I have no disagreement with this statement of the law, but in the present case the

following effect

'Where several . . . . of suits'."

"That statement of the law applies to the facts of the present case."

A. I. R. 1934 Peshawar 57 at 61.

"These conflicting views are noted on pp 746 and 747 of Chitaley's Civil Procedure Code." (1st Edn)

A. I. R. 1934 Peshawar 40 at 42.

"The argument is based on Chitaley's Commentary, 1st Edition, page 1888 under O. 21, R. 15 of the Code, which is supported by *Gopendra Krishna* v. *Moti Lal*, A. I. R. 1928 Cal. 559"

A. I. R. 1934 Allahabad 253 at 255.

cedure Code, (1st Edn), Vol. 1, pp. 4 and 5."

A. I. R. 1933 Peshawar 61 at 62.

"The law on the subject is lucidly summed up in *Chitaley's Commentary* on *Civil* Procedure Code, (1st Edn), Vol. 1, p. 182, and is stated as follows. '*A party* . . . . . them'."

A. I. R. 1938 Lahore 345 at 346.

"The learned counsel for the present respondents also quoted A I. R. 1932 All. 446, A. I. R. 1933 All 264 (a judgment by a Full Bench, one member of which was the present Hon'ble Chief Justice of the Lahore High Court) and the remarks in the Commentary of Mr. Chitaley's Criminal Procedure Code, (1st Edn) Vol. 1, p 676."

A. I. R. 1938 Lahore 220 at 222.

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A. I. R. 1938 Calcutta 287 at 289 & 290= I. L. R. (1938) 1 Cal. 53 at 58 and 60.

"In the Note to Messrs. Chitaley and Annaji Rao's Code of Civil Procedure, (2nd Edn) at p. 1388, I find the following comment: 'The first . . . . parties'.

'The learned authors of Chitaley and Annaji Rao's Code of Civil Procedure in the paragraph to which I have already referred, appear to me to sum up in a few words the substance of the decisions'."

A. I. R. 1937 Rangoon 391 at 392.

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A. I. R. 1937 Peshawar 81 at 81.

"Learned counsel has been unable to show me any decided case in which action of that nature amounts to a public nuisance, and the Commentary in Chitaley's Civil Procedure Code (2nd Edn.) certainly indicates the contrary."

A. I. R. 1937 Peshawar 41 at 41.

"On p. 1180 of Mr. Chitaley's commentary on the Civil Procedure Code (Edn. 1) it is noted that 'where a plaint is presented on the re opening date after court holidays and the period of limitation has expired during the holidays, the fact that the ground of exemption under S. 4, Limitation Act, was not specifically mentioned in the plaint will not entail the dismissal of the suit inasmuch as the Court is bound to take judicial notice of [illegible] stated appears to me to be correct."

A. I. R. 1937 Peshawar 13 at 15.

"In this connexion we may quote the following Note No. 4 from Mr. Chitaley's Commentary (2nd Edn p 1895) under R 53 which is as follows. 'Other decrees. — A decree . . . . this rule'."

A. I. R. 1937 Oudh 481 at 483 = I. L R. 13 Luck. 560 at 565 & 566.

"Messrs. Chitaley and Annaji Rao in their Commentary on the Code (2nd Edn. p. 2347) express the opinion that the present cl. (d) of R. 5 of O. 33 gives effect to the view taken in the Full Bench decision of the Allahabad High Court reported in 7 All 661, and other cases."

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